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

BETWEEN: **NUCOAL RESOURCES LIMITED**
Plaintiff

10 AND

STATE OF NEW SOUTH WALES
Defendant

PLAINTIFF'S SUBMISSIONS

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I. CERTIFICATION

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

II. ISSUES

2. The issues that arise are as follows:

   (i) Does s 5 of the *Constitution Act 1902* (NSW) confer judicial power on the New South Wales Parliament??

   (ii) Is Schedule 6A to the *Mining Act 1992* (NSW) ("the Mining Act") wholly or partly invalid because it constitutes an exercise of judicial power?

   (iii) Is clause 11 of Schedule 6A to the Mining Act inconsistent with the *Copyright Act 1968* (Cth) and inoperative to the extent of the inconsistency because of s 109 of the Constitution?

III. SECTION 78B NOTICES

3. The Plaintiff has given notice to the Attorneys-General in compliance with s 78B of the *Judiciary Act 1903* (Cth).

IV. JUDGMENTS BELOW

4. This proceeding is brought in the Court's original jurisdiction pursuant s 30(a) of the *Judiciary Act 1903* (Cth).

V. FACTS

5. Under the *Mining Act 1992* (NSW), a person may apply for an "exploration licence".[1] The licence holder may apply for its renewal from time to time.[2]

6. On 15 December 2008, the Minister for Mineral Resource, Ian MacDonald, granted an exploration licence with a term of four years to Doyles Creek Mining Pty Ltd ("Doyles Creek").[3] Thereafter, a company not associated with Doyles Creek or its promoters, Taurus Funds Management Pty Ltd ("Taurus"), was invited to invest in Doyles Creek.[4] Taurus acquired a 20% shareholding in Doyles Creek and two of its nominees were appointed as directors.[5] A public company, NuCoal Resources Ltd, was acquired to take the whole of the shareholding in Doyles Creek. A prospectus was published. The existing shareholders in Doyles Creek accepted shares in NuCoal in return for their shares in Doyles Creek. Members of the public

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[1] Subsection 13(1). An application must be accompanied by certain "required information" (ss.13(4) and (5)); if granted, a licence may be subject to conditions (s.26). An application for renewal can be refused, *inter alia*, if the decision maker reasonably considers that the holder provided false or misleading information in connection with the application or in connection with the licence (s.114(2)(c)). In any event, a licence can be cancelled if the decision maker reasonably considers that the holder has contravened a provision of the Act (s.125(1)(b)), or has provided false or misleading information in connection with an application or in connection with the licence (s.125(1)(b2)). There is a right of appeal to the Land and Environment Court; such an appeal is by way of hearing *de novo* (ss.128(1) and (2)).

[2] *Mining Act*, s.113.

[3] Special Case Book (hereafter "SCB") at 63.

[4] Special Case (hereafter "SC") para.8.

[5] SC para. 11.

and institutions subscribed for further shares[6] and the company's shares were listed on the ASX.

7. The original shareholders of Doyles Creek, including Maitland, Ransley, Poole and Chester, made large profits on modest investments as a result of the listing of the shares and their sale of all or parts of their respective shareholdings.[7]

8. The Independent Commission Against Corruption ("ICAC") was established by s.4 of the *Independent Commission Against Corruption Act 1988* (NSW). On 23 November 2011, by resolution, and pursuant to ss.13 and 73 of the ICAC Act, each of the two Houses of Parliament requested ICAC to inquire into and to report upon, *inter alia,* the circumstances surrounding the application for, and the grant of, the Exploration Licence to Doyles Creek.[8] ICAC conducted its investigation and published two reports.[9] ICAC found that Maitland, Ransley, Poole and Chester had each made numerous false statements in support of the application or had abetted that conduct.[10] It found that that conduct of Maitland, Ransley, Poole and Chester, was "corrupt conduct" within the meaning of s.8 of the ICAC Act.[11] The Commission also concluded that if the facts as found by it were established beyond a reasonable doubt before an appropriate tribunal, then that would ground findings that each of the four directors had committed criminal offences.[12] The Commission made similar findings and drew similar conclusions concerning the former Minister.[13]

9. In December 2013, in a second report,[14] ICAC concluded that "the granting of the authorities for Doyles Creek ... was so tainted by corruption that [the authority] should be expunged or cancelled".

10. As to the justification for the prejudice such cancellation would cause to NuCoal and its shareholders, ICAC concluded that at the time of the issue of NuCoal's prospectus, "there was notorious public controversy in relation to the circumstances of the granting of" the licence.[15] ICAC also found that Chester and Poole, who became two (of five) directors of NuCoal, were "aware of significant circumstances pertaining to the improper grant".[16]

11. ICAC expressed the opinion that any proceeding under s.125 of the *Mining Act* to cancel the licence would be "vulnerable to appeal"[17] and that reliance upon the ground of "public interest" to refuse renewal under s.380A(2) would permit a right of appeal which provided for the tendering of "fresh evidence or evidence additional to that available to the decision-maker when the decision was made" and

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[6] SC para. 20.
[7] SCB 524. By then, Maitland and Ransley, two of the four directors of Doyles Creek, had ceased to be directors: SC para. 6 and 14. Chester, the third director, ceased to be a director on 10 February 2010: SC para 23 (and of NuCoal on 1 May 2013). Poole, the other director, ceased to be a director of either company by 9 August 2012.
[8] SCB at 351.
[9] SCB at 359 and 532.
[10] SCB 499-500.
[11] SCB 501.
[12] SCB 502-503.
[13] SCB 360-534.
[14] SCB 535.
[15] SCB 550.
[16] SCB 550.
[17] SCB 552.

that this "may well result in prolonged litigation."[18] It observed that proceedings had already been brought in the Supreme Court by five named individuals to have ICAC's findings of corrupt conduct set aside. ICAC "consider[ed] it has good prospects of resisting these claims, [but] there is always a risk inherent in litigation"[19] and so "it would be prudent for any relevant minister to proceed without assuming that the findings made by the Commission concerning these persons will not be set aside."[20]

12. On that footing, ICAC recommended the enactment of legislation to "expunge" the licence because "[o]ne advantage of such legislation is that it would significantly reduce the risks associated with any administrative law challenge" but that "[s]uch legislation would, of course, need to be carefully drafted to avoid successful constitutional challenge".[21]

13. On 30 January, 2014, the *Mining Amendment (ICAC Operations Jasper and Acacia) Bill 2014* ("the Amending Act") was introduced and passed by both Houses; it was assented to on the next day.

14. Section 3 of Schedule 6A to the Act provides:

> 3 Purposes and objects
>
> (1) The Parliament, being satisfied because of information that has come to light as a result of investigations and proceedings of the Independent Commission Against Corruption known as Operation Jasper and Operation Acacia, that the grant of the relevant licences, and the decisions and processes that culminated in the grant of the relevant licences, were tainted by serious corruption (the tainted processes), and recognising the exceptional nature of the circumstances, enacts the *Mining Amendment (ICAC Operations Jasper and Acacia) Act 2014* for the following purposes:
>
> (a) restoring public confidence in the allocation of the State's valuable mineral resources,
>
> (b) promoting integrity in public administration above all other considerations, including financial considerations, and deterring future corruption,
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> (c) placing the State, as nearly as possible, in the same position as it would have been had those relevant licences not been granted, recognising that adjustments or otherwise, an alternative outcome in relation to the relevant licences based on what would have happened had the relevant licences been granted pursuant to processes other than the tainted processes.
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> (2) To those ends, the specific objects of the *Mining Amendment (ICAC Operations Jasper and Acacia) Act 2014* are as follows:
>
> (a) to cancel the relevant licences and ensure that the tainted processes have no continuing impact and cannot affect any future processes (such as for the grant of further authorities) in respect of the relevant land,
>
> (b) to ensure that the State has the opportunity, if considered appropriate in the future, to allocate mining and prospecting rights in respect of the relevant land according to proper processes in the public interest,
>
> (c) to ensure that no person (whether or not personally implicated in any wrongdoing) may derive any further direct or indirect financial benefit from the tainted processes,

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[18] SCB 552.
[19] SCB 553.
[20] SSB 553.
[21] SCB 554.

