IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

NO S138 OF 2014

BETWEEN: **NUCOAL RESOURCES LIMITED**
Plaintiff

AND: **STATE OF NEW SOUTH WALES**
Defendant

ANNOTATED SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

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Filed on behalf of the Attorney-General of the Commonwealth (Intervening):

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PART I FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the internet.

PART II BASIS OF INTERVENTION

2. The Attorney-General of the Commonwealth (**Commonwealth**) intervenes under s 78A of the *Judiciary Act 1903* (Cth). The Commonwealth intervenes in support of the defendant.

PART III LEGISLATIVE PROVISIONS

3. The applicable constitutional provisions and statutes are those identified in the Commonwealth's submissions in proceeding No S119 of 2014 (**the Duncan proceeding**).

PART IV ISSUES AND ARGUMENT

Summary of argument

4. The Commonwealth submits that:

   4.1. The provisions of Sch 6A to the *Mining Act 1992* (NSW) (**the impugned provisions**) do not involve an exercise of judicial power. They operate to alter existing rights.

   4.2. There is no basis in the text or structure of the Commonwealth Constitution, or in State constitutional law, to prevent the NSW Parliament from enacting a law whose operation can also be characterised as judicial in nature.

   4.3. The NSW Parliament is not required to afford an affected party an opportunity to be heard before a law is enacted, even a law whose operation can also be characterised as judicial in nature.

   4.4. The plaintiff's submissions have been rejected by the NSW Court of Appeal and by the authoritative statements of four justices of this Court in *Kable v Director of Public Prosecutions (NSW)* (***Kable No.1***).[1]

The plaintiff's contentions

5. The plaintiff makes four broad submissions:

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[1] (1996) 189 CLR 51.

5.1. First, that the impugned provisions involve an exercise of judicial power (PS [16]-[27]).

5.2. Secondly, that the NSW Parliament cannot exercise judicial power (PS [28]-[54]).

5.3. Thirdly, that '[e]ven if the NSW Parliament possesses judicial power, that power would be a power that must be exercised judicially' (PS [55]).

5.4. Fourthly, that these contentions are not precluded by existing authority (PS [56]-[74]).

6. For the reasons developed in these submissions, and in the submissions of the Commonwealth in the Duncan proceeding and proceeding S206 of 2014 (**the Cascade proceeding**), these contentions should not be accepted.

7. The plaintiff also contends that cl 11 of Sch 6A is inconsistent with the *Copyright Act 1968* (Cth), and relies on the reasons given by the plaintiffs in the Cascade proceeding. The Commonwealth relies, in response to the inconsistency argument, on the submissions made by the Commonwealth in that proceeding.

An exercise of judicial power

8. The plaintiff advances a range of arguments in favour of characterising the impugned provisions as having a judicial nature. Ultimately, the contention appears to be that the provisions operate, and are intended to operate, to 'adjudge persons complicit in serious corruption' and impose 'a punishment for such acts' (PS [28]).

9. For the reasons set out in the Commonwealth's submissions in the Duncan proceeding, the impugned provisions do not involve an exercise of judicial power. Specifically, they do not adjudge and punish criminal guilt: 'serious corruption' is not a criminal offence and the cancellation of the licences is not punishment consequent on the commission of an offence. When properly understood, the impugned provisions alter statutory rights for the future. In addition to the submissions in the Duncan proceeding, the Commonwealth makes the following submissions on the arguments presented by the plaintiff in this proceeding.

Characterising the provisions

10. The plaintiff seeks to characterise the impugned provisions as involving an exercise of judicial power because they: express an 'authoritative censure'; 'stigmatise' the holders of the licences; 'deprive' the holders of their statutory rights; and impose 'consequences upon' the licensees 'for and in respect of their obtaining the licences' (PS [16], [17]). The plaintiff contends that 'each of these characteristics is central to the character of a criminal judgment and sentence' (PS [16]). The Commonwealth submits that these features of the

provisions do not result in the impugned provisions being characterised as judicial in nature. It may readily be accepted that an exercise of judicial power to adjudge and punish criminal guilt may: involve an 'authoritative censure' of an offender, 'stigmatise' the offender, 'deprive' the offender of a right, and impose 'consequences'. However, these are characteristics shared by exercises of non-judicial power: that is, they are not exclusive characteristics of judicial power. This is evident in the following examples:[2]

10.1. In *Visnic v Australian Securities and Investments Commission*[3] and *Albarran v Companies Auditors and Liquidators Disciplinary Board*,[4] administrative bodies were authorised to make certain decisions, the consequence of which was the loss of a person's statutory entitlement (in *Visnic*, disqualification from managing a company; in *Albarran*, disqualification from being a liquidator or company administrator). In exercising its power of disqualification, the relevant body could take account of the person's previous conduct including, in the case of *Albarran*, matters going to compliance with the law.

10.2. In *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth*,[5] the Australian Building Construction Employees' and Builders Labourers' Federation's registration under the *Conciliation and Arbitration Act 1904* (Cth) had been cancelled by special legislation – the *Builders Labourers' Federation (Cancellation of Registration) Act 1986* (Cth).

10.3. In *Kariapper v Wijesinha*,[6] legislation enacted by the Ceylon Parliament operated to vacate the seats of members of Parliament following the findings of a commission of inquiry into allegations of bribery against members of Parliament.

10.4. In *Roche v Kronheimer*,[7] a ministerial order pursuant to statutory authority vested the property of a German national in the Public Trustee.

11. In each of these cases, the operation of the provisions involved an authoritative *censure*, *stigmatised* the relevant person, *deprived* the relevant person of a right and imposed *consequences.* In none of these cases was it held that the power was exclusively judicial. As the Commonwealth contends in more detail in the Duncan proceeding, judicial power involves the binding and conclusive determination of a dispute about existing rights. The impugned provisions do not operate in that way. More is needed for a provision to be characterised as judicial in nature than the features identified by the plaintiff.

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2 See also *Djalic v Minister for Immigration, Multicultural and Indigenous Affairs* (2004) 139 FCR 292, [73]-[75] (Tamberlin, Sackville and Stone JJ) concerning the cancellation of the appellant's visa on character grounds following his conviction for several offences (special leave to appeal refused: [2005] HCATrans 245 (22 April 2005)).

3 (2007) 231 CLR 381.

4 (2007) 231 CLR 350.

5 (1986) 161 CLR 88.

6 [1968] AC 717.

7 (1921) 29 CLR 329.

Punishment

12. The plaintiff also contends that the impugned provisions are judicial in character because they impose punishment. For the reasons set out in the Commonwealth's submissions in the Duncan proceeding, the impugned provisions do not impose punishment consequent on the commission of a criminal offence. Accordingly, they do not impose punishment in the relevant sense to constitute an exercise of judicial power.

