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

BETWEEN: **NUCOAL RESOURCES LIMITED**
Plaintiff

AND

10 **STATE OF NEW SOUTH WALES**
Defendant

PLAINTIFF'S REPLY

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I INTERNET PUBLICATION

1. This reply is in a form suitable for publication on the Internet.

II SUBMISSIONS IN REPLY

2. The Defendant's selective quotation[1] of dicta of Kitto J in *R v Trade Practices Tribunal; Ex Parte Tasmanian Breweries Pty Ltd*[2] concerning the nature of judicial power is not helpful because it omits two things that appear on the same page. First, his Honour qualified his statement by referring to it as being the "general rule". Second, his Honour also observed that some powers are judicial in nature because of an analogy with "an admittedly judicial function".[3] Here, the relevant judicial action is of the kind referred to by McHugh J in *Chu Kheng Lim v Minister*[4], namely, an Act which is directed to an individual or individuals and which punishes that individual or those individuals, without the procedural safeguards of a judicial trial. Such an Act would be an exercise of judicial power. The question in every case is whether the Act constitutes an exercise of judicial power. If a State parliament conducted a trial and afterwards made a finding of guilt and determined to impose a punishment (by, among other things, cancelling a licence and destroying other property and procedural rights), and if that parliament then embodied that punishment in an Act, it is submitted that it would not prevent the Act being regarded as a judicial act even if the Act, when looked at alone, contained only a single provision cancelling a licence. To construe such an Act without regard to the actions which preceded it would result in a triumph of form over substance. That is why the prohibition against Bills of Attainder in the United States Constitution has been construed to operate against legislative acts "no matter what their form" that inflict punishment without a judicial trial".[5]

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[1] Defendant's Submissions in Duncan proceeding at [23]

[2] (1970) 123 CLR 361 at 374

[3] For the same reasons, the analysis of cases in which the nature of judicial power was examined by reference to disputes in respect of which courts make decisions declaring rights, and an analysis of the *Amending Act* in those terms in Victoria's submissions in paragraphs 13 to 30 is inapposite. What is in question in this case is the power to adjudicate in respect of guilt and the power to punish. That is, unquestionably, an exercise of judicial power. Consequently, there are two questions which arise: does a State parliament have a power to adjudicate in respect of guilt and a power to punish; and is the *Amending Act* an exercise of such a power?

[4] *Chu Kheng Lim v Minister* (1992) 176 CLR 1 at 70

[5] *ibid.* In paragraph 27 Queensland rightly accepts that the Commonwealth Parliament cannot pass a bill of pains and penalties because that would constitute an exercise of judicial power. The reasons of McHugh J,[5] quoted by Queensland, are precisely those which raise the constitutional implications advanced in the Plaintiff's Outline of Submissions. If that is correct, the dictum of McHugh J referred to in paragraph 29 of Queensland's submissions should be disapproved.

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3. This is why the "context"[6] of the *Amending Act* is relevant to its characterisation.[7] If this Act is an exercise of judicial power, and if the New South Wales legislature lacks such power, then the absence from the Act of s.3(2) would make no difference to its invalidity if the Plaintiff were still able to demonstrate its character as an exercise of judicial power. It is not necessary to consider, in this case, how that might be demonstrated, for in this case the provisions relied upon by the Plaintiff *do* appear in the Act and the factual context - the request of both Houses of Parliament to ICAC, followed by a hearing involving the calling of witnesses and the writing of a report containing factual and legal findings, the communication of that report to the Houses of Parliament, followed by Parliament's own finding and legislative deprivation of the licence and other property and procedural rights as a response to the findings - shows the character of the Act. The vice in the exercise of judicial power to punish by a parliament[8] lies precisely in the unbridled freedom of a parliament exercising judicial power to punish otherwise than in accordance with a pre-existing or antecedent legal principle or standard,[9] a feature that is inconsistent with the demands of the rule of law underlying the Constitution[10] and which is inconsistent with the terms of the constitutional statutes when they are read in a way which upholds the rule of law.

4. As to paragraph 15(b) and (c) of the Defendant's submission, this Act did not "vary the law" so that it applied in a particular way in general and in the future.[11] It cancelled a licence. Courts cancel licences as a punishment on a daily basis. The Defendant correctly acknowledges that "tainted processes" is a term wide enough to encompass the activities of the persons who undertook those processes. The punishment is not imposed solely upon the licence holders; it is imposed upon all those who lose the benefit of Doyles Creek's enjoyment of the licence, namely, NuCoal. It is, for this reason, not merely a punishment, but an arbitrary punishment. The Defendant's reference to the dictum of Frankfurter J is

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[6] Defendant's submissions [15]; Defendant's submissions in Duncan proceeding [19]-[26]

[7] *HA Bachrach v Queensland* (1998) 195 CLR 547 at [11]-[13]

[8] As to which, see Plaintiff's Submissions, [16]-[27]; *Kennedy v Mendoza-Martinez* 372 US 144 (1963), 168-169; *Wilson v Seiter* 501 US 294 (1991), 300; *Smith v Doe* 538 US 84 (2003), 92; *Veen v The Queen (No. 2)* (1988) 164 CLR 465. See also John Finnis, *Natural Law and Natural Rights* (1980) 262-263; Alice Ristroph, "State Intentions and the Law of Punishment", (2008) 98(4) *The Journal of Criminal Law & Criminology* 1353, 1396; Aaron Fellmeth, "Civil and Criminal Sanctions in the Constitution and Courts", (2005) 94 *Georgetown Law Journal* 1, 40-41.