(d) to protect the State against the potential for further loss or damage and claims for compensation, without precluding actions for personal liability against individuals, including public officials, who have been implicated in the tainted processes and have not acted honestly and in good faith.

15. Section 4 provides, relevantly:

> **4 Cancellation of certain exploration licences**
> (1) The following exploration licences are cancelled by this Schedule:
> (a) exploration licence number 7270 dated 15 December 2008,
> (b) exploration licence number 7405 dated 21 October 2009,
> (c) exploration licence number 7406 dated 21 October 2009.
> (2) The cancellation takes effect on the cancellation date.
> (3) The cancellation of an exploration licence by this Schedule does not affect any liability incurred before the cancellation date by or on behalf of a holder of a relevant licence or by or on behalf of a director or person involved in the management of a holder of a relevant licence.[22]

VI. ARGUMENT

16. The Act was intended to and does express an authoritative censure upon the three licence holders at which it is directed. It was also intended to and does stigmatise the holders of the licences, as well as former directors. It deprives the licence holders of their property. It deprives them also of the right (enjoyed by all other licencees in New South Wales) to seek renewal of their licences, to resist cancellation, and to resort to the Supreme Court in aid of these rights. It deprives NuCoal and its shareholders of the benefit of the property forfeited by NuCoal's subsidiary.[23] It imposes these consequences upon them for and in respect of their obtaining the licences. It is submitted that each of these characteristics is central to the character of a criminal judgment and sentence.

17. Conviction for an offence always involves the public expression of a censure by the State's judicial officer.[24] The conviction may also involve stigmatisation of the offender by disqualification from the exercise of rights.[25] Punishment follows conviction. Punishment for an act constituting an offence is to be distinguished

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[22] The Act also permanently stigmatised some of the directors of the licence holders. Section 380A, which was introduced by the *Mining and Petroleum Legislation Amendment Act 2014,* provides that it is a ground to refuse an application to grant or renew a mining right that a director of an applicant company has been a director of a company that "has compliance or criminal conduct issues". A company has "compliance or criminal conduct issues" if, *inter alia*, "the body corporate has held a mining right ... that has been cancelled." Consequently, by force of the Act cancelling the licences, each of the directors of Doyles Creek at the time of the grant is a person who was a director of a company which has compliance or criminal conduct issues. Each of them will now carry that stigma with him to any other company of which he ever becomes a director.

[23] It is true that the property of a company is not, as a matter of law, property in which the company's shareholders have any interest: *Macaura v Northern Assurance Co.* (1925) AC 619. As Professor Hohfeld has demonstrated, however, "transacting business under the forms, methods and procedure pertaining to so-called corporations is simply another mode by which *individuals* and *natural persons* can enjoy their property and engage in business.": 'Nature of Stockholders' Individual Liability for Corporate Debts' (1909) 9 *Columbia Law Review* 285 at 288 and footnote 9. No doubt this was why the effect of *Macaura*, insofar as it affected the insurable interest of shareholders, was negated by s.17 of the *Insurance Contracts Act 1984* (Cth).

[24] A. Stumer, *The Presumption of Innocence: Evidential and Human Rights Perspectives* (2010) at 28-30.

[25] Eg. s.206B(2) of the *Corporations Act* 2001 (Cth) and *Roach v Electoral Commissioner* (2008) 233 CLR 162.

from other forms of sanction imposed by law. These sanctions may include the conferral of a right upon a person to sue for compensation or for some other remedy. Such sanctions vindicate the rights of a particular person and are usually obtained at the suit of such person. But punishment for an act is not directed at the vindication of the rights of identified third parties or, at least, if it vindicates such rights it does so only indirectly. Rather, a punishment is imposed for public purposes, at the instigation of a public officer and at the discretion and by the direction of judicial officers who are appointed on behalf of the public.[26] And a punishment is exacted *for* identified and articulated wrongdoing[27] by a specific person. That is why judgments of courts are necessarily *ad hominem* whereas a criminal statute creating offences and providing for punishment is not.

18. The justification for punishment is different from the justification for an award of damages.[28] Punishment is justified by being imposed *pro bono publico*, by being imposed in order to promote public confidence in the efficacy of laws of the state, by its deterrent (or rehabilitative) effect upon the offender and upon possible future offenders. Punishment also has been justified by the sense of retribution it may confer.[29]

19. In order to achieve these purposes, punishment must bear certain characteristics. It has been said[30] that the standard case of punishment exhibits five characteristics:

    (a) It must involve pain or other consequences normally considered unpleasant.
    (b) It must be for an offence against legal rules.
    (c) It must be imposed on an actual or supposed offender for his or her offence.
    (d) It must be intentionally administered by human beings other than the offender.
    (e) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.

20. To these five characteristics, one author has added a sixth, that punishment must be imposed for the dominant purpose of preventing offences against legal rules or of exacting retribution from offenders or both.[31] In any event, these purposes have long been accepted as the central purposes of punishment.

21. The Amending Act is punitive. Its relevant characteristics are the following. First, it is directed solely against the holders of the "relevant licences". It was necessarily drafted as an *ad hominem* instrument because it was directed at the conduct of particular persons. Second, it selects those licensees because Parliament was "satisfied" that the processes by which they got their licences "were tainted by serious corruption".[32] That is to say, Parliament has declared the complicity of the licence holders in conduct involving corruption. That guilt was expressed to have been constituted by their behaving in a way that was contrary to the standards of

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[26] James Fitzjames Stephen, *A General View of the Criminal Law of England* (1863) at 5-6.
[27] *Al-Kateb v Godwin* (2004) 219 CLR 562 at [265] (Hayne J).
[28] *Cf. Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 150 (the joint source of tort and crime).
[29] A. Stumer, *The Presumption of Innocence: Evidential and Human Rights Perspectives* (2010) at 28-30.
[30] HLA Hart, 'Prolegemnon to the Principles of Punishment' in *Punishment and Responsibility: Essays in the Philosophy of Law* (2nd ed, 2008) 1 at 4-5; *Al-Kateb v Godwin* (2004) 219 CLR 562 at [265] (Hayne J).
[31] Herbert Parker, *The Limits of the Criminal Sanction* (1968) at 31. However, it might be said that this is to conflate the purposes of punishment with its essential characteristics.
[32] s.3(1).