13. The plaintiff refers to the characteristics of punishment identified by HLA Hart (PS [19]).[8] Even if these characteristics are essential to the identification of punishment consequent on the commission of an offence, it is clear that the punishment must be 'for an offence against legal rules'. The impugned provisions do not operate in this way. As explained in more detail in the Commonwealth's submissions in the Duncan proceeding, there is no adjudgment and punishment of any offence. In particular:

    13.1. 'Serious corruption' is not a criminal offence and the NSW Parliament has not 'declared the complicity of the licence holders in conduct involving corruption' (cf PS [21]).

    13.2. The statement of purpose in cl 3(1)(c) of Sch 6A does not lay down a rule or norm of conduct[9] in relation to which punishment has been imposed (cf PS [21]). The plaintiff appears to concede as much at PS [24].

Purposes of the provisions

14. The plaintiff supports the argument that the impugned provisions constitute an adjudgment of criminal guilt by contending that they have a punitive purpose discernible from the purposes identified in cl 3 of Sch 6A (PS [18], [22]-[25]). This contention should not be accepted.

15. The express purposes and objects explain why the impugned provisions excised the cancelled licences from the broader legislative scheme that applies to other statutory licences, and subjected them to a special legislative scheme. They explain why the impugned provisions altered existing rights. To suggest that those purposes and objects can only be explained as punitive in nature is to confine legislative purposes in a way that is not supported by existing principles[10] or the cases identified at para 10 above.

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8 'Prolegemnon to the Principles of Punishment', in *Punishment and Responsibility: Essays in the Philosophy of Law* (2nd ed, 2008) 1, 4-5.

9 See *Kuczborski v Queensland* [2014] HCA 46, [235] (Crennan, Kiefel, Gageler and Keane JJ).

10 The case of *Attorney-General (NT) v Emmerson* (2014) 88 ALJR 522 (***Emmerson***), referred to by the plaintiff at [23], note 37, does not support the proposition advanced by the plaintiff. *Emmerson* concerned an exercise of power by a court to make a declaration that would trigger the forfeiture of property following the conviction of criminal offences. The discussion at [19]-[20] emphasised the expanded range of purposes that inform modern day forfeiture provisions, but does not suggest that such purposes are pigeon-holed as exclusively judicial in nature.

Bill of attainder

16. The plaintiff contends that the impugned provisions constitute a bill of attainder (PS [27]). For the reasons set out in the Commonwealth's submissions in the Duncan proceeding (at [71]), this contention should be rejected.

Separation of judicial power arguments

17. The plaintiff contends that, for two reasons, the NSW Parliament cannot exercise judicial power:

    17.1. First, 'since Federation a State legislature could not exercise judicial power because of the effect of the Constitution upon State constitutions';
10 and

    17.2. Secondly, 'the legislative history of New South Wales demonstrates that the colonial legislature never had judicial power conferred upon it' (PS [28]).

18. The first reason seeks to rely upon a limitation derived from the Commonwealth Constitution; the second challenges the authority of colonial legislatures to exercise judicial power. For the reasons to be developed, neither contention should be accepted.

Limitations from the Commonwealth Constitution

19. The plaintiff contends on a range of bases that the Commonwealth Constitution
20 prevents the NSW Parliament from exercising judicial power. None of these contentions should be accepted.

Rule of law

20. The primary way in which the argument appears to be put is that (i) the 'rule of law' is an assumption upon which the Constitution is based (PS [43]) and (ii) '[i]t is part of the rule of law that no person is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of the law established in the ordinary legal manner before ordinary courts of the land' (PS [44]).

21. The rule of law is 'notoriously vague and contested'.[11] While it has been accepted that the Constitution is framed upon the general assumption of the
30 rule of law, the essence of that notion is that all authority is subject to, and constrained by, law.[12] It 'reflects values concerned in general terms with abuse

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11 J Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge, Cambridge University Press, 2010) 61. See also J Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979) Chapter 11; J Gardner, *Law as a Leap of Faith* (Oxford and New York: Oxford University Press, 2012) Chapter 2, especially at §3.2; Lon L Fuller, *The Morality of Law* (Revised ed) (New Haven, Conn: Yale University Press, 1969) 38-44.

12 The Honourable M Gleeson AC, 'Courts and the Rule of Law', The Rule of Law Series, Melbourne University, 7 November 2001; *R v Secretary of State for the Home Department, ex parte Pierson* [1998] AC 539, 591 (Lord Styne). As Joseph Raz put it, it requires only 'that the government should

of power by the executive and legislative branches of government'.[13] As the Commonwealth develops in its submissions in the Duncan proceeding, to the extent relevant to this case, the rule of law finds reflection in the operation of s 76(i) of the Constitution (concerning jurisdiction to enforce constraints on State Parliaments arising from the Commonwealth Constitution, including from the combined operation of s 109 of the Constitution and s 6 of the *Australia Act 1986* (Cth)) and in the jurisdiction of a State Supreme Court to enforce the constitution of that State.

22. Any substantive principle or implication said to flow from the rule of law must conform to the text and structure of the Constitution. The values that comprise the rule of law ought not be given 'an immediate normative operation in applying the Constitution'.[14] In other words, limitations cannot be drawn from the Constitution based on some freestanding implication derived from the rule of law.[15] As McHugh J said in *McGinty v Western Australia*, '[u]nderlying or overarching doctrines may explain or illuminate the meaning of the text or structure of the Constitution but such doctrines are not independent sources of the powers, authorities, immunities and obligations conferred by the Constitution'.[16]

23. The plaintiff contends that the principles deriving from *Kable (No.1)* and *Kirk v Industrial Court (NSW)*[17] (***Kirk***) can be explained on a rule of law basis (PS [44]). It may readily be accepted that these principles reflect rule of law values. The independence and impartiality of courts and the entrenched jurisdiction to determine the validity of government action are certainly well accepted features of the rule of law, even on the narrowest conception of that principle. However, the principles accepted in *Kable (No.1)* (and subsequent cases applying *Kable (No.1)*) and *Kirk* derive from the text and structure of the Constitution, not a freestanding conception of the rule of law.[18] As further explained in the

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be ruled by law and subject to it': 'The Rule of Law and Its Virtue', in *The Authority of Law* (Oxford: Clarendon Press, 1981) 210, 212.

