IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

NO S 206 OF 2014

BETWEEN: **CASCADE COAL PTY LTD**
First Plaintiff

MT PENNY COAL PTY LTD
Second Plaintiff

GLENDON BROOK COAL PTY LTD
Third Plaintiff

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

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

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

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PART I FORM OF SUBMISSIONS

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

PART II BASIS OF INTERVENTION

2. The Attorney-General of the Commonwealth (**Commonwealth**) intervenes under s 78A of the *Judiciary Act 1903* (Cth). The Commonwealth intervenes in support of the position of the defendant in relation to the first question stated for the opinion of the Full Court and largely in support of the position of the plaintiffs in relation to the second question stated for the opinion of the Full Court.

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PART III LEGISLATIVE PROVISIONS

3. The Commonwealth adopts the plaintiffs' statement of the applicable legislative provisions.

PART IV ISSUES AND ARGUMENT

Summary of Argument

4. In summary, the Commonwealth contends:

   4.1. The provisions of Sch 6A to the *Mining Act 1992* (NSW) (**the impugned provisions**) are a 'law' for the purposes of s 5 of the *Constitution Act 1902* (NSW) and would be a 'law' for the purposes of s 51 of the Commonwealth Constitution if enacted by the Commonwealth Parliament.

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   4.2. There is no covering the field inconsistency between the impugned provisions and the *Copyright Act 1968* (Cth) (**the Copyright Act**). However s 109 of the Constitution renders cl 11(4) of Sch 6A to the Mining Act inoperative at least to the extent that clause denies an obligation to provide 'terms' or 'equitable remuneration' as required by ss 183(5) and s 183A(2) of the Copyright Act, but may have no further operation.

Adoption of argument and additional matters

5. The Commonwealth adopts its written submissions in No S 119 of 2014 (**Duncan proceeding**) and makes submissions on the two additional matters
30 raised by the plaintiffs in this proceeding.

Proposition 3: Impugned legislation is not a 'law'

6. The plaintiffs adopt the third proposition from the Duncan proceeding that 'the impugned legislation is not a "law" within the meaning of s 5 of the *Constitution*

Act 1902 (NSW).'[1] The plaintiffs' submissions should not be accepted for the following reasons:

6.1. Proposition 3 is a restatement of Propositions 1 and 2 from the plaintiff's submissions in the Duncan proceeding and should be rejected for the reasons set out in the Commonwealth's submissions in that proceeding.

6.2. There is no basis for reading a limitation into the word 'law' in s 5 of the Constitution Act.

6.3. In any event, for the reasons set out in the Commonwealth's submissions in the Duncan proceeding, the impugned provisions alter rights, thereby satisfying the criterion of validity proposed by the plaintiffs.

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7. It is clear from the way in which Proposition 3 is presented, that the plaintiffs' argument seeks to achieve a separation of legislative and judicial powers through a restrictive reading of the word 'law'. For example, the plaintiffs contend that, in its use of the word 'law', s 51 of the Commonwealth Constitution does not extend to the making of adverse findings in respect of the conduct of individuals, and the meting out of punishment or penalty consequent upon the making of such findings'.[2]

8. To achieve this outcome, the plaintiffs rely on a statement by Latham CJ in *Commonwealth v Grunseit* (***Grunseit***)[3] referred to by the Court in *Plaintiff S157/2002 v Commonwealth* (***Plaintiff S157***),[4] that the 'hallmark of the exercise of legislative power' is the determination of 'the content of a law as a rule of conduct or a declaration as to power, right or duty'.[5] The plaintiffs deploy this statement to contend that the word 'law' in s 51 of the Constitution marks the territory between legislative and judicial power, and that that constitutional line marking should apply to State power through the word 'law' in s 5 of the NSW Constitution. These arguments should be rejected.

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9. The Commonwealth submits that Latham CJ's statement in *Grunseit,* and its subsequent applications, is directed to questions concerning the distinction between Commonwealth *legislative* and *executive* power in the particular contexts that arose in those cases. It might also be an expression of how the operation of a Commonwealth law can be delineated to establish the requisite connection between the law and a relevant head of power in s 51 of the Constitution.[6] *Grunseit* concerned the distinction between legislative and executive power for the purposes of determining whether an instrument was to be laid before the Houses of Parliament in accordance with the Act in question. The discussion of *Grunseit* in *Plaintiff S157* was in the context of the Court considering the limits on Parliament's power to delegate broad legislative power

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1 Plaintiffs' submissions at [8]; plaintiff's submission in the Duncan proceeding at [22].