"what would have happened had the relevant licences been granted pursuant to processes other than the tainted processes" and, by such means, obtaining a grant of licenses.[33] Third, *for* those acts the Amending Act deprives them of the property they are found to have gained in that manner as well disqualifying them from exercising statutory rights conferred by a law of general application enjoyed by all other licencees.[34] Fourthly, the imputation of guilt and the forfeiture of property and rights has been imposed by an official, authoritative and public written judgment of a department of Government.[35]

22. Fifthly, and most significantly, the express purposes of the Amending Act are the purposes for which punishment is traditionally imposed. Those purposes are stated in s.3(1) and (2) of the Act. They are, relevantly:

    (a) Restoring public confidence in the allocation of the State's valuable resources;
    (b) Promoting integrity in public administration above all other considerations;
    (c) Deterring future corruption;
    (d) To ensure that no person (whether or not personally implicated in any wrongdoing) may derive any further direct or indirect financial benefit from the tainted processes.[36]

23. Each of these factors is a conventional rationale for punishment.[37]

24. This is not a law which establishes norms of conduct, with or without sanctions, so that by requiring obedience to the law, the State might "restore public confidence" and "promote integrity in public administration" and by the imposition of rules of conduct for the future, "deter future corruption". Rather, this is a law which seeks to achieve those purposes by imposing a penalty upon persons for their acts (or acts done on their behalf), and, as a result of the imposition of this penalty, seeks to deter others in the future and to give the public confidence that justice has, in this particular case, been done and seen to be done.

25. It is true that imposition of a detriment upon a person, even that of lengthy detention, might constitute punishment when imposed for one purpose and not when imposed for another.[38] However, the most definitive indicator of whether a detriment which has been imposed is punitive is the purpose for which it has been

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[33] s.3(1)(c).

[34] The explorations licences were "property" notwithstanding that they were property of a kind that was liable to extinguishment by amendment of legislation or executive action: *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 73 (Gummow J), 56 (McHugh J). This case does not concern the question whether has been an "acquisition" of the rights constituted by the exploration licence. What matters is that the licence holders have been deprived of their rights.

[35] Contrast this Act, which declares that Parliament "is satisfied", with the Act in *Kariapper v Wijesinha* [1968] AC 717 which disqualified persons from certain offices based upon the *factum* of prior conviction: see at 736.

[36] The remaining "purposes" and "objects" of the Act are to cancel the licences so that they "have no continuing impact", to restore to the State the right to allocate the same rights to others and to protect the State against claims for compensation.

[37] Compare *Attorney-General (NT) v Emmerson* (2014) 88 ALJR 522 at [19]-[20] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) (describing the purposes served by forfeiture provisions).

[38] See, eg, *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27-29 (Brennan, Deane and Dawson JJ); *R v Kirby; Ex parte Boilermakers Society of Australia* (1956) 94 CLR 254 at 278 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *Thomas v Mowbray* (2007) 233 CLR 307 at [10]-[11] (Gleeson CJ); *Wainohu v New South Wales* (2011) 243 CLR 181 at [30] (French CJ and Kiefel J).

imposed[39] and here the New South Wales legislature has expressly asserted its purpose in the Act itself.

26. A bill of pains and penalties is a legislative enactment which inflicts punishment without judicial trial.[40] At common law it was distinguished from a bill of attainder which inflicted the punishment of death.[41] The objection to such Acts was that they substituted the judgment of the legislature for that of a court.[42] Even if a law does not match the description of a bill of attainder or a bill of pains and penalties, if it adjudges a person guilty or imposes a punishment it usurps judicial power.[43]

27. A law may operate to impose a penalty upon specific persons by identifying them by name or by reference to specific characteristics held by them. A court, in applying such a law will be confined in its inquiry to the issue whether or not an accused is one of the persons identified by the law.[44] The ordinary judicial task of inquiring as to whether a person has *actually* done an act or made an omission which constitutes an offence has thus been assumed by the legislature which has performed the task by adopting the findings of another person.

28. The question is whether the New South Wales Parliament can pass a law which is both intended to and does adjudge persons complicit in serious corruption and which imposes a punishment for such acts. It is submitted that it cannot for two reasons. First, it is submitted that such an law involves an exercise of judicial power but the legislative history of New South Wales demonstrates that the colonial legislature never had judicial power conferred upon it. Second, it is submitted that since Federation a State legislature could not exercise judicial power because of the effect of the Constitution upon State constitutions. The plaintiff accepts that the legislative power of a State parliament extends to permit it to enact a law that confers judicial power upon a body other than a court.[45] But that is a different matter from the exercise of judicial power by the New South Wales Parliament itself.

29. From 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

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[39] *Re Woolley; Ex p. Applicants M276/2003* (2004) 225 CLR 1 at [58]-[61] (McHugh J).

[40] *Polyukhovich v Commonwealth* (1991) 172 CLR 501 ("*Polyukhovich*") at 536 (Mason CJ), 648-650 (Dawson J), 685 (Toohey J), 719-721 (McHugh J); *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 ("*Chu Kheng Lim*") at 69-70 (McHugh J); *International Finance Trust Co v NSW Crime Commission* (2009) 240 CLR 319 at [167] (Heydon J); *United States v Lovett* 328 US 303 at 315-316 (1946).

[41] *Polyukhovich* (1991) 172 CLR 501 at 645 (Dawson J), 719 (McHugh J). In the United States, the phrase 'bill of attainder' has come to encompass bills of pains and penalties: see *United States v Brown* 381 US 437 at 447 (1965)

[42] *Polyukhovich* (1991) 172 CLR 501 at 646, 647 (Dawson J); see also at 536 (Mason CJ), 611-612 (Deane J), 685 (Toohey J), 721 (McHugh J). The Commonwealth cannot pass such laws because of the terms of Chapter III. *Cf. Kariapper v Wijesinha* [1968] AC 717 in which a Ceylonese law vacating a parliamentary seat was held not to impose a punishment because the consequence was imposed for disciplinary purposes and because it involved no legislative finding of guilt: see at 736-737.

[43] *Polyukhovich* (1991) 172 CLR 501 at 536 (Mason CJ), 685-686 (Toohey J); *Leeth v Commonwealth* (1992) 174 CLR 455 at 469-470 (Mason CJ, Dawson and McHugh JJ); *Chu Kheng Lim* (1992) 176 CLR 1 at 70 (McHugh J); *Haskins v Commonwealth* (2011) 244 CLR 22 at [25] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), [96] (Heydon J).

[44] *Cf. Totani v South Australia* (2010) 214 CLR 1 at [75], [142], [223], [434] and [459].

[45] *Cf. R v Burah* (1877-1878) 3 App. Cas. 889 at 901.

such legislature, either possessed or believed that it possessed judicial power.[46] On the contrary, prior to the departure from England of Governor Arthur Phillip, by the Act of 27 Geo. III 56, the Crown being authorised to establish a Court of Criminal Jurisdiction and a Court of Civil Jurisdiction for the Colony of New South Wales, acted in accordance with that statute by issuing Letters Patent dated 2nd April 1787 ("the First Charter of Justice"). By that instrument, the Crown established a Court of Criminal Jurisdiction to consist of "a Judge-Advocate ... appointed in and for [New South Wales] together with six officers of His Majesty's forces" and a Court of Civil Jurisdiction consisting of the Judge-Advocate with two fit and proper persons appointed from time to time by the Governor.[47] From the first days of settlement, judicial power was exercised by a judicial authority and nobody else.[48]

30. Letters Patent dated 13 October 1823 issued pursuant to the *New South Wales Act 1823*[49] established the Supreme Court of New South Wales as a court of record. The court was to consist of a single Judge, Chief Justice Francis Forbes. The Act provided: "That the said courts shall have cognisance of all pleas, civil, criminal or mixed ...".