[9] Defendant's Submissions in Duncan proceeding, paragraph 23

[10] As to which, see Friedrich Hayek, *The Constitution of Liberty* (1960) 155, 171, 206; Lon Fuller, *The Morality of Law* (1968) 59-60, 81-91, 209-210; John Rawls, *A Theory of Justice* (1971) 238-239; John Finnis, *Natural Law and Natural Rights* (1980) 261-262, 271; Tom Bingham, *The Rule of Law* (2010) 60-65, 73-74; Joseph Raz, *The Authority of Law* (1979) 212, 217-218. See also Blackstone, Introduction *Commentaries* 2; Edward Coke, *The Fourth Part of the Institutes of the Laws of England: Concerning the Jurisdiction of Courts* (1644) 23. See also *Re Manitoba Language Rights* [1985] 1 SCR 721, [59]; *British Columbia v Imperial Tobacco Canada Ltd* [2005] 2 SCR 473, [59]. Contrary to the Commonwealth's submissions at paragraph 21 (and see also South Australia's submissions at paragraph 23), there is a broad degree of "consensus" as to the meaning of the "thin" or formal conception of the rule of law: Timothy Endicott, "The Impossibility of the Rule of Law", (1999) 19(1) *Oxford Journal of Legal Studies* 1; Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (2010) 63.

[11] Defendant's Submissions in Duncan proceeding, paragraph 27

apposite.[12] Punishment does indeed presuppose an offence and, as here, not necessarily for an act previously declared criminal.

5. As to paragraph 20 to 23 of the Defendant's submission, the possession by the first colonial governors of plenary powers demonstrates nothing except that the nature of New South Wales, as a penal colony, required the appointment of a military officer with wide powers. Accordingly, Captain Arthur Phillip's commission appointed him "Captain-General and Governor-in-Chief in and over our territory called New South Wales".[13] It is true that the later statutes establishing the Supreme Court of New South Wales did not, in their terms, confer judicial power upon it exclusively; however, the later statutes establishing the legislature, in *their terms*, only conferred legislative power upon the successive forms of legislature. The quotations referred to in footnotes 3, 5 and 6 are, therefore, selective and taken out of context.[14]

6. The Defendant's submission assumes that there can be an exercise of judicial power which is legislative power also.[15] That assumption is not explained and, it is respectfully submitted, is inconsistent with the accepted notions of the nature of legislative, executive and judicial power in this country.[16] In any event, this case raises the question whether a State parliament can exercise judicial power, whether such exercise is or is not coupled with an exercise of legislative power.

7. The dictum of McHugh J in *Kable* at 109, quoted in paragraph 25 is inapposite. There is no attempt in this legislation to confer judicial power upon any body.[17] Subject to the Constitution, it can, of course, do so. It is respectfully submitted that the dictum of McHugh J in *Kable* at 121 should be disapproved for the reasons advanced in the Plaintiff's Outline of Submissions.

8. As to paragraph 27, s. 2(2) of the *Australia Act 1986* should not be construed as if it conferred judicial power upon the Parliaments of the States. Its express terms confer only legislative power and not judicial power. The purpose of the section is exhaustively explained in the *Australia Acts 1986,* Twomey, at 214 *et seq.*

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[12] Defendant's Submissions in Duncan proceeding, paragraph 43

[13] See the discussion of this aspect of the authority of colonial governors in *A Birthright and Inheritance, The Establishment of the Rule of Law in Australia,* Sir Victor Windeyer, (1958-1963) 1 *Tasmanian Law Review* 635 at 645 *et seq;* and *The Rule of Law in a Penal Colony,* Neal, Cambridge University Press, 1991, at 86-97.

[14] See the discussion by Watson at pp.xiv to xliii; as to the Commonwealth's submissions in paragraphs 26, the implicit prohibitions in the Constitution relied upon by the Plaintiff are those which require that no inferior court or tribunal is immune from judicial review by State Supreme Courts and that appeals from State Supreme Courts to the High Court cannot lawfully be prevented.

[15] paragraph 24

[16] Although the character of a power may vary depending upon the character of the body exercising it.