2 Plaintiffs' submissions at [10].

3 (1943) 67 CLR 58, 82.

4 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

5 *Plaintiff S157/2002* at 512-513 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

6 Ibid 513.

to the executive government. The observations in those cases in relation to the 'hallmarks' of legislative power are of limited relevance outside the specific contexts in those cases and, certainly, are of no relevance to questions about the relationship between legislative and judicial power.

10. Even in its proper context, the limitation that is said to arise from *Grunseit* derives from the constitutional conception of a separation between legislative and executive power, not from the word 'law'. The word 'law' in s 51 does not, itself, impose constraints in addition to the limits discernible from the requirements of separation of powers principles. With respect, Dawson J was correct in *Kable v Director of Public Prosecutions* (NSW)[7] (***Kable***) to say that "'laws' is synonymous with the word 'statutes'".[8] A law is one that passes through the Houses of Parliament and has received the royal assent.[9] This would clearly extend to statutes in the nature of a *privilegium.*[10]

11. Furthermore, the argument that a bill of attainder is not a 'law' on this basis was rejected by the Court in *Kable.*[11] A Commonwealth law of that character would be invalid, not because it lacks the quality of a 'law', but because it would also involve an exercise of judicial power.[12]

12. The plaintiffs also rely on the use of expressions like 'law of a State' in ss 109 and 118 of the Constitution as a means of entrenching a constitutional meaning for a state 'law' in s 5 of the NSW Constitution. However, the effective operation of those provisions does not require the word 'law' to have the meaning contended by the plaintiffs.[13] Those provisions may well be inapplicable to some forms of 'law', but it does not necessarily follow that 'laws' must have the contended meaning. For example, a federal or State law that creates no rule of conduct is likely to be incapable of giving rise to an inconsistency under s 109, but it does not logically follow that s 109 requires either law to be of a particular character.

13. The comments of Dixon J in *Grunseit* and Gummow and Hayne JJ in *Momcilovic v The Queen*[14] must be seen, in that context, as directed to an

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7 (1996) 189 CLR 51.

8 *Kable* at 76; McHugh J agreed at 109. Although Dawson J in *Kable* was concerned with the meaning of the word 'laws' in s 5 of the *Constitution Act 1902* (NSW), the same understanding should be adopted for s 51 of the Commonwealth Constitution.

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

10 *Australian Communist Party v Commonwealth ('Communist Party Case')* (1951) 83 CLR 1, 261 (Fullagar J). As Maitland put it, '...it seems very necessary to notice that the power of a statute is by no means confined within what the jurist or political philosopher would consider the domain of legislation. A vast number of statutes he would class as *privilegia* than as *leges*; the statute lays down no general rule, but deals only with a particular case' (ibid 382).

11 See, *Kable* at 64 (Brennan CJ); 76-77 (Dawson J); 109, 121 (McHugh J), 125 (Gummow J).

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

13 Cf, plaintiffs' submissions at [14].

14 Referred to in the plaintiffs' submissions at [15]-[18].

exercise of assessing inconsistent legislative commands, duties or sanctions. Without conflicting legislative commands, duties or sanctions, s 109 would have no operation. However, that does not require 'laws' to have those features.

14. The plaintiffs also rely upon the contrasting use of 'laws' and 'judicial proceedings' in ss 51(xxv) and 118 in support of the argument that both provisions 'impliedly recognise that state judicial power is to be exercised in "judicial proceedings"'.[15] The short answer to this submission is that neither provision refers to 'state judicial power'. In any event, the effective operation of those constitutional provisions does not require the suggested constitutional
10 content advanced by the plaintiffs.

15. The plaintiffs' arguments to support Proposition 3 are in marked contrast to the reasoning of the Court in *Kable* and *Kirk v Industrial Court (NSW)* (***Kirk***)[16] to support the conclusions that constitutional expressions like 'State courts' and 'State Supreme Courts' have an entrenched constitutional meaning. The Court in those cases relied on more than the mere use of those words in the Commonwealth Constitution: the essential characteristics were required for the effective operation of Chapter III. The same could not be said for the textual references to State 'laws'.