31. The first legislative body was established by the same Act. It provided for a power in the Crown to appoint a legislative council in New South Wales consisting of between seven and five residents of the colony appointed by his Majesty. Legislative power was conferred by s.24 on the Governor, with the advice of the council, to make "laws and ordinances for the peace, welfare and good government of the said colony".

32. The establishment of the Supreme Court of New South Wales as a "court of record" was not a mere technicality. As Holdsworth has explained:[50]

> It is the infallibility of its formal record which is the earliest mark of a court of record. But gradually the court of record developed other characteristics ... It alone could fine

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[46] It is true that in the earliest stages of colonisation, necessity drove the appointment of governors as ultimate appellate authorities from decisions of courts (see, eg, the First Charter of Justice), but this exceptional appellate jurisdiction, from courts constituted in part by military officers, and born of practical necessity, demonstrates that the orthodox position is as described. See also Sir Ivor Jennings, 'Magna Carta & Constitutionalism in the Commonwealth' in *The Great Charter* (1966) 76 at 82-83.

[47] Such a court was convened for the first time on 11 February 1788 consisting of six officers together with Judge-Advocate Collins. On 1 July 1788, the first writ was issued out of the Court of Civil Jurisdiction in New South Wales at the suit of Henry and Susannah Kable, two convicts, who sued the captain of the ship which had transported them but who had failed to deliver their baggage. See David Neal, *The Rule of Law in a Penal Colony* (1991) at 4-5. The court consisted of the Judge-Advocate and two civilians. It gave judgment for the plaintiffs.

[48] Indeed, Governors from Arthur Phillip onwards struggled with the problem of constituting an effective court as required of them by this law. But even in the face of difficult problems concerning the constitution and workings of colonial courts, neither the successive Governors nor their interlocutors in London, with whom they corresponded, ever offered any view that judicial power in the Colony could be exercised other than by the institution established by Letters Patent pursuant to Imperial statute: see *Historical Records of Australia*, Series I volume I at 34, 35, 107-108, 218, 224-225; Series IV volume I at 35-37, 164-165, 170-174, 188-189, 243, 251-253, 257-261, 602-603; Series I volume VI at 151, 156, 242-243. In *Attorney-General (Hong Kong) v Kwok-a-Sing* (1873) 5 LRPC 179, Lord Justice Mellish expressed the view, *arguendo*, that a Crown colony did not have jurisdiction to make a bill of attainder. His Lordship's reference to *Phillips v Eyre* [1870] LR 4 QB 225; LR 6 QB 1 may be explained by the fact that he was counsel in the case.

[49] 4 Geo. IV c 96.

[50] Holdsworth, *A History of English Law*, vol. V at 158; vol. VI at 235; and see *Halsbury's Laws of England* (4th ed. Reissue), para 308 and footnote 3.

> and imprison; and this characteristic, which was perhaps one of the latest to be developed, is its most important characteristic at the present day.

33. The Imperial Parliament's provision for the establishment of the Supreme Court of New South Wales as a court of record with the jurisdiction referred to above, cannot be reconciled with a power in the Governor, with the advice of his Council, to exercise judicial power simultaneously, for example, to find a man guilty of an offence and to execute him.

34. The 1823 Act was superseded by the *Australian Courts Act* 1828 (9 Geo.IV c 83 (Imp)), s.3 of which provided:

> The said Courts respectively shall be courts of record and shall have cognisance of all pleas, civil, criminal or mixed, and jurisdiction in all cases whatsoever, as fully and amply, to all intents and purposes, in New South Wales ... as his Majesty's Courts of Kings Bench, Common Pleas and Exchequer, at Westminster, or either of them, lawfully have or hath in England.

35. The *Australian Courts Act* of 1828 also provided that it was lawful for the King "to constitute and appoint in New South Wales ... a Council to consist of such persons resident in the said colonies respectively not exceeding 15 nor less than 10 as his Majesty ... shall be pleased to nominate." The Act further provided that the Governor of New South Wales, with the advice of the Legislative Council so established "shall have power and authority to make laws and ordinances for the peace, welfare and good governance of the said colon[y] ... such laws and ordinances not being repugnant to this Act or to any Charter or Letters Patent or Order in Council which may be issued in pursuance [to this Act] or to the laws of England ...".[51]

36. After Federation, the *Constitution Act 1902* replaced the earlier legislation but not the 1828 Act insofar as the Supreme Court was concerned.[52] Section 5 of the 1902 Act provided:

> The Legislature shall, subject to the provisions of the *Commonwealth of Australia Constitution Act,* have power to make laws for the peace, welfare, and good government of New South Wales in all cases whatsoever ...

37. It is submitted that the successive statutes which constituted a legislature for New South Wales did not confer upon it any power other than legislative power. Correspondingly, the statute which established the Supreme Court of New South Wales, as well as the early statutes and Letters Patent which preceded it, conferred judicial power upon such courts alone. That the colonial parliaments did not have judicial power is also evident from their lack of power even to punish for contempt unless such a power was conferred expressly by statute.[53]

38. The *Australia Act 1986* (Cth) by s.2(2) provided that the *legislative* powers of the parliament of each State include all *legislative* powers that the Parliament of the United Kingdom might have exercised before the commencement of the Australia

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[51] See also *The Australian Constitution Act (No. 1)* 1842 (Imp); *The New South Wales Constitution Act* 1855 (Imp).

[52] *Cf Egan v Willis* (1996) 40 NSWLR 650 at 658 (Gleeson CJ).

[53] *Kielley v Carson* (1843) 13 ER at 232; *The Speaker of the Legislative Assembly v Glass* (1869) 3 LRPC at 570; *R v Richards* (1955) 92 CLR 157; *Armstrong v Budd* [1969] 1 NSWR 649 at 653 (Herron CJ), 659 (Wallace P), 663 (Sugerman JA).

Act. It made no reference to any *judicial* power possessed by the Parliament of the United Kingdom.[54] Certainly, it made no reference to any judicial power to punish.

39. It is not surprising that the various Imperial statutes conferring powers upon the New South Wales legislature from time to time did not confer any judicial power upon it. The judicial powers of the Parliament of the United Kingdom were limited and were not, for reasons which will appear, of a kind that could have been exercised by any colonial legislature. The history of the development of the English Parliament demonstrates this. In the thirteenth century, the King's Council was the 'core and essence' of Parliament; and from the King's Council there developed the House of Lords. The House of Commons developed from the assembly of knights and burgesses who were summoned to meet the King's Council.[55] This 'Parliament' was regarded as 'The High Court of Parliament' and was recognised as the highest court which the King had. Relief could be granted which could not be granted anywhere else and in which, indeed, errors of courts themselves could be redressed.[56] However, as explained by Professor Holdsworth, by the fourteenth century the judicial power of Parliament came to be exercised exclusively by the Lords. First, by the doctrine of the peerage and the concomitant right to trial by peers, the Lords gained a limited criminal jurisdiction by way of impeachment on the petition of the House of Commons and in respect of the trial of peers for serious offences.[57] Second, by the acquisition of a monopoly to hear petitions it gained a civil jurisdiction.[58] The Commons asserted no such jurisdiction.

40. The trial of peers and the process of impeachment was irrelevant to Australia's constitutional development. Those processes have at their heart the status of the members of the House of Lords.

