IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No. S138 of 2014**

B E T W E E N:

NUCOAL RESOURCES LIMITED
Plaintiff

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AND

STATE OF NEW SOUTH WALES
Defendant

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ANNOTATED WRITTEN SUBMISSIONS OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

Date of Document: 26 November 2014
Filed on behalf of the Attorney General for Western Australia by:

State Solicitor for Western Australia
Level 16, Westralia Square
141 St Georges Terrace
PERTH WA 6000
Solicitor for the Attorney General For Western Australia

Tel: (08) 9264 1888
Fax: (08) 9321 1385
Ref: 3939-2014
Email: d.leigh@sso.wa.gov.au

PART I: SUITABILITY FOR PUBLICATION

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

PART II: BASIS OF INTERVENTION

2. Section 78A of the *Judiciary Act 1903* (Cth) in support of the Defendant.

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

PART IV: RELEVANT CONSTITUTIONAL PROVISIONS AND LEGISLATION

4. See Annexure A of the Plaintiff's submissions in *Duncan.*

PART V: SUBMISSIONS

5. To the submissions of the Attorney General for Western Australia in the *Duncan* and *Cascade Coal* matters, the following submissions are added.

6. The Plaintiff advances three propositions. *First*, that Schedule 6A to the *Mining Act 1992* (NSW) is a law which punishes those complicit in serious corruption, and is thereby an exercise of judicial power[1]. *Second*, that the Parliament of New South Wales cannot exercise judicial power because such power was never conferred upon either the Governor or the New South Wales Parliament, prior to Federation or thereafter[2]. *Third*, that the Commonwealth *Constitution* has, since Federation, precluded State legislatures from exercising judicial power[3].

7. The Attorney General's response to the first proposition is at [12]–[30] of the Attorney General for Western Australia's submissions in the *Duncan* and *Cascade Coal* matters. A complete answer to this contention is that all persons can apply for tenure over the land the subject of the avoided leases. No doubt all whom the Plaintiff contends to be punished for corruption by the operartion of Schedule 6A to the *Mining Act 1992* (NSW) can apply and their application will be considered according to law.

The Plaintiff's Second Proposition

8. The second proposition is best expressed as follows. The United Kingdom Parliament's power to enact Bills of Pains and Penalties had, at some time after 1820, fallen into desuetude. Next, and as such, this was not a power or a genus of power conferred upon the New South Wales Parliament prior to Federation. So, it follows, as the power was not conferred prior to Federation, s.106 of the Commonwealth *Constitution* is irrelevant. The argument then continues; s.2(2) of the *Australia Act* is irrelevant because the power being exercised here is judicial.

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[1] Plaintiff's submissions at [16]–[27], and particularly at [21]–[27].
[2] Plaintiff's submissions at [29]–[41].
[3] Plaintiff's submissions at [43]–[72].

Accordingly, the declaration in s.2(2) of the *Australia Act* that the "legislative powers" of the New South Wales Parliament include "all legislative powers that the Parliament of the United Kingdom might have exercised" before the commencement of the *Australia Act* says nothing of the power of the New South Wales Parliament to enact this law, because it is not an exercise of legislative power.

9. There are a number of reasons why this contention ought to be rejected.

10. *First*, the Plaintiff cannot establish the desuetude or abandonment of the power of the United Kingdom Parliament to exercise judicial power by enacting Bills of Attainder or Bills of Pains and Penalties. Unexercised power and deficit of power are different things. As Professor Holdsworth teaches, the last mediaeval impeachment on a Bill of Attainder was in 1459 and the power not again exercised (perhaps revived) until 1620–1621[4]. It is difficult to contend that a 193 year gap results in abandonment where a 161 year gap did not. The Plaintiff's contention would also carry with it that the acceptance of the existence of this power of the United Kingdom Parliament, expressed without interruption in Halsbury[5] and Erskine May[6], is erroneous and has been erroneous since the time of desuetude, whenever that was. This sustained fundamental error is rather unlikely.

11. *Second*, and as a corollary to the first point, to accept the Plaintiff's argument requires that the date of revocation or abandonment of this power in the United Kingdom Parliament, after 1821, be fixed. When was it, how was it so, why then and for what reason? The Plaintiff does not answer these questions.

12. *Third*, the contention concerning s.2(2) of the *Australia Act* must be rejected. The term "legislative powers" in the section means no more than power to make laws. The section confirms that the only substantive limitation on the power of State Parliaments to make laws is that such laws be for the peace, order and good government of the State[7]. To contend otherwise, and to introduce into the section a distinction between legislative and judicial power, is to infuse this distinction into the notion of the "legislative powers that the Parliament of the United Kingdom might have exercised before the commencement of this Act". To do so is to invoke a distinction with no meaning in respect of the powers that the United Kingdom Parliament has and had. Further to this, it is notable that s.2(2) refers to "all legislative powers that the Parliament of the United Kingdom might have exercised before the commencement of this Act" and not to powers that the Parliament of the United Kingdom had immediately prior to the commencement of the *Australia Act*[8]. There is no doubt that the United Kingdom Parliament did exercise judicial power

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[4] Sir William Holdsworth, *A History of English Law* (Methuen & Co, 7th ed, 1956) vol.1 at 381–382.