13 *Re Minister for Immigration; Ex parte Lam* (2003) 214 CLR 1 (***Lam***) at 23 [72] (McHugh and Gummow JJ); *City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at 152-154 [43]-[44] (Gleeson CJ, Kirby, Gummow, Kirby and Hayne JJ). Writing extra-judicially, Lord Bingham of Cornhill understood the notion as entailing that, 'all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the Courts': T Bingham, *The Rule of Law,* (London: Allan Lane, 2010) Chapter 3, 37. Hayek's celebrated notion predicated 'rules fixed and announced beforehand': F Hayek, *The Road to Serfdom* (London, 1944) 54. J Locke, *Two Treatises of Government* (1690) II, xi, [136], cited in TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford and New York: Oxford University Press, 2001), 31: 'the legislative or supreme authority cannot assume to itself a power to rule by extemporary arbitrary decrees, but is bound to dispense justice and decide the rights of the subject by promulgated standing laws, and known authorised judges.' See also, Montesquieu, *The Spirit of the Laws* (New York, Hafner Press, 1949), Book xi, §3,150.

14 *Lam* at 23 [72] (McHugh and Gummow JJ).

15 The Court has rejected reasoning that derives constitutional limitations from freestanding political principles: see *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 566-7 and *McGinty v Western Australia* (1996) 186 CLR 140 (***McGinty***), 168 (Brennan CJ), 182-3 (Dawson J), 231 (McHugh J), 284-5 (Gummow J).

16 *McGinty* at 231-2.

17 (2010) 239 CLR 531.

18 The various references by the Court to the rule of law in this context have been made in the course of discerning the requirements of the text and structure of Chapter III: *South Australia v Totani* (2010) 242 CLR 1, 21 [4], 42 [61] (French CJ), 62 [131] (Gummow J), 91 [232]-[233] (Hayne J),

Commonwealth's submissions in the Duncan proceeding, neither *Kable (No.1)* nor *Kirk* supports the plaintiff's contention that a State Parliament cannot enact a law that operates in a way that exhibits a judicial character.

24. Similar rule of law arguments were put forward by the plaintiff in *Kable (No.1)* to support the constitutional challenge in that case.[19] Those arguments were not accepted in any of the judgments. Instead, a majority accepted a limitation implied from the text and structure of Ch III. The plaintiff's attempt to reconceptualise the basis of *Kable (No.1)* should be rejected (PS [48]-[49]).

25. The plaintiff further contends that the doctrine of separation of powers in Australia 'is insisted upon as part of the rule of law in order to ensure the continued existence of an impartial and independent judiciary and to apply the law which will bind the executive and legislature'. Again, it may readily be accepted that the objectives of judicial independence and impartiality, sought to be achieved by the separation of judicial power principles, reflect rule of law values. But, the separation of judicial power principles arise by implication from the structural separation of Commonwealth judicial power within the Constitution. The Court has rejected an application of those principles to State Parliaments.[20] The plaintiff cannot avoid that outcome by appealing directly to the rule of law.

Other contentions

26. The plaintiff also contends that '[t]he courts can be traduced also by the legislature arrogating to itself judicial power and without doing constitutional violence directly upon the judiciary' (PS [50]). It is said that such a jurisdiction exercised by Parliament would lack the traditional judicial characteristics (PS [50]), and that a 'criminal judgment by Parliament would result in judgements lacking finality, because of the power of repeal', 'require the courts to give effect to legislative judgments and to act upon legislative findings of guilt' (PS [51]), and 'would be immune against any review' (PS [52]). It is said that this 'is contrary to the implicit inhibitions in Chapter III that proscribe the establishment of criminal courts immune from appeal' (PS [53]).

27. It is not entirely clear what the 'implicit inhibitions' are said to be or what their basis is. As further developed in the Commonwealth's submissions in the Duncan proceeding, neither *Kable (No.1)* nor *Kirk* provides a foundation for these propositions. Furthermore, the case of *Cockle v Isaksen*[21] relied on by the plaintiff (PS [52], note 95) provides no support for any of the plaintiff's contentions. The decision concerned the power of the Commonwealth

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155-6 [423]-[424] (Crennan and Bell JJ); *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 351-2 (Gleeson CJ and Heydon J); *Thomas v Mowbray* (2007) 233 CLR 307, 342 (Gummow and Crennan JJ).

19 See *Kable (No 1)* at 54; *Kable v Director of Public Prosecutions for New South Wales* [1995] HCA Trans 430 (7 December 1995).

20 The rejection of that proposition has been recently affirmed by the Court: see *Pollentine v Bleijie* (2014) 88 ALJR 796 at 804 [42]; *Assistant Commissioner Condon v Pompano* (2013) 87 ALJR 458 at 488 [125].

21 (1957) 99 CLR 155.

Parliament to provide for exceptions from, or regulations of, the appellate jurisdiction of the High Court from the judgments, decrees, orders or sentences of the courts identified in s 73. It had nothing to say about the power of a State Parliament to pass a law having judicial characteristics.

28. The plaintiff also relies upon historical events leading to the establishment of judicial independence in the United Kingdom (PS [53]-[54]). Four points may be made about this contention and the way in which it is relied on by the plaintiff:

28.1. First, as developed by the plaintiff, it would seem necessarily to imply that the establishment of judicial independence in the United Kingdom operated to prevent the Parliament of the United Kingdom from enacting laws whose operation also exhibit a judicial character. That is clearly not the case.[22]

28.2. Secondly, the need to preserve the independence of State courts was recognised in *Kable (No.1)* and subsequent cases as required by the text and structure of Chapter III. Yet, the Court has maintained the position that such a requirement does not result in a separation of powers at the State level.[23]

28.3. Thirdly, the plaintiff contends that this constitutional history supports the proposition 'that the exercise of judicial power in a way that would effectively substitute the legislature for the courts in the exercise of criminal jurisdiction would conflict with the position of the courts established over the course of four centuries under the rule of law as the arbiters between citizen and executive'. The possession by the Parliament of judicial power, it is said, 'would be capable of rendering otiose the courts of the States' (PS [54]). These propositions appear to assert that the independence of State courts, and perhaps their continuing existence, requires a constitutional rule preventing State Parliaments from enacting a law whose operation also exhibits a judicial character. In the present case, the Supreme Court and the entire system of courts in NSW is left untouched by the impugned provisions. The mere fact that, on a particular occasion, Parliament has deemed it necessary to pass a measure which, on the alternative hypothesis being considered, has an additional judicial character, does not impugn the existence or integrity of those courts.

28.4. Fourthly, to the extent that the plaintiff relies on the proposition that Parliament is acting 'as a court' (PS [53]), the plaintiff fails to appreciate the difference between the Houses of Parliament historically acting 'as a

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22 See, eg, *Builders' Labourers Federation v Minister for Industrial Relations* (1986) 7 NSWLR 372 (***BLF Case***) at 381 (Street CJ), 395-6 (Kirby P), 408 (Mahoney JA), 414, 416-7 (Priestley JA). In particular, Priestley JA noted that the alteration of the English judicial system by the *Supreme Court of Judicature Act 1873* 'does not appear to have given rise to any comment relating to the doctrine of the separation of powers'. The point was also made by Toohey J in *Kable (No.1)* at 93-4.