16. In any event, even if the word 'law' in s 5 of the NSW Constitution and s 51 of
20 the Commonwealth Constitution has the meaning contended by the plaintiffs, for the reasons set out in the Commonwealth's submissions in the Duncan proceeding, the provisions of Sch 6A operate to alter rights: they do not mete out punishment consequent upon the making of findings.[17]

Other matters

17. The plaintiffs rely[18] on the decision of the Supreme Court of British Columbia in *Sewell v The British Columbia Towing and Transportation Co Limited* (**the *Thrasher Case***).[19] However, subsequent to the decision the Supreme Court of British Columbia in that case, the Governor-General referred the questions answered by that Court to the Supreme Court of Canada. As the law report
30 indicates,[20] the Supreme Court reached the contrary view on those questions, including that the Provincial Legislature did have the power to set the procedures for the Supreme Court of British Columbia. Accordingly, the plaintiffs' reliance on that case is misplaced.[21]

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15 Plaintiffs' submissions at [20].

16 (2010) 239 CLR 531.

17 Cf the plaintiffs' submissions at [19].

18 Plaintiffs' submissions at [22]-[23].

19 (1882) 1 BC (Irving) 153.

20 (1882) 1 BC (Irving) 153, 243-4.

21 No reasons were provided for those answers. The discussion of the case by Lefroy is annotated as having overruled the Supreme Court of British Columbia: *The Law of Legislative Power in Canada* (1897-8), The Toronto Law Book and Publishing Company Limited, 126.

18. In any event, the decision of the Supreme Court of British Columbia in the *Thrasher Case* was predicated on an implication of separation of powers that was said to condition the grant of legislative power to the Provincial Legislature.[22] That reasoning is inapplicable to the NSW Constitution.

19. The existence or non-existence of a parliament's inherent power to punish for contempt[23] has no bearing on the scope of plenary legislative power to enact laws. They are conceptually distinct aspects of the State's constitutional arrangements. The privileges and powers of the NSW Parliament are, as the plaintiffs acknowledge, a product of its colonial constitutional history. The scope of its 'plenary' legislative power has never been seen as tethered to its inherent powers and, indeed, was ample enough to enact legislation declaring/defining its powers and privileges to encompass the same powers and privileges as those enjoyed by the House of Commons, including powers to commit for contempt, to judge that same contempt and to commit for the contempt by Warrant.[24]

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Section 109 inconsistency

20. The plaintiffs' s 109 claim has two features:

20.1. First, it seeks to render inoperative the whole of cl 11 of Sch 6A;

20.2. Secondly, it asserts both covering the field inconsistency and inconsistency arising from direct contradiction. In support of the first form of inconsistency it is said that the Copyright Act, especially Div 2 of Pt VII, provides a scheme that is 'comprehensive and exhaustive', into which cl 11 intrudes.[25] As for the direct form of inconsistency, it is said that cl 11 '*does* in terms contradict the Commonwealth law, because it purports to authorize the State to do the acts comprised in the plaintiffs' copyright without provision for compensation'.[26]

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21. Because these submissions are to be filed contemporaneously with the submissions for the defendant and the interveners, the Commonwealth is not aware of the full extent of the controversy in respect of the plaintiffs' s 109 submissions. Accordingly, these submissions identify the general manner in which s 109 might operate under various scenarios.

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22. In summary, the Commonwealth submits as follows:

22 (1882) 1 BC (Irving) 153, 171-2.

23 Cf Plaintiffs' submissions at [24]-[26].

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

25 Plaintiffs' submissions at [30], [51]. There is some imprecision with the way in which the inconsistency tests are described and applied by the plaintiffs. At [30], the plaintiffs associate the covering the field test with the 'alters, impairs or detracts from' test, but at [51] the two tests appear to be identified as separate, albeit related, tests.

26 Plaintiffs' submissions at [30], [54].

22.1. There is no covering the field inconsistency.

22.2. Section 109 renders cl 11(4) inoperative at least to the extent that clause denies an obligation to provide 'terms' or 'equitable remuneration' as required by ss 183(5) and s 183A(2) of the Copyright Act, but may have no further operation.

Copyright under the Commonwealth Act

23. Copyright comprises a bundle of exclusive rights set out in s 31 of the Copyright Act and subsists in 'works' that meet the requirements set out in s 33. An owner's copyright will be infringed by a person who does, or authorises the doing in Australia of, any act comprised in the copyright (s 36(1)). Section 115 of the Copyright Act provides that a copyright owner may bring an action for an infringement of the copyright.