41. Acts of attainder and bills of pains and penalties are in a different category. They were the result of historic forces in the United Kingdom. The last Act of Attainder in England was passed in 1746.[59] The last Bill of Pains and Penalties was introduced but not passed in 1820. It was directed against Queen Caroline, the wife of George IV.[60] The objection to such Acts lies in the fact that they usurp judicial power.[61] The power to enact them was asserted to meet political needs of the day and, as in the case of

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[54] The purpose of enacting s.2(2) of the *Australia Act 1986* (Cth) is related exhaustively in A. Twomey, *The Australia Acts 1986* (2010) at 200-217.

[55] Holdsworth, *Essays in Law and History* (AL Goodhart and HG Hanbury eds., 1946) at 49.

[56] *Ibid.* at 50-51.

[57] Holdsworth, *History of English Law,* vol.1 at 358; F.W.Maitland, *Constitutional History of England* (1908) at 214.

[58] Holdsworth, *History of English Law,* vol.1 at 359-361, 365-394; Maitland, *Constitutional History of England* at 213-215. A petition, addressed '*al roy et al nobles*' or '*al nobles seigneurs en parlement*' was to the King and his Council in Parliament and it was only those in the House of Lords who served in that capacity. And it was only the Lords who had access to the expert assistance required to deal with these petitions, in the persons of judges and law officers.

[59] G McBain, 'Abolishing "High Crimes and misdemeanours" and the criminal processes of impeachment and attainder' (2011) 85 *Australian Law Journal* 810 at 868. However, Maitland, in his *Constitutional History of England* (1908) at 319, claims that the date was 1696.

[60] McBain, *op.cit.* at 870.

[61] *Polyukhovich* (1991) 172 CLR 501 at 539 (Mason CJ), 649-650 (Dawson J); *Haskins v Commonwealth* (2011) 244 CLR 22 at [25] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

impeachment, has been rendered otiose by later constitutional developments in the United Kingdom.[62] Those particular political needs never existed in Australia.

42. Professor Holdsworth has written that "too much stress should not be laid upon the fact that Parliament thus continued to be spoken of as a court ... That Parliament, without ceasing to possess some of the characteristics of a court, could be so used by the Tudor sovereigns that it became a true legislative assembly, is due largely to the manner in which lawyers had guided its development ... especially to the substitution of the practice of legislating by bill for the practice of legislating by petition."[63] Indeed, it was the character of the instrument resulting from a bill as an Act of Parliament which justified its status as a law which the courts had to enforce whether or not it was moral.[64] The concept of the "Supremacy of Parliament", which thus emerged, has resulted in the dilemma whether a Parliament that can pass any law at all could pass a law which abolishes the constitution itself.[65] This dilemma cannot arise in Australia because of the nature of the State constitutions under the Australian Constitution.[66] Unlike the United Kingdom Parliament, the parliaments of the several States are not sovereign and omnipotent bodies.[67] They are limited by the terms of the Imperial legislation or State legislation to which such a legislature owes its existence, by the *Commonwealth of Australia Constitution Act* and the Commonwealth Constitution, and by the *Australia Act 1986*.[68] Section 106 of the Constitution makes the constitution of New South Wales 'subject to' the Constitution as does s.5 of the *Constitution Act 1902* itself. Therefore, upon what had been the judicial structures of the colonies, which became upon federation the judicial structures of the States, the Constitution by its own force imposed significant changes.[69]

43. It is indisputable that the Constitution is based upon the assumption of the rule of law:[70]

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[62] Impeachment was the process which allowed the House of Commons to get rid of a Minister of the Crown: *Holdsworth, History of English Law*, vol.1 at 380-385. In the United States it is still required because of the inability of Congress otherwise to remove a member of the Executive. *cf R v Transport Secretary; ex p. Factortame Ltd (No.2)* [1991] 1 AC 603 at 658-9. An Act of Attainder would conflict with Article 6 of the European Charter of Human Rights which requires that the determination of a civil right or obligation or of a criminal charge be by a fair trial in an impartial and independent tribunal: T. Bingham, *The Rule of Law* (2010) at 46; McBain, '*Abolishing "high crimes and misdemeanours" and the criminal processes of impeachment and attainder*' (2011) 85 ALJ 810 at 869.

[63] Holdsworth, *History of English Law*, vol.4 at 184.

[64] *Ibid* at 185-187.

[65] See, eg, A.V. Dicey, *The Law of the Constitution* (5th ed, 1897) at 38; G. de Q. Walker, 'Criticism of Dicey's Dogma of Parliamentary Sovereignty', 59 *Australian Law Journal* 276; T.R.S.Allan, 'Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism' (1985) 44 *Cambridge Law Journal* 111; P. Allott, 'The Courts and Parliament: Who Whom?' (1979) 38 *Cambridge Law Journal* 79; J. Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (1999).

[66] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 ("*Kable*") at 65-66 (Brennan CJ).

[67] *AG (NSW) v Trethowan* (1931) 44 CLR 394 at 418 (Rich J), 422 (Starke J), 425 (Dixon J).

[68] *McGinty v Western Australia* (1996) 186 CLR 140 at 172-3 (Brennan J); Dixon, 'The Common Law as an Ultimate Constitutional Foundation' in *Jesting Pilate* (1965) at 206.

[69] *Gould v Brown* (1998) 193 CLR 346 at [186] cited with approval in *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at [66].

[70] *Australian Communist Party v Commonwealth* (1950-1951) 83 CLR 1 at 193 (Dixon J). See also Dixon, 'The Law and the Constitution' in *Jesting Pilate and other Papers and Addresses* (1965) at 53; See also *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at [31] (Gleeson CJ) and [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *South Australia v Totani* (2010) 242 CLR 1 at [423] (Crennan and Bell JJ). It has been observed that the full implications of that assumption in the Constitution have not

> Moreover, it is a government under the Constitution and that is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as for example, in separating the judicial power from other functions of government, others of which are simply assumed. Among these I think that it may fairly be said that the rule of law forms an assumption.

44. It is submitted that the rule of law is a principle which informs the interpretation of the Constitution. The continued requirement of independent and impartial courts is part of that principle.[71] It is submitted that this is the reason why general words of the Constitution have been read to mean that no Australian legislature may enact a law which could validly deprive a State court of the characteristics essential to its status as a court,[72] or which confers powers on a court which are repugnant to or incompatible with the exercise of federal judicial power[73] or which would abolish the Supreme Court of a State.[74] It 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.[75] This aspect has manifested itself in decisions of this Court which are concerned with the requirement that a criminal trial be fair[76] whether it is a trial in a Chapter III court or a State court.[77] The "right to a fair trial" is one of several rights entrenched in our legal system to ensure that innocent people are not convicted[78] as an aspect of the rule of law and, to that extent, our Constitution assumes the existence of that right as a basis for interpretation.[79] It is also part of the rule of law that everyone is subject to one law administered by the courts.[80] It is submitted that for these reasons, the terms of Chapter III were interpreted to entrench judicial review for jurisdictional error in the State sphere.[81]

45. It has been established that federal judicial power can only be conferred upon courts and federal courts can only exercise judicial power.[82] In this sense, it is often said that there is a "strict separation of powers" in the federal sphere. However, that is not entirely true in the federal sphere or in the State sphere. In both jurisdictions, there is no strict separation of powers of the legislature and the executive. In the United Kingdom it has been held that the constitution, though unwritten, is "firmly based on

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yet been worked out fully: *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at [89] (Gummow and Hayne JJ); *Momcilovich v The Queen* (2011) 245 CLR 1 at [563] (Crennan and Kiefel JJ).