23 *Kable (No.1)* at 67 (Brennan J), 78 (Dawson J), 92-94 (Toohey J), 103-104 (Gaudron J), 109 (McHugh J), 132 (Gummow J); *Assistant Commissioner Condon v Pompano* (2013) 87 ALJR 458 at 488 [125]; *Pollentine v Bleijie* (2014) 88 ALJR 796 at 804 [42].

court' (say, when it is hearing contempt and impeachment proceedings), and the power of Parliament to enact a law whose operation also exhibits judicial characteristics. For reasons to be developed below, the plaintiff falls into error by not recognising that fundamental difference.

Authority for colonial legislatures to exercise judicial power

29. The plaintiff contends that '[f]rom the beginning of British sovereignty in Australia, not a single document suggests that any Governor or, after the establishment of a legislative body, that any such legislature, either possessed or believed that it possessed judicial power' (PS [29]).

30. The argument has two aspects: first, that the relevant Imperial Acts and instruments created courts, including the Supreme Court of New South Wales, to exercise judicial power and, consequently, a negative implication arises to the effect that 'judicial power was exercised by a judicial authority and nobody else' (PS [29]). Secondly, that neither the *Constitution Act 1902* (NSW), nor any earlier colonial constitution, gave judicial power to the NSW Parliament.

No negative implication

31. The first of these arguments seeks to establish a limitation on the NSW Parliament by drawing a negative implication from the instruments creating colonial/State courts. That is, the argument goes, colonial/State courts were created to exercise judicial power and, consequently, judicial power could not be exercised by the NSW Parliament.

32. Such an argument conflates the vesting of governmental *power* and the governmental *institutions or authorities* established for the exercise of power. An implication preventing the NSW Parliament from exercising judicial power must be based, as it is in the context of the Commonwealth Constitution,[24] and as it was in relation to the legislation struck down in *Liyanage v The Queen*[25] (***Liyanage***) on a structural arrangement for the *separate and exclusive vesting of judicial power*.[26] As Brennan CJ said in *Kable (No.1)*,[27] 'the implication must clearly appear'.[28] When properly understood, the constitutional history of New South Wales reveals no foundation for a negative implication of the kind

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24 *The Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434; *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

25 [1966] 2 WLR 682.

26 *Kable (No.1)* at 66-7 (Brennan CJ), 79-80 (Dawson J), 93-4 (Toohey J), 109 (McHugh J); *Clyne v East* (1967) 68 SR (NSW) 385 (***Clyne***), 396-7 (Sugerman JA, with Herron CJ agreeing); *BLF Case* at 400-1 (Kirby P), 408-9 (Mahoney J).

27 (1996) 189 CLR 51, 66.

28 As his Honour said, '[i]f the connection between the text and the propounded implication is tenuous or obscure, it would be wrong for a court by declaration to withdraw from public debate the matters to which the submitted restraint applies. If the constitutional text does not clearly support an implication of restraint, the court declaring the restraint is plunged into political controversy in which it is ill-fated to engage and from which it is hard put to withdraw' (at 66).

contended by the plaintiff.[29] The relevant legislation[30] and Letters Patent[31] provided for the creation of colonial courts in NSW, including the Supreme Court, and the identification of their jurisdiction, but they did not provide for the separate and exclusive vesting of judicial power. As four justices of this Court and the Court of Appeal of New South Wales have clearly held, neither the creation of New South Wales courts, nor the entrenchment of their independence, is a sufficient foundation upon which such an implication can be based.[32]

33. Indeed, there are a number of contrary indications suggesting that judicial power, of a kind now identifiable at the federal level, was not vested exclusively in colonial courts. Under the 1823 Act, the Governor constituted the Court of Appeals of the Colony of New South Wales to hear appeals from the Supreme Court. In doing so the Governor would be 'assisted' in hearing the appeals by the Chief Justice, but it was the Governor who was to hold the court. The judgment of the Court of Appeals was then to be remitted to the Supreme Court to be put into effect. Furthermore, the Governor could institute 'Courts of Requests' with civil jurisdiction in different parts of New South Wales as occasion required. These courts, constituted by a Commissioner appointed by the Governor, had full power and authority to summarily hear and determine certain small monetary claims. And, significantly, under the 1855 Act, the NSW Parliament was empowered to abolish colonial courts,[33] directly undercutting the contention that the establishment of colonial courts was a basis for the exclusive vesting of judicial power in those courts. This power was later confirmed by s 5 of the *Colonial Laws Validity Act 1865*.[34]

34. More generally, the various Acts and instruments demonstrate that governmental power was exercised across different government authorities without clear delineation of power or repository of power. Following a period of 'personal rule'[35] from 1788 to 1823, the Governor under the 1823 Act was to make laws on the advice of a legislative council, and only after the opinion of the Chief Justice that the proposed law was consistent with the laws of England. Even under the 1828 Act, the judges of the Supreme Court could

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29 A detailed discussion of these arrangements can be found in R D Lumb, *The Constitutions of the Australian States* (5th ed) ch 1; A C V Melbourne, *Early Constitutional Development in Australia* (1963) 37-46, 121-124, 192-201.

30 Mainly, 27 Geo III, c 2 (Imp) (*Act Constituting a Court of Criminal Judicature in New South Wales 1787*); 4 Geo IV, c 96 (Imp) (*Act for the Administration of Justice in New South Wales and Van Diemen's Land 1823*); 9 Geo IV, c 83 (Imp) (*The Australian Courts Act 1828*); 2 & 3 Vict, c 70 (Imp) (*Australian Courts Act Extension 1839*); 5 & 6 Vict, c 76 (Imp) (*The Australian Constitution Act (No 1) 1842*); 13 & 14 Vict, c 59 (Imp) (*The Australian Constitutions Act (No 2) 1850*); 18 & 19 Vict, c 54 (Imp) (*The Constitution Act NSW 1855*) (with the scheduled New South Wales Constitution Act).

31 First Charter of Justice (Letters Patent, 2 April 1787); Second Charter of Justice (Letters Patent, 4 February 1814); Third Charter of Justice (Letters Patent, 13 October 1823).

32 *Kable (No.1)* at 65-6 (Brennan CJ), 77-80 (Dawson J), 92-4 (Toohey J), 109 (McHugh J); *Clyne* at 395; *BLF Case* 400-1 (Kirby P), 411 (Mahoney JA).

33 See s 42 of the 1855 Constitution; see the *BLF Case* at 401 (Kirby P); 409 (Mahoney JA). Indeed, the earlier 1839 Act gave the power to make provision 'for the better administration of justice, and for defining the constitution of the courts of law and equity, and of juries'.

34 28 & 29 Vict, c 63 (Imp).