[5] See, for example, Earl of Halsbury, *The Laws of England* (Butterworth & Co, 1st ed, 1912) vol.21 at 727 [1351]; Lord Mackay, *Halsbury's Laws of England* (LexisNexis Butterworths, 5th ed, 2010) vol.24 at [643].

[6] See, eg, Sir Donald Limon and W R McKay (eds), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (Butterworths, 22nd ed, 1997) at 63.

[7] Of course, ss.5 and 6 recognises other restriction on State Parliaments but these are not relevant here.

[8] See Anne Twomey, *The Australia Acts 1986: Australia's Statutes of Independence* (Federation Press, 2010) at 205–206, where the drafting history of the section and the deliberate omission of the word "immediately" is discussed.

prior to 1986, even if (as the Plaintiff speculates) this power was abandoned due to desuetude at some time between 1820 and now.

13. There is a complete answer to the Plaintiff's proposition, in the Plaintiff's submissions. The Plaintiff notes at [37] that colonial parliaments lacked an (inherent) power to punish for contempt but that such a power could be conferred by statute[9]. Indeed, in some colonies such powers were conferred, and exercised, prior to Federation[10]. This demonstrates that colonial legislatures had legislative power to confer judicial power (to punish for contempt) upon themselves.

14. The Plaintiff's contention brings to mind that rejected by Gaudron, McHugh, Gummow and Hayne JJ in *Durham Holdings*[11]; to the effect that a right to just compensation for compulsorily acquired property is a "deeply rooted right" that restrains the legislative power of the New South Wales Parliament. As their Honours observed[12]:

> The applicant must seek to introduce into the constitutional text, in particular s 2(2) of the *Australia Act*, a limitation not found there. Undoubtedly, having regard to the federal system and the text and structure of "[t]he Constitution of each State of the Commonwealth" (the phrase used in s 106 of the Constitution), there are limits to the exercise of the legislative powers conferred upon the Parliament which are not spelled out in the constitutional text. However, the limitation for which the applicant contends is not, as a matter of logical or practical necessity, implicit in the federal structure within which State Parliaments legislate.

15. No reason of logical or practical necessity compels the Plaintiff's contention.

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[9] The authority of *Speaker of the Legislative Assembly of Victoria v Glass* (1871) LR 3 PC 560, referred to in the Plaintiff's submissions at [37] fn.53 was one in which the Privy Council considered the exercise of the judicial power to punish for contempt. In that case a writ was issued which commenced by saying that the Legislative Assembly of Victoria had, on the 27th of April, resolved that Glass was guilty of a contempt. Lord Cairns delivered the judgment of the Committee, in which he relevantly stated at 572: "the Legislature of the colony, having been permitted to carry over to the colony the privileges and powers of the House of Commons, and having in terms carried over all the privileges and powers exercised by the House of Commons at the date of the Statute which has been read, there was carried over to the Legislative Assembly of the colony the privilege or power of the House of Commons connected with contempt - the privilege or power, namely, of committing for contempt, of judging itself of what is contempt, and of committing for contempt by a warrant stating generally that a contempt had taken place."

[10] South Australia, for example, passed the *Parliamentary Privilege Act 1858* (22 Vic., 1858, No. 9), s.5 of which allowed each House to punish contempt in a summary manner by imprisonment. In 1870 Serjeant-Major Patrick McBride was sent to prison for one week for sending a letter to a member of the Legislative Council accusing him of having lied to the Council: *Memorandum by the Clerk of the Legislative Council of South Australia*, Jan Davis, Clerk of the Legislative Council, 11 May 1998, online at http://www.parliament.the-stationery-office.co.uk/pa/jt199899/jtselect/jtpriv/43/43ap39.htm. See also H Goodwin, A Stewart and M Thomas, 'Imprisonment for Contempt of the Western Australian Parliament' (1995) 25(1) *University of Western Australia Law Review* 187.

[11] *Durham Holdings Pty Ltd v New South Wales* [2001] HCA 7; 205 CLR 399 at 410 [14] ('*Durham Holdings*').

[12] *Durham Holdings* [2001] HCA 7; 205 CLR 399 at 410 [13]–[14] (footnotes omitted).