[17] Similarly, reference by the Commonwealth in paragraph 10 to the exercise of power by administrative bodies to revoke rights or to discipline is beside the point. Such exercises are not exercises of judicial power; they constitute administrative decision making which is undertaken according to law and which is subject to judicial review. The exercise of power to punish by a parliament is not undertaken according to pre-existing law and is unreviewable

9. Further, although an appreciation of the constitutional history of the United Kingdom is vital to an understanding of the Australian constitutional position, it is not the constitutional history of Australia. One vital difference is that every Australian legislature owes its existence to statute and is subject to the Australian Constitution. The possession, historically, of judicial power by the Westminster Parliament, itself not a creature of statute, is interesting but determines nothing in this case.

10. The Plaintiff does not challenge the correctness of the dicta quoted by the Defendant in paragraphs 37 and 38. It makes no argument that there should be a direct application to States' constitutions of dicta concerning the separation of judicial from other powers by Chapter III. Nor does the Plaintiff submit that the Constitution mandates a separation of powers at the State level. Rather, the Plaintiff contends that the Constitution prevents State parliaments from passing a law to punish someone.[18]

11. As to paragraphs 39 and 40, the reasons why the untrammelled exercise of judicial power is inimical to State courts is explained in the Plaintiff's Outline of Submissions at [49]-[54]. The reason why the exercise of judicial power by State bodies other than courts does not undermine State courts is that such bodies are amenable to judicial review. Parliament exercise of judicial power is not. On the Defendant's argument, a law imposing punishment would be valid. Being valid, no further question of efficacy arises. There could be no occasion for the application of a court's role as explained in *Marbury v Madison.*[19] Such an exercise of governmental power would be unique: *all* other powers, legislative, executive and judicial, are subject to *some* review for lawfulness. In the case of the judiciary, it is only the High Court which is immune from any review. Yet, as the Defendant's submissions in the Duncan proceeding candidly acknowledge, the exercise of judicial power by the New South Wales parliament would not be reviewable because it is "supreme".[20]

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[18] As to paragraphs 25 and 31 of the Commonwealth's submissions, the Plaintiff does not seek to "appeal directly to the rule of law" to support its argument. Rather, it contends that the Constitution, when read with an appreciation of its underpinnings in the rule of law, requires the conclusion that no Australian legislature can exercise judicial power to punish. Nor does it rely upon a "negative implication". Instead, it points to the absence of any legislative text to support a grant of judicial power to State parliaments.

[19] 5 US (1 Cranch) 137; and see *The Separation of Powers and the Unity of the Common Law,* Gleeson and Yezereski, essay in *Historical Foundations of Australian Law,* Volume 1, Federation Press, 297 at 327-329

[20] "because of the doctrine of parliamentary supremacy": paragraph 65 of Defendant's Submissions in the Duncan proceedings. And see to the same effect the submissions of South Australia in the Duncan proceeding at paragraphs 50 to 54. And see paragraphs 13-24 of Queensland's submissions in which repeated references are made to powers of State parliaments being "plenary" and to "the doctrine of parliamentary supremacy". These do not address the issue in this case. It is accepted that, subject to the Constitution, these parliaments' legislative powers are plenary. The issue is whether they can exercise judicial power. The "broad plenary power" of State parliaments is one to make laws; not to punish. Queensland's submissions fail to address the point. Queensland's reference to *Brown v West* (1990) CLR 195 is misconceived. At 201 the Court observed that "the Crown and the executive have come to represent the same forces as control a majority in the lower house". And see *The English Constitution,* Bagehot, 4th edition, at 15.

[20] Queensland Submission paragraph 27

12. If, as the Defendant contends,[21] the State parliaments possess judicial power, then it would follow that they could punish for contempt for such a power is inherent to a body exercising judicial power. Yet, the authorities cited have established that, absent a law conferring such a power upon a State legislature, it does not exist. In *The Queen v Richards; ex p. Fitzpatrick and Brown,* this Court decided that the power of a parliament to punish for contempt does not involve the exercise of judicial power.[22] The exercise by colonial parliaments of this power does not, therefore, furnish a "conclusive answer to the Plaintiff's proposition".[23]

13. The avowal by the Defendant and every intervener that State parliaments can exercise judicial power is charged with unaddressed implications. Can a State parliament entertain litigation in competition with the Courts - as the Westminster Parliament did in the case of impeachment for treason? Can a State parliament pass a law establishing itself as a venue for criminal appeals which, resulting in "Acts" and not "judgments" and not, in any case, in judgements of the Supreme Court of a State, would not be amenable to appeal to the High Court?[24] Must litigation in such a place be "fair"? Could unfair or erroneous pronouncements be reviewed? If a State Parliament can exercise judicial power, can a State executive do so as well because in the ancient days of English history, the King could do so?

14. The Defendant and interveners ignore these problems which lie at the heart of any consideration of the power of State parliaments, status of which is expressly stated to be "subject to the Australian Constitution".

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[21] paragraph 42
[22] (1955) CLR 157 at 167
[23] As Western Australia contends in paragraph 13
24 cf *A-G (Qld) v Lawrence* [2013] QCA 364