35 R D Lumb, *The Constitutions of the Australian States* (5th ed, 1991) 7.

notify the Governor that a law made, with the advice of the Legislative Council, was repugnant in the relevant sense. This intermingling of power, authorities and institutions emphasises the early stage of development of the system of government established in the colony, and the instability of any foundation to support the plaintiff's contention.

35. Following federation, the constitutional arrangements for NSW courts were not then affected until the introduction of Pt 9 of the *Constitution Act 1902* in 1992[36] and its entrenchment in 1995.[37] However, as four justices of the Court accepted in *Kable (No.1)*,[38] neither its introduction, nor its entrenchment, can be seen as preventing State Parliaments from exercising judicial power.

36. This legislative history shows that the constitutional arrangements for the exercise of government power in New South Wales were, prior to 1900, in the continuing process of development with no clear delineation of power, authorities or institutions.[39] That history suggests that judicial power, of a kind that is now identifiable at the federal level, was not vested exclusively in colonial courts. The mere creation of colonial courts, and their investiture with jurisdiction, is an insufficient basis for drawing such an implication. Consequently, there is no basis for the plaintiff's contention.

37. If such a limitation could be drawn, it must also operate to prevent State tribunals or other administrative officers from exercising judicial power. The plaintiff, however, concedes that the implication would not extend that far (PS [28]). However, such a concession undermines the argument for a negative implication.

No lack of legislative power to enact laws exhibiting a judicial character

38. The second aspect of the plaintiff's contention is that, since the establishment of New South Wales as a colony, the law-making authorities in New South Wales have lacked the power to enact laws whose operation exhibits a judicial character.

39. This contention should not be accepted for at least two reasons. The first reason is that it misunderstands the gradual amplification of legislative authority in the colony to a point where, subject to certain limitations, the NSW Parliament had the same authority to enact laws as that enjoyed by the Imperial Parliament. The second reason is that the submission assumes, incorrectly, a clear dichotomy between judicial power and the legislative power exercised by the NSW Parliament to enact laws.

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36 See *Constitution (Amendment) Act 1992* (NSW).

37 See *Constitution (Entrenchment) Amendment Act 1992 (No 2 of 1995)* s 2.

38 *Kable (No.1)* at 66 (Brennan CJ); 77-78 (Dawson J), 93-4 (Toohey J), 109 (McHugh J).

39 The problems of implementing the system of government in colonial New South Wales reflected in the historical materials referred to by the plaintiff (in note 48) demonstrate, in the clearest way, the embryonic and developing nature of the system of government established in the colony.

40. The Commonwealth contends that the starting point for the analysis must be an acceptance that, by 1900, the NSW Parliament had plenary power, subject to territorial and repugnancy limitations, as broad as that enjoyed by the United Kingdom Parliament.[40] Whatever the position was prior to the enactment of the *Colonial Laws Validity Act 1865*, s 5 of that Act confirmed the plenary character of Parliament's power to alter the Constitution, make provisions for the administration of justice, and make laws respecting the 'Constitution, Powers and Procedure' of the Parliament, subject only to repugnancy (s 2) and manner and form (s 5) limitations. That plenary power became (i) subject to the Commonwealth Constitution at federation and the manner and form requirements of s 6 of the *Australia Act 1986* (Cth), and (ii) relieved of the repugnancy constraints with the enactment of s 3 of the Australia Acts.

41. Section 5 of the *Constitution Act 1902* has been, and must be, seen against this historical context as conferring plenary legislative power on the NSW Parliament to enact both 'constituent' and 'ordinary' laws,[41] a power that was confirmed by s 2(2) of the Australia Act.

42. The plaintiff relevantly contends that only *legislative power* was conferred on the NSW Parliament and, consequently, the Parliament does not have *judicial power* (PS [37]-[38]). The contention is supported by the argument that the Parliament lacked power 'to punish for contempt unless such a power was conferred expressly by statute' (PS [37]). However, this contention erroneously attempts to draw a clear dichotomy between judicial power and the power of Parliament to enact a law. This leads the plaintiff into error in two important ways.

    42.1. First, the NSW Parliament, like the Imperial Parliament and the Commonwealth Parliament, exercises legislative power *by enacting a law*. As Dawson J said in *Kable (No.1)*[42] '"laws" is synonymous with the word "statutes"'.[43] A law is one that passes through the Houses of Parliament and has received the Royal Assent.[44] For example, a bill of attainder is a 'law'.[45] A Commonwealth law of that character would be invalid, not because it lacks the quality of a law enacted by Parliament, but because it

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40 See *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 9-10, citing *R v Burah* (1878) 3 App Cas 889; *Hodge v The Queen* (1883) 9 App Cas 117; *Powell v Apollo Candle Company* (1885) 10 App Cas 282; *Riel v The Queen* (1885) 10 App Cas 675. See also *Kuczborski v Queensland* [2014] HCA 46, [145] (Crennan, Kiefel, Gageler and Keane JJ).

41 *Clyne* at 400. Herron CJ described the plenary power of the NSW Parliament to make laws as 'complete and unrestricted subject to a territorial limitation': ibid, 395.

42 (1996) 189 CLR 51.

43 *Kable (No.1)* at 76; McHugh J agreed at 109. Although Dawson J in *Kable (No.1)* was concerned with the meaning of the word 'laws' in s 5 of the *Constitution Act 1902* (NSW), the same understanding should be adopted for s 51 of the Commonwealth Constitution.

44 See, eg, F W Maitland, *The Constitutional History of England* (1st ed, 1908, reprinted 1948) 381: '... the chief function of parliaments is to make statutes. ... The essence of the statute seems to be the concurrence of the king, the House of Lords and the House of Commons'.

45 *Kable (No.1)* at 64 (Brennan CJ); 76-77 (Dawson J); 109, 121 (McHugh J), 125 (Gummow J).

would also involve an exercise of judicial power.[46] As the plaintiff correctly accepts, '[t]he objection to such Acts lies in the fact that they usurp judicial power' (PS [41], citing *Polyukhovich* and *Haskins*). The fact that the legal operation of a law *might also be* characterised as determining a dispute about existing rights, does not deny its character as a law that has been enacted with an exercise of legislative power. To adopt the words of Brennan CJ in *Kable (No.1)*, '[t]he Act may be a law which, by reason of its specificity, is enacted in exercise of a power that is not purely legislative, but it is nonetheless a law'.[47] The plaintiff's contention in this respect has been rejected by four justices of this Court[48] and the Court of Appeal of New South Wales[49] and should not be accepted.[50]

42.2. Secondly, the absence of any inherent impeachment or contempt power (PS [39]-[40]) is not to the point (cf PS [62]). As Sugerman JA (with Herron CJ agreeing) said in *Clyne*,[51] that is 'concerned with quite a different question'. There is a clear difference between these functions of each House of Parliament and their 'chief function ... to make statutes'.[52] Whether either House of the NSW Parliament enjoyed an inherent power to impeach or punish for contempt is of no consequence for Parliament's legislative power to enact laws. The scope of its 'plenary' legislative power has never been seen as tethered to its inherent powers and, indeed, was ample enough to enact legislation declaring/defining its powers and privileges to encompass the same powers and privileges as those enjoyed by the House of Commons, including powers to commit for contempt, to judge that same contempt and to commit for the contempt by Warrant.[53]

43. Additionally, the infrequency with which the Parliament of the United Kingdom enacted laws of this character does not displace the existence of legislative power (cf PS [62]). The essential feature of legislative power is the enactment of a law, irrespective of its legal operation. As Street CJ recognised in the *BLF Case*, despite the declining incidence, particularly since 1805, of

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46 *Haskins v The Commonwealth* (2011) 244 CLR 22, 37; *Polyukhovich v The Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501, 536 (Mason CJ), 649-50 (Dawson J), 685-686 (Toohey J), 721 (McHugh J).