The Third Proposition

16. The third proposition is best expressed as follows. *First*, s.106 of the Commonwealth *Constitution* provides for the continuation of the Constitution of each State "subject to" the Commonwealth *Constitution*. *Second*, the Commonwealth *Constitution* is "based on an assumption of the rule of law" and the rule of law "is a principle which informs its interpretation"[13]. *Third*, an aspect of the rule of law is that judicial power can only be exercised by an independent and impartial court system; and so, *fourth*; an independent and impartial court system exclusively exercising State and Commonwealth judicial power is required.

17. There a number of short answers to this. If correct, the reasoning of this Court in *Kable No.1*[14] is wrong, or at least, completely missed the point[15].

18. This contention cannot be reconciled with the long accepted proposition that the *Constitution* does not impose or require a separation of powers in New South Wales[16]. In this sense, a complete answer to this proposition was recently expressed by Hayne J in *Kuczborski v Queensland*[17].

> ... independence and impartiality are defining characteristics of all of the courts of the Australian judicial system. These are notions which connote separation from the other branches of government, at least in the sense that the courts must be and remain free from external influence. But, because the repugnancy doctrine does not imply into the constitutions of the States the separation of judicial power required for the Commonwealth by Ch III, there can be no direct application to the States of all aspects of the doctrines that have been developed in relation to Ch III. The repugnancy doctrine cannot be treated as simply reflecting what Ch III requires in relation to the exercise of the judicial power of the Commonwealth.

19. It may be accepted that the rule of law "is a principle which informs ... interpretation" of the Commonwealth *Constitution*, as the Plaintiff contends, but the rule of law neither confers power or excludes it. Many principles inform interpretation without conferring or excluding power. Equality before the law is analogous, and just as the dissenting judgments of Deane and Toohey JJ and

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[13] Plaintiff's submissions at [44]

[14] *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24; (1996) 189 CLR 51 ('*Kable No.1*').

[15] In *Kable No.1* [1996] HCA 24; (1996) 189 CLR 51, the term "rule of law" appears only in the judgment of Gummow J at 133 and in the context of United States jurisprudence..

[16] See *Kable No.1* [1996] HCA 24; (1996) 189 CLR 1 at 67 (Brennan CJ), 85–86 (Dawson J), 92–95 (Toohey J), 103–104 (Gaudron J), 109, 118 (McHugh J), 132 (Gummow J); *South Australia v Totani* [2010] HCA 39; (2010) 242 CLR 1 at 45 [66] (French CJ). In respect of the States generally, see *Pollentine v Bleijie* [2014] HCA 30; (2014) 88 ALJR 197 at 805 [42] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *Condon v Pompano* [2013] HCA 7; (2013) 87 ALJR 458 at 466–467 (French CJ), 488 [124]–[126] (Hayne, Crennan, Kiefel and Bell JJ); *Momcilovic v The Queen* [2011] HCA 34; (2011) 245 CLR 1 at 66 [92] (French CJ); *Wainohu v New South Wales* [2010] HCA 24; (2011) 243 CLR 181 at 192 [7] (French CJ and Kiefel J), 248 [172] (Heydon J); *South Australia v Totani* [2010] HCA 39; (2010) 242 CLR 1 at 86 [221] (Hayne J), 123 [324] (Heydon J); *Kirk v Industrial Court of New South Wales* [2010] HCA 1; (2010) 239 CLR 531 at 573 [69] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Fardon v Attorney-General (Qld)* [2004] HCA 46; (2004) 223 CLR 575 at 598 [37] (McHugh J), 614 [86] (Gummow J).

[17] *Kuczborski v Queensland* [2014] HCA 46 at [104].

Gaudron J in *Leeth*[18] sought to expand the notion beyond its proper role as a principle[19] informing the development of legal rules, to contend that the rule of law limits the power of State Parliaments to enact legislation is to "introduce into the constitutional text … a limitation not found there"[20].

PART VI: LENGTH OF ORAL ARGUMENT

20. It is estimated that the oral argument for the Attorney General for Western Australia in the *Duncan*, *NuCoal* and *Cascade Coal* proceedings will take 30 minutes.

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G R Donaldson SC
Solicitor General for Western Australia
Telephone: (08) 9264 1806
Facsimile: (08) 9321 1385
Email: grant.donaldson@sg.wa.gov.au

D E Leigh
State Solicitor's Office
Telephone: (08) 9264 1888
Facsimile: (08) 9321 1385
Email: d.leigh@sso.wa.gov.au

[18] *Leeth v Commonwealth* [1992] HCA 29; (1992) 174 CLR 455.
[19] Perhaps what Sir Owen Dixon referred to as a "deep-rooted legal doctrine" – Sir Owen Dixon, 'The Common Law as the Ultimate Constitutional Foundation' in *Jesting Pilate* (Law Book Co, 1965) 203 at 205.
[20] *Durham Holdings Pty Ltd v New South Wales* [2001] HCA 7; 205 CLR 399 at 410 [14] (Gaudron, McHugh, Gummow and Hayne JJ).