[71] Bingham, *The Rule of Law* (2010) at 90-102; *Totani* (2010) 242 CLR 1 at [60]-[68] (French CJ).

[72] *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at [63] (Gaudron, Gummow and Hayne JJ); *Wainohu v New South Wales* (2011) 243 CLR 181 at [44] (French CJ and Kifel J); *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 87 ALJR 410 at [100]-[101] (Hayne, Crennan, Kiefel and Bell JJ).

[73] *Kable* (1996) 189 CLR 51 at 103 (Gaudron J).

[74] *Ibid.* at 111 (McHugh J).

[75] A.V. Dicey, *The Law of the Constitution* (5th ed., 1897) at 179: Constitutional development since Dicey's day has meant that the word "courts" must in this context include some administrative tribunals. However, those tribunals would still be subject to the supervisory jurisdiction of the Supreme Courts.

[76] See, eg., *Jago v District Court (NSW)* (1990) 168 CLR 23 at 29 (Mason CJ), 45-47 (Brennan J).

[77] See also by the requirements of fairness imposed upon administrative tribunals.

[78] *Jago v District Court (NSW)* (1990) 168 CLR 23 at 29 (Mason CJ); and in the UK, *R v Davis* [2008] AC 1128.

[79] Stumer *The Presumption of Innocence* (2010) at 33, 37 and footnote 62.

[80] Dicey, *The Law of the Constitution* (5th ed., 1897) at 185.

[81] *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 580-581.

[82] *R v Kirby: Ex p. Boilermakers' Society of Australia* (1956) 94 CLR 254 at 296.

the separation of powers".[83] Yet, as Walter Bagehot demonstrated, there is in England no separation of powers of the executive and legislature. The executive, that is to say, the cabinet, is a committee of the legislature appointed by that body. The executive controls the legislature to the extent that it can dissolve it. The legislature controls the executive to the extent that it can, by majority vote, choose a new executive.[84] Bagehot described it as a "fusion of the legislative and executive functions".[85] Dicey, when writing the eighth edition of his *Introduction to the Study of Law of the Constitution,* in a section entitled "The Parliamentary Executive", described the Australian Constitution as one which also fused the legislature and the executive.[86]

10 46. Referring to the strict separation of the legislative and executive arms of government under the US Constitution, Sir Owen Dixon observed:[87]

> But a curious and surprising departure from, indeed violation of, British constitutional practice and theory is the adoption of the separation of powers. There can be no doubt that the plan of the American instrument of government was to make a mutually exclusive division of the functions of government among the executive, the legislature and the judiciary. This artificial and almost impractical classification was opposed to British practice and theory. The frame of our Constitution in this respect follows the American plan. The notion that all law-making was confined to the legislature which, therefore, could not authorise the executive to complete its work, was so foreign to the
> 20 conceptions of English law that the Australian courts ignored or were unaware of the full consequences of the American plan we had adopted. In a series of decisions here the power of the Commonwealth Parliament to authorise the executive to legislate by regulation was recognised and thus, in effect, established, although the logical difficulty created by the frame of the Constitution was not adverted to. On the other hand, it is quite clearly established that judicial power is exercisable by courts alone and that Parliament cannot empower any other tribunal to perform judicial functions. The failure of the doctrine of the separation of the powers of government to achieve a full legal operation here is probably fortunate. Its failure to do so may be ascribed perhaps to mere judicial incredulity....Legal symmetry gave way to common sense.'
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> 30 ... The basis of the system is the supremacy of the law. The courts administering the law should all derive an independent existence and authority from the Constitution.

47. The main operation in Australia of the doctrine of the separation of powers lies in its emphasis upon the necessity for there to be a substantial and real separation of the judiciary from the executive and the legislature both in the State and Commonwealth spheres. In the Commonwealth sphere, this separation is almost absolute.[88] James Madison has said that that while Montesquieu established that the doctrine of separation of powers is necessary for the maintenance of liberty, acceptance of that principle did not determine the degree of separation required.[89] Nevertheless, such separation, whether absolute or flexible, is insisted upon as part of the rule of law in

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[83] *Duport Steels Ltd v Sirs* (1980) 1 All ER at 541g (Lord Diplock).
[84] Walter Bagehot, *The English Constitution* (4th ed.) at 10-11, 12-13, 15.
[85] *Ibid* at 10.
[86] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed) at 389-390.
[87] Dixon, 'The Law and the Constitution' in *Jesting Pilate* (1965) at 52-53.
[88] The conferral of administrative jurisdiction upon federal judges is an incursion upon the otherwise absolute separation of the federal judiciary from the other two arms of government: *Grollo v Palmer* (1995) 184 CLR 348; *Hilton v Wells* (1985) 157 CLR 57. It is an acknowledgement that the "frame of the constitution" as Sir Owen Dixon referred to it, must give way to a certain overlap of power for historical common-sense reasons.
[89] *Federalist No.47.* See also *Federalist No.37.*

order to ensure the continued existence of an impartial and independent judiciary to declare and to apply the law which will bind the executive and legislature.

48. *Kable v DPP (NSW)*[90] was decided upon the footing that the Constitution, and the rule of law as its basis, requires there to be no such intrusion into the State judiciary as would threaten the continued existence of State courts as bodies capable of exercising judicial power, that is to say, as independent and impartial courts. In that respect there can be no distinction between the State and Federal courts. As Sir Owen Dixon said:[91]

> The judicial power of the Commonwealth therefore extends to deciding questions of State law. State law differs from federal law in its source and of course in the restricted area of its operation, but it forms part of the total corpus of Australian law. A federal judge sitting in the court's original jurisdiction would feel not only entitled but bound to pronounce upon State law in the same way as federal law. A State court in the same way will examine and pass upon federal law if in the course of exercising its jurisdiction a federal law come in question. In other words, the courts within the limits of their various jurisdictions administer the law of the land independently of its source.

49. It was precisely because of the unity of the Australian judicial system that this Court, in *Kable*, perceived the same invulnerability of State Supreme Courts (and State inferior courts[92]) as federal courts enjoy although no express provision of the Constitution expressly provides so in terms. (Nor, for that matter, do express provisions of the Constitution exhaustively define the nature of a federal court.) It is submitted that this limitation upon State legislative power articulated in *Kable* arises because the Constitution was interpreted as requiring consistency with the rule of law and this requires that there must be true courts in the country and upon the conclusion that there will not be any such courts if the legislature can pass laws which make them adjuncts of the executive. The limitation upon legislative power was expressed as a limitation founded upon the need to ensure that State courts must remain as fit repositories of federal judicial power. It could also have been expressed as a limitation based upon the requirement that a State legislature may not enact a law which destroys State courts as impartial and independent bodies applying both State and Federal law because to do so would be contrary to the Constitution interpreted consistently with the rule of law.

50. The legislation in this case is the obverse of that in *Kable*. The courts can be traduced also by the legislature arrogating to itself judicial power and without doing constitutional violence directly upon the judiciary. The existence and exercise of such power would create a jurisdiction that is not required to afford procedural fairness or, indeed, any fairness at all, which can act upon prejudice, can ignore evidence entirely and which may impose arbitrary or disproportionate punishment. A State Parliament, purportedly acting as a court, in keeping with usual parliamentary procedure, need not exhibit a single characteristic of an Australian court.