47 *Kable (No.1)* at 64.

48 *Kable (No.1)* at 65 (Brennan CJ), 77-80 (Dawson J), 92-94 (Toohey J), 109 (McHugh J).

49 *Clyne* at 385; *BLF Case* at 372.

50 As Professor Geoffrey Sawer said, having explored the operation of the colonial constitutions, 'it was and still is the case that the State legislatures can ... themselves executive judicial powers': *Australian Federalism in the Courts* (1967) 153.

51 (1967) 68 SR (NSW) 385, 396.

52 F W Maitland, *The Constitutional History of England* (1st ed, 1908, reprinted 1948)) 381. When considering the 'work of Parliament' Professor Maitland said: 'I leave out of sight for a time the judicial power of the House of Lords as a court for the trial of peers, and as a court to which appeals can be brought from the lower courts; also I leave out of sight the procedure for impeachment – these matters are better treated in connexion with the administration of justice' (at 380). The enactment of bills of attainder was treated as part of the function of making statutes (at 386-7).

53 See G Carney, *Members of Parliament: Law and Ethics* (2000) 167; *The Speaker of the Legislative Assembly of Victoria v Glass* (1871) LR 3 PC 560; *Doyle v Falconer* (1866) LR 1 PC 328; *Dill v Murphy* (1864) 1 Moo PC (NS) 487.

adjudication of disputes through legislation, '[t]he power is ... there'.[54] The authority of the United Kingdom Parliament to enact such a law is, put simply, a consequence of the supremacy that that Parliament enjoyed in the late 19th century, a supremacy that characterised the scope of legislative power entrusted to the NSW Parliament by s 5 of the NSW Constitution and confirmed by s 2(2) of the Australia Act. While Australian State legislatures are not 'sovereign' (cf PS [42]), they are certainly *supreme* within their constitutional limits.

44. In summary, there is no basis in the constitutional history of New South Wales to support a limitation that prevents the NSW Parliament from enacting a law whose legal operation also exhibits a judicial character.

Natural justice

45. The plaintiff contends that '[e]ven if the New South Wales Parliament possesses judicial power, that power would be a power that must be exercised judicially' and that '[p]arties liable to be affected must be given an opportunity to be heard' (PS [55]). No authority is cited in support of that proposition. It is unclear what the plaintiff contends should follow as a consequence of non-compliance with such a requirement. Presumably, the plaintiff is suggesting that the Act is invalid.

46. The submission should be rejected. It is misconceived for three reasons. First, it again assumes a dichotomy between judicial power and the enactment of law by the NSW Parliament. Even if the operation of a law exhibits a judicial character, it remains a law enacted by Parliament. Whether procedural fairness is required does not turn on its judicial character: it depends upon its character as a law made by Parliament. Secondly, it is well established that the processes and procedures of Parliament for the enactment of a law are beyond the scope of judicial supervision or inquiry. In *Edinburgh and Dalkeith Railway Co v Wauchope*,[55] a claim had been made that a private Act affecting a vested right could not be applied to a person who had no notice of the bill's introduction. The claim was abandoned, but Lords Brougham, Cottenham and Campbell rejected it:[56]

> All that a Court of Justice can do is to look to the Parliamentary roll: if from that it should appear that a bill has passed both Houses and received the Royal Assent, no Court of Justice can inquire into the mode in which it was introduced into Parliament, nor into what was done previous to its introduction, or what

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54 Ibid at 381.

55 (1842) 8 Cl & Fin 710.

56 Ibid 725 (Lord Campbell); see also to the same effect at 720 (Lord Brougham), 720 (Lord Cottenham). See also the decision of the House of Lords in *British Railways Board v Pickin* [1974] 1 All ER 609, 618 (Lord Reid), 619-21 (Lord Morris of Borth-Y-Gest), 622 (Lord Wilberforce), 627-8 (Lord Simon of Glaisdale), 630-31 (Lord Cross of Chelsea). Of course, this principle would not prevent the courts from considering whether the enactment of a NSW law has complied with a manner and form requirement: see *Victoria v Commonwealth* (1975) 134 CLR 81, 162-4 (Gibbs J).

passed in Parliament during its progress in its various stages through both Houses.[57]

47. Thirdly, any suggestion that the courts should be able to review whether Parliament has afforded a person procedural fairness is also inconsistent with the requirement in Art 9 of the *Bill of Rights Act 1688*[58] '[t]hat the freedom of speech, and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament'.

Existing authority

48. The plaintiff asserts that '[t]he conclusions above are not precluded by the authorities to the effect that the doctrine of the separation of powers does not apply to State constitutions', and attempts to substantiate that claim by considering *Clyne*, the *BLF Case* and *Kable (No.1)*.[59] This contention should be rejected. The plaintiff's arguments have been rejected by the NSW Court of Appeal and by the authoritative statements of four justices of this Court in *Kable (No.1)*.

Clyne v East

49. The constitutional challenge in *Clyne* was to s 5 of the *Landlord and Tenant (Amendment) Act 1966* (NSW) that conferred power on the Fair Rents Board to vary the amount of rent to be paid. Section 5 had a long legislative history concerning the basis upon which applications for rent variation were to be determined. It can be summarised briefly as follows. The NSW Parliament had enacted provisions which resulted in rent determinations to be calculated on a basis favourable to tenants. This Court and the Court of Appeal had interpreted those provisions in a way that resulted in rent variations more favourable to landlords. Section 5 was enacted to restore the basis of rent calculation more favourable to tenants and had the effect of permitting the Board to order a refund of rents already paid on the basis of a calculation more favourable to landlords. The constitutional challenge was advanced on the basis that (i) s 5 constituted a 'legislative judgment'[60]; (ii) 'the State Parliament has no power and has never been invested with power to act judicially to enter a legislative judgment'; and (iii) the Board was 'part of the judicial apparatus of the State'.[61] Reliance was placed on *Liyanage*.[62]

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57 See also the comments of Griffith CJ in *Osborne v Commonwealth* (1911) 12 CLR 321, 336, in the context of the procedural requirements in ss 53 and 54 of the Constitution, '[w]hatever obligations are imposed by these sections are directed to the houses of Parliament whose conduct of their internal affairs is not subject to review by a court of law'; also at 352 (Barton J). See also *Northern Suburbs General Cemetery Reserve Fund v Commonwealth* (1993) 176 CLR 555, 578 (Mason CJ, Deane, Toohey and Gaudron JJ), 585 (Brennan J).

58 1 William & Mary sess 2, c 2 (Imp), preserved by s 6 of the *Imperial Acts Application Acts 1969* (NSW); see also *Egan v Willis* (1998) 195 CLR 424, 444-7.

59 (1996) 189 CLR 51.

60 (1967) 68 SR (NSW) 385, 396.

61 (1967) 68 SR (NSW) 385, 396 (Sugerman JA).

62 [1966] 2 WLR 682.

50. Sugerman JA delivered the leading judgment, with which Herron CJ and Asprey JA agreed.[63] His Honour rejected the argument that the NSW Parliament could not exercise judicial power. For his Honour, the question was one of construction, and there was nothing in the *Constitution Act 1902*, or in the Imperial Act of 1855, that warranted the conclusion that Parliament's power was limited in the way suggested. The NSW Constitution was 'flexible or uncontrolled' and, endorsing the comments of the High Court in *Clayton v Heffron*,[64] Parliament's power was 'complete and unrestricted' including both 'constituent' and 'ordinary' legislative power.[65] *Liyanage* was the product of Ceylon's written constitutional arrangement and could not be applied 'to read into the Constitution of New South Wales a further limitation of power based upon an aspect of the doctrine of separation of powers which the Privy Council applied to Ceylon'.[66] The challenge was rejected, in part, on that basis.[67]

51. In summary, it is quite clear from the reasoning of Sugerman JA that the rejection of the challenge to the impugned provisions necessarily involved the conclusion that State Parliaments can enact laws that operate in a way that might be characterised as judicial in nature. It is necessarily inconsistent with the plaintiff's submissions on the limitations on the NSW Parliament's power to the extent that they rely upon State constitutional law arguments.

52. As indicated, the argument in *Clyne* proceeded on the basis that the Board was a court and that the impugned provision constituted an exercise of judicial power. It is, therefore, not to the point that *Clyne* 'was a case in which Parliament had conferred such power upon a tribunal' (PS [58]).

The BLF Case

53. In the *BLF Case*, the New South Wales Court of Appeal gave leave to reargue *Clyne*, however, the decision was affirmed by a unanimous court. The relevant background to the impugned provisions in the *BLF Case* can be stated shortly. On 2 January 1985, the Minister had, pursuant to the *Industrial Arbitration (Special Provisions) Act 1984* (NSW), by certification, cancelled the registration of the Federation. The Federation's judicial review challenge to the cancellation was rejected at first instance by the NSW Supreme Court, and an appeal against that decision had been listed for hearing before the Court of Appeal. The *Builders Labourers Federation (Special Provisions) Act 1986* (NSW) was enacted before the appeal was heard by that Court. Amongst other things, s 3 of that Act provided (i) that the registration of the Federation 'shall, for all purposes, be taken to have been cancelled on 2 January 1985 by the

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63 It is clear that both Herron CJ (at 396) and Asprey J (at 403) agreed with Sugerman J's reasoning and conclusions, despite appearing at times (at 395 (Herron CJ), at 403 (Asprey J)) content to rest the outcome on the nature of the power exercised.

64 (1960) 105 CLR 214.

65 (1967) 68 SR (NSW) 385, 400. Herron CJ described the plenary power of the NSW Parliament to make laws as 'complete and unrestricted subject to a territorial limitation': ibid 395.

66 Ibid 395.

67 It was also held that the Board was not a court (at 402 (Sugerman AJ), with Herron CJ and Asprey JA agreeing), and that s 5 did not involve an exercise of judicial power: at 393 (Herron CJ); at 402 (Sugerman AJ); at 403 (Asprey JA).

operation of, and pursuant to, the *Industrial Arbitration (Special Provisions) Act 1984* (NSW) (s 3(1)); and (ii) that the certificate issued by the Minister for the purposes of administering that Act 'shall ... be treated, for all purposes, as having been valid, and the certificate shall correspondingly be treated, for all purposes, as having been validly given from the time it was given or purportedly given' (s 3(2)).

54. The provisions were challenged on the basis that they usurped or interfered with judicial power, and that such power could not be exercised by the NSW Parliament. The Court rejected the claim, with all justices dismissing the contended limitation on the NSW Parliament. Street CJ concluded that '*Clyne v East* correctly states the law ... that Parliament in this State has power to adjudicate between parties by an exercise of judicial power equally as has Parliament in England' (at 381). For his Honour, the plenary power of the NSW Parliament conferred unlimited power, 'comparable with that vested in the English Parliament' (at 383; see also at 384). For Kirby P, *Liyanage* could not be applied to the 'uncontrolled' NSW constitutional arrangement (at 400). Additionally, at the time, there was no mention of the judiciary in the *Constitution Act 1902* and no entrenchment of judicial independence (at 400).[68] Thus, unlike the provisions of the Ceylon Constitution, the arrangement of constitutional power in NSW did not suggest a separation of powers and functions. Furthermore, 'the history of judicial arrangements in New South Wales denies the suggestion of a constitutional separation' (at 400). In particular, the *Constitution Act* of 1855 gave the Parliament the power to abolish courts (at 401).

55. Mahoney JA expressed similar views to those of Kirby P. For his Honour, there was 'nothing in the terms of the former or present *Constitution Act* or in any other law' which warranted an implication that the 'New South Wales legislature may not make laws which exercise judicial power' (at 407).[69] Indeed, as a matter of State constitutional law, the courts might be abolished (at 409). The power given to the NSW Parliament to make laws is 'plenary' and extended to altering, subject to manner and form requirements, the existing constitutional arrangements (at 408). The constitutional framework in Ceylon was different, and no analogy could be made to it (at 411).

56. Only Priestley JA (with Glass JA agreeing) expressed hesitation in rejecting the analogy to *Liyanage*. However, even if the constitutional instruments in NSW supported an inference that judicial power was to be vested exclusively in the courts, his Honour agreed with the view expressed by Sugerman JA in *Clyne* that the NSW Constitution is uncontrolled and can be changed by ordinary legislation (at 419). On that basis, his Honour rejected the argument that the Parliament could not 'invade the judicial function' or 'give a legislative judgment' (at 414, 420).