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[90] (1996) 189 CLR 51.

[91] *Sources of Legal Authority* in Jesting Pilate (1965) at 201-202.

[92] *K-Generation v Liquor Licensing Court* (2008) 237 CLR 501; *South Australia v Totani* (2010) 242 CLR 1.

51. A criminal judgment by Parliament would result in judgements lacking finality, because of the power of repeal.[93] Such a judgment would require the courts to give effect to legislative judgements and to act upon legislative findings of guilt.

52. Such a judgment would be immune against any review for an Act of Parliament is not a "judgment, decree, order or sentence" against which there can be an appeal to the High Court.[94] Nor is Parliament a "court' within the meaning of the Constitution. This is contrary to the implicit inhibitions in Chapter III that proscribe the establishment of criminal courts immune from appeal.[95]

53. The constitutional history of the United Kingdom, up to the time of Federation, demonstrates that, since the time of Lord Coke, the assertion by the judiciary of independence must have, as its necessary concomitant, the inability of the Parliament to act as a court. Those struggles were between the judiciary and the executive. But in the system of responsible government that has since developed in which the executive controls the legislature, the same objections to executive supremacy over the judiciary apply to any assertion of supremacy of the legislature over the judiciary in so far as the exercise of judicial power is concerned. The judiciary alone of the three arms of government may authoritatively determine the scope of its jurisdiction. From the thirteenth century, the courts developed the procedure of indictment,[96] declared that imprisonment by executive order (except in cases of treason) would be held unlawful by the courts,[97] were aided in these assertions of independence by Parliament,[98] experienced the bitter conflict between Chief Justice Coke and King James II,[99] and finally saw the enactment of the *Act of Settlement 1701*. It was the latter Act which established the independence of the judiciary by securing tenure and fixed salaries, and gave immunity from suit and prosecution for acts done in a judicial capacity.[100]

54. It is submitted 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.[101] The possession of such judicial power by the legislature would be capable of rendering otiose the courts of the States.

55. Even if the New South Wales Parliament possesses judicial power, that power would be a power that must be exercised judicially. Parties liable to be affected must be given an opportunity to be heard. The Parliament as constituted would have to be unbiased. It would be obliged to consider only relevant information. It

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[93] Historically, bills of attainder were often reversed: see McBain, "Abolishing 'High Crimes and misdemeanours' and the criminal processes of impeachment and attainder" (2011) 85 *Australian Law Journal* 810 at 868.

[94] Section 73 of the Constitution; and see the problem of appeals from criminal tribunals considered in *The Queen v Burah, (supra)*, at 900-901; *cf. Grant v Gould* (1792) 126 ER 434 at 450; contrast the protections afforded by the traditional court-martial system: *Lane v Morrison* (2009) 239 CLR 230 at [84]–[93].

[95] *Cockle v Isaksen* (1957) 99 CLR 155 at 165.

[96] Holdsworth, *History of English Law*, vol.V at 176-177.

[97] *The Opinion given by the Judges in 1591 as to Imprisonments by Order of the Council* at 495.

[98] SR Gardiner, *History of England 1603-1642*, vol.VI at 272-309.

[99] *Ibid.* vol.III at 1-17.

[100] Bingham, *The Rule of Law* (2010) at 24-25; *Holdsworth, History of English Law*, vol. VI at 234-235, 242.

[101] Compare *R v Quinn; Ex parte Consolidated Food Corporation* (1977) 138 CLR 1 at 11 (Jacobs J).

would have to avoid arbitrariness. It would probably have to ensure the availability of a right of review. It would, somehow, have to confer the element of finality upon its judgements despite the principle that a State Parliament can always repeal any of its own Acts (subject to presently immaterial exceptions). The Amendment Act was passed without any of these orthodox protections afforded by Australian courts.

56. The 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.

57. In *Clyne v East*[102] it was argued that legislation enacted to overcome the effect of a court's decision involved a prohibited exercise of judicial power. The argument sought to equate the constitution of Ceylon, considered by the Privy Council in *Liyanage v The Queen*,[103] with that of New South Wales. The Privy Council had construed the constitution of Ceylon to require a strict separation of judicial from legislative power. The Court of Appeal concluded that the constitution of New South Wales did not.[104]

58. Sugerman JA observed that the constitution of New South Wales was an uncontrolled constitution and could be amended.[105] Consequently, a law which conferred judicial power upon a Rents Tribunal was within power. *Clyne* was, however, not a case in which Parliament purported to exercise judicial power itself. It was a case in which Parliament had conferred such power upon a tribunal. *Clyne* would be decided in the same way today.

59. *Clyne* was approved in *Builders' Labourers Federation v Minister for Industrial Relations* ("*BLF Case*").[106] The BLF was a union which had been deregistered by the Minister. It sought judicial review on the ground that it had not been afforded procedural fairness. It lost at first instance and appealed. While the appeal was pending, the legislature passed another Act which provided that the deregistration "was to be taken" for all purposes to be effective. The law also extinguished any existing rights to costs.

60. Street CJ held that the Act was a legislative judgment and an exercise of judicial power. His Honour said that "the method chosen by the New South Wales Parliament was by a legislative interference with the judicial process of this Court by directing the outcome of particular litigation".[107]

61. Street CJ observed that while the submission of the King to the law was established at the time of James I, "the authority of parliament to adjudicate has not been correspondingly denied at common law".[108] He then referred to the history of impeachments and bills of attainder and of pains and penalties. He cited a passage from Lord Coke's *Fourth Institute* acceding to the existence of a power in parliament to attaint. He concluded that "the existence of the power was recognised in that case". His Honour then said that constitutional history since 1805 "hardly justifies that authority being exercised by enacting an express legislative judgment

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[102] (1967) 86 WN (Pt2) NSW 102.
[103] [1967] 1 AC 259.
[104] (1967) 86 WN (Pt2) NSW at 106
[105] (1967) 86 WN (Pt2) NSW at 115-116.
[106] (1986) 7 NSWLR 372.
[107] *Ibid.* at 379.
[108] *Ibid.* at 380.

between the parties to a specific dispute currently before a court". His Honour concluded "the power is, however, there".

62. It is respectfully submitted that the exercise of judicial power, by the Imperial Parliament two hundred years ago and not since, does not, as a matter of constitutional law, demonstrate that the "power is [still] there"; and much less that it is a power of the New South Wales Parliament. Indeed, a conclusion upon that footing that the State legislature has this power merely because the United Kingdom Parliament had it two hundred years ago is inconsistent with the settled authorities that State parliaments do not have power to punish for contempt in the absence of express statutory provisions conferring such power.[109]

63. Street CJ further sought to demonstrate the possession by the State legislature of judicial power by pointing to the undisputed power of the legislature to pass laws conferring judicial functions upon tribunals which are not courts.[110] But such laws are the product of legislative power not of judicial power. Yet his Honour reasoned from the existence of that legislative power that "[i]t follows that Parliament must necessarily be the repository itself of that power to judge which it vests in another".[111] His Honour cited no authority for that proposition and it is mistaken. The Commonwealth Parliament has legislative power to establish federal courts but has no judicial power itself. And the exercise of legislative power to create a court is not an exercise in delegation of judicial power.

64. Having decided, by that process of reasoning, that the legislature "has judicial power", Street CJ then went on to consider whether there were any limits to the exercise by Parliament of that power. The BLF argued that there was a limitation inherent in the parliament's power to pass laws for the peace, welfare and good government of the State. His Honour thought that those words, while words of the widest import, did convey some limitation upon the scope of legislative power.[112] His Honour did not say what that limit might be and noted that the BLF did not argue that the law in question was beyond any such limit.