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68 Although the Act has since been amended, the Court in *Kable (No.1)* did not consider that those amendments resulted in a different outcome.

69 There was nothing in the terms of the Acts establishing the constitutional arrangements of the State 'which effected a relevant separation or segregation of judicial powers' (at 90).

57. Therefore, it is quite clear that the Court's rejection of the challenge to the impugned provisions necessarily involved the conclusion that State Parliaments can enact laws that operate in a way that might be characterised as judicial in nature. It is necessarily inconsistent with the plaintiff's submissions on the limitations on the NSW Parliament's power to the extent that they rely upon State constitutional law arguments.

58. The plaintiff suggests that the *BLF Case* may have been decided differently after *Kable (No.1),* and contends that '[t]he BLF Case therefore does not support the validity of Schedule 6A of the Act' (PS [67]). Even if it were correct to say that the *BLF Case* would now be decided differently (a proposition that is not self-evident), that proposition provides no logical basis to support the plaintiff's contention. The plaintiff's case for invalidity is based on an argument that the NSW Parliament has exercised judicial power, not that Parliament has interfered with the exercise of judicial power by a State Court.

59. Chief Justice Street gave the example of Parliament authorising administrative tribunals to exercise judicial power. If Parliament could authorise such a tribunal, it followed that 'Parliament must necessarily be the repository itself of that power to judge which it thus vests in another' (at 381). The plaintiff has taken issue with that conclusion, saying that '[h]is Honour cited no authority for that proposition and it is mistaken' (PS [63]). The Commonwealth contends that his Honour's proposition is the logical consequence of the conclusion 'that Parliament in this State has power to adjudicate between parties by an exercise of judicial power equally as has Parliament in England'.[70] Additionally, the position of the Commonwealth Parliament, referred to by the plaintiff (PS [63]), is inapposite as the Commonwealth Parliament is controlled by the entrenched separation of judicial power limitations.

60. The plaintiff further contends that '[s]ince the *BLF Case* was decided, various limitations implicit upon the otherwise "plenary" legislative powers of State parliaments have been found' (PS [65], see also [66]). It is not disputed that the NSW Parliament's power is subject to limitations. However, the examples offered by the plaintiff are limitations that properly derive from the text or structure of the Commonwealth Constitution. They are not, as contended by the plaintiff, based on a freestanding 'acceptance of the rule of law and the consequence for the judiciary of the rule of law for its position of the judiciary *vis-à-vis* the legislature and the executive' (PS [65]).

Kable (No.1)

61. In *Kable (No.1),* the challenge to the validity of the *Community Protection Act 1994* (NSW) was presented on a range of bases. The legislation was held invalid by a majority of the Court on the basis of an implication drawn from the text and structure of Chapter III of the Constitution. The other bases, however, were either expressly or impliedly rejected by a majority of the Court.

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70 *BLF Case* at 381 (Street CJ).

62. First, it was argued that the legislation constituted 'an exercise of judicial power or an interference in the judicial process and, on that account',[71] was beyond the power of the New South Wales Parliament. As Brennan CJ said, that submission was 'based on the proposition that the doctrine of separation of judicial power, an essential element of the Constitution of the Commonwealth, is part of the constitutional law of the State'. That argument, and its underlying proposition, was expressly rejected by four justices of the Court.[72] In doing so, their Honours recognised the rejection of the proposition in *Clyne* and the *BLF Case* .[73]

63. Secondly, the appellant in *Kable (No.1)* presented the Chapter III challenge in terms of the requirements of the rule of law.[74] None of the majority justices who upheld the constitutional challenge to the impugned provisions endorsed the rule of law argument. Indeed, there was no reliance upon the rule of law in any of the majority judgments.[75] Instead, their Honours invalidated the impugned provisions on the basis of an implication drawn from the text and structure of Chapter III. The dissenting judgments of Brennan CJ and Dawson J necessarily rejected that basis for the challenge.

64. Therefore, it is quite clear that the rejection, by four justices of this Court, of the challenge based on State constitutional law necessarily involved the conclusion that State Parliaments can enact laws that operate in a way that might be characterised as judicial in nature. That rejection is necessarily inconsistent with the plaintiff's submissions to the extent that they rely upon State constitutional law arguments. Furthermore, the arguments based on a freestanding rule of law implication are inconsistent with the way in which the majority anchored the implied limitation in the text and structure of Chapter III.

65. It is incorrect to assert that the comments of Dawson J (or for that matter those of Brennan CJ, Toohey or McHugh JJ) were limited to the propositions that State Parliaments can confer judicial power on bodies other than courts and that State courts can exercise non-judicial power (PS [70]). As indicated, the rejection by Brennan CJ, Dawson, Toohey and McHugh JJ of a separation of powers, based in State constitutional law, was in direct response to an argument by the appellant that the law involved an exercise of judicial power and that the NSW Parliament could not exercise judicial power. Although it is strictly correct to describe their Honours' comments as 'dicta',[76] the

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71 (1996) 189 CLR 51, 65 (Brennan CJ).

72 Ibid 65 (Brennan CJ), 77-80 (Dawson J), 92-94 (Toohey J), 109 (McHugh J).

73 Ibid 65 (Brennan CJ), 79 (Dawson J), 92-94 (Toohey J), 109 (McHugh J).

74 See *Kable (No.1)* at 54; *Kable v Director of Public Prosecutions for New South Wales* [1995] HCA Trans 430 (7 December 1995).

75 There was only one reference to the rule of law in a quotation from the United States decision of *Hobson v Hansen* (1967) 265 F Supp 902, 923 (JS Wright J dissenting) referred to by Gummow J at 133. The statement is to the effect that 'public confidence in the judiciary is indispensable to the operation of the rule of law'.

76 Since Brennan CJ and Dawson J were in dissent in the result.

Commonwealth submits that their Honours' rejection of the argument based on State constitutional law should be considered to be authoritative.[77]

66. The passages of McHugh J in *Kable (No.1)* referred to by the plaintiff (PS [71]-[72]) do not provide any support for the plaintiff's contentions. Indeed, to the contrary, McHugh J clearly accepted that, as a matter of State constitutional law, judicial power could be vested in the NSW Parliament, and that limitations from the Commonwealth Constitution must be drawn from its text and structure, not the requirements of a freestanding rule of law principle.

67. In summary, the plaintiff's submissions have been rejected by the NSW Court of Appeal and by the authoritative statements of four justices of this Court in *Kable (No.1)*.

PART V ESTIMATED HOURS

It is estimated that 1 hour will be required for the presentation of the oral argument of the Commonwealth in this proceeding and the Cascade and NuCoal proceedings.

Dated: 26 November 2014

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[77] See the comments of Heydon J in *Wurridjal v The Commonwealth of Australia* (2009) 237 CLR 309 at 429 [325].