65. Since the *BLF Case* was decided, various limitations implicit upon the otherwise "plenary" legislative powers of State parliaments have been found: restrictions upon limiting freedom of political expression, restrictions against interference with the courts, the restriction against the abolition of the Supreme Courts, the inability to limit judicial review of jurisdictional error and so on. In addition, principles limiting permissible changes to the law while proceedings are on foot have been developed in a succession of cases such as *Nicholas v R*[113] and *Bachrach v Queensland.*[114] Many of these limitations arise, in one form or other, from an acceptance of the necessity for a system of government by laws, that is to say, an 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.

66. Kirby P also rejected the BLF's arguments upon the footing that the New South Wales parliament enjoys legislative supremacy which, his Honour said, was the

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[109] *Armstrong v Budd* [1969] 1 NSWR 649 at 653 (Herron CJ), 659 (Wallace P), 663 (Sugerman JA).
[110] (1986) 7 NSWLR 372 at 381.
[111] *Ibid.* at 381.
[112] *Ibid.* at 385.
[113] (1998) 193 CLR 173.
[114] (1998) 195 CLR 547.

product of a long political history.[115] Kirby P proceeded upon the footing that it had been conceded that the Australian Constitution was silent upon the subject of any relevant limitation upon State legislative power. His Honour therefore did not consider whether any possible limitations arose from the Constitution.[116]

67. It is submitted that after the decision in *Kable*, the *BLF Case* would have been decided the opposite way if the conclusion were accepted that the Act was "a legislative interference with the judicial process" of the New South Wales Supreme Court".[117] The Act would now be held to infringe the *Kable* principle. The BLF Case therefore does not support the validity of Schedule 6A of the Act.

10 68. In *Kable* itself, several judges made statements to the effect that the doctrine of separation of powers does not operate in New South Wales. For example, Dawson J said:[118]

> The New South Wales Court of Appeal was clearly correct in concluding in *Clyne v East* that, notwithstanding that the Supreme Court of New South Wales also owes its origin to a Charter of Justice, no basis could be found in the provisions of the Constitution Act 1902 for isolating judicial power from the other powers of government. To do so would confine the legislative power conferred by s.5 of the Constitution Act 1902. It is clear that it is not so confined and, as I have explained, it extends to the judiciary. As is well established, the ultimate source of the power
> 20 contained in s.5 is the Imperial Act (18&19 Vict.c54) (known as the *Constitution Statute 1855*), and the Act of the Colony of New South Wales which forms the Schedule to the Statute (17 Vict No. 41), which is called the *Constitution Act*. Section 49 of the latter Act recognised the power of the New South Wales legislature to abolish, alter or vary the Constitution and functions of the courts of the colony.

69. Brennan CJ agreed with the reasons of Dawson J in that respect.[119]

70. It is submitted that dicta such as those[120] involve no more than the proposition that judicial power might by a valid law be vested in a body other than a State court and that certain parts of the jurisdiction of such courts can be varied from time to time. Also, they are authority for the proposition, which is not challenged, that State
30 courts may exercise some functions that are non-judicial[121]. But they do not entail that the legislature can purport to adjudge persons guilty and sentence them.[122]

71. It is true that in *Kable* McHugh J said:[123]

> Subject to the operation of the *Commonwealth of Australia Constitution Act* 1900 (Imperial), the State of New South Wales is governed by the New South Wales Constitution. The latter Act is not predicated on any separation of legislative, executive and judicial power although no doubt it assumes that the legislative, executive and judicial power of the State will be exercised by institutions that are functionally separated. Despite that assumption, I can see nothing in the New South Wales Constitution nor the constitutional history of the State that would preclude the State

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[115] (1986) 7 NSWLR 372 at 397.
[116] The other members of the Court of Appeal expressed similar reasons.
[117] (1986) 7 NSWLR 372 at 379.
[118] (1996) 189 CLR 51 at 79.
[119] *Ibid.* at 65.
[120] *Ibid* at 92–94.
[121] *Ibid.* at 84, 106, 109-10 and 132.
[122] *cf South Australia v Totani* (2010) 242 CLR 1 at [147] (Gummow J).
[123] *Kable* (1996) 189 CLR 51 at 109.

> legislature from vesting legislative or executive power in the New South Wales judiciary or judicial power in the legislature or executive.

72. It is respectfully submitted, however, that the assumption referred to in that passage, which reflects the requirement of the rule of law that manifests itself in the separation of powers, would require the State constitution to be interpreted so that the power to legislate does not include the power for the legislature itself to assume judicial power to pass criminal judgment. This conclusion is consistent with another dictum of McHugh J:[124]

> The working of the Constitution requires and implies the continued existence of a system of State courts with a Supreme Court at the head of the State judicial system. Covering clause 5 of the Constitution ... necessarily implies the continuing existence of a system of State courts declaring the legal rights and duties of the people of Australia. So does s.118 in declaring "[f]ull faith and credit shall be given, throughout the Commonwealth to the ... judicial proceedings of every State." ...
>
> It is hardly to be supposed that the Constitution intended that a State could defeat the exercise of the grants of power conferred on the Parliament of the Commonwealth by s.77 by the simple expedient of abolishing its courts and setting up a system of tribunals that were not courts."

73. The reasoning in the last sentence applies with equal force to a State Parliament exercising judicial power itself. Such an assertion of power would likewise defeat the grants of power conferred by s 77 on the Commonwealth.

74. It is respectfully submitted that as a matter of statutory interpretation of colonial statutes and the *Constitution Act 1902* (NSW), and because of the effect of the Constitution upon the State constitutions, the State Parliaments never possessed judicial power to enable them to make judgments assigning guilt and imposing punishment on persons. The Amendment Act purports to do so and is invalid.

(b) Copyright

75. The Plaintiff has asserted that it owns copyright in the information it was required to submit to the NSW Department of Trade and Investment under s 163C of the Mining Act and in the samples and related information that it provided to the Department in response to a notice under s 248B of that Act.[125] It is an agreed fact that some of the information constitutes literary or artistic works within the meaning of the *Copyright Act 1968* (Cth).[126]

76. For the reasons given by the Plaintiffs in proceedings S206 of 2014, clause 11 of Schedule 6A is inconsistent with the *Copyright Act 1968* (Cth) and is inoperative to the extent of the inconsistency.

VIII. ORDERS SOUGHT

77. The questions stated for the opinion of the Full Court should be answered as follows:

    (i) Are clauses 1 to 13 of Schedule 6A to the *Mining Act 1992* (NSW), or any of them, invalid?

    Answer: Clauses 1 to 13 of Schedule 6A are invalid.

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[124] *Ibid.* at 110-111.
[125] SC, para 59; SCB at 59.
[126] SC, para 58; SCB at 59.

(ii) Is clause 11 of Schedule 6A to the *Mining Act 1992* (NSW) inconsistent with the *Copyright Act 1968* (Cth) and inoperative to the extent of that inconsistency?

Answer: Yes.

(iii) Who should pay the costs of the special case?

Answer: The Defendant.

IX. ESTIMATE OF ORAL ARGUMENT

78. The Plaintiff considers that 4 hours will be sufficient time to present its oral argument.

10 Date: 5 November 2014

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