24. The exclusive rights protected by the Act 'are negative in character',[27] the scope of which is defined by reference to acts of infringement. In other words, copyright owners are not given positive rights under the Act to engage in protected acts: they have the right to prevent others from engaging in acts that infringe their copyright. The Copyright Act provides a statutory assurance of *exclusive* use, not a positive right or authority *to use*.

25. Consequently, where an act that does not infringe, or is taken by the Act not to infringe, an owner's copyright, then the statutory protections for works offered by the Act are relevantly inoperative and the acts are not capable of giving rise to an action for infringement under the Act.

Crown use

26. 'Crown use' of copyright does not constitute an infringement. Subsection 183(1) of the Copyright Act relevantly provides that the doing of acts comprised in the copyright in a work by a State, or by a person authorised in writing by a State, is not an infringement if the acts are done 'for the services of the ... State'.

27. Where there is 'Crown use' within the meaning of the Act, s 183 does not operate to confer rights to engage in acts comprising copyright. Instead, because copyright is negative in nature, s 183(1) operates to qualify[28] or roll back the operation of the Act so as not to relevantly apply to those Crown uses. In other words, as against Crown use within the meaning of the Act, the owner does not enjoy the exclusive bundle of rights comprising the copyright.

28. However in circumstances triggering the Crown use provisions, the Act imposes the following statutory obligations on the State:

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27 See *JT International SA v Commonwealth* (2012) 250 CLR 1 at 31, [36] (French CJ).

28 See *Copyright Agency Ltd v NSW* (2008) 233 CLR 279, [68] (Gleeson CJ, Gummow, Heydon, Crennan and Kiefel JJ).

28.1. If s 183A of the Copyright Act does not apply ('Special arrangements for copying for services of government'), the State is under an obligation to give notice under s 183(4) and to provide 'terms' in accordance with s 183(5).

28.2. If s 183A does apply, the State is under an obligation to pay 'equitable remuneration' (s 183A(2)).

The impugned provisions

29. Subclause 11(1) of Sch 6A to the Mining Act authorises the appropriate official to use (including to reproduce) or disclose (including to publish or communicate), for specified purposes, certain 'information' obtained in respect of the cancelled licences.

30. Subclause 11(3) provides that no intellectual property right or duty of confidentiality prevents the use or disclosure of information by the appropriate official as authorised by cl 11 or the use or disclosure of that information by or on behalf of a person to whom it has been disclosed.

31. Subclause 11(4) provides that no liability attaches to the State or any other person in connection with authorised use or disclosure.

Application of s 109

32. To the extent that 'information' for the purposes of the impugned provisions is not a 'work' within s 33 of the Copyright Act, then the Crown use provisions of the Copyright Act are not engaged and, consequently, no inconsistency under s 109 arises between the impugned provisions and the provisions of the Copyright Act.

33. To the extent that 'information' for the purposes of the impugned provisions is a 'work' within s 33 of the Copyright Act, then the work attracts the protection provided by the Copyright Act against infringement. On the assumption that the acts comprised in the copyright *are* done 'for the services of the ... State', then the Crown use provisions are engaged and the doing (pursuant to cl 11(1)) of acts comprised in the copyright will not constitute an infringement of the owner's copyright. The statutory protection for copyright will not operate against the Crown use and the copyright owner will have no action for infringement of copyright to the extent of that Crown use. Section 183 operates to qualify or roll back the copyright protection under the Act and, accordingly, no inconsistency arises between cl 11(1) of the impugned provisions and the provisions of the Copyright Act. Nor will cl 11(3) relevantly operate against any applicable Commonwealth provision.

34. Because the scheme of the Act operates in this way, the plaintiffs' covering the field argument must also be rejected. To the extent that it is rolled back, the Act does not seek to cover the field that has been vacated. To put it another way, the comprehensive scheme created by the Act marks out the field in relation to

which the rights of copyright are exclusive. That field does not extend to circumstances where an infringement does not, or is taken not to, occur.

35. However, the State remains under the obligations imposed by the Crown use provisions to give notice and provide 'terms' (under s 183(4) and (5)), or pay 'equitable remuneration' under s 183A(2).

35.1. To the extent that cl 11(4) denies an obligation to provide 'terms' or 'equitable remuneration' as required by ss 183(5) and 183A(2) of the Copyright Act, cl 11(4) is inconsistent with those Commonwealth provisions and, consequently, invalid to that extent.

10 35.2. If the words '[n]o liability' in cl 11(4) are capable of being read to include the giving of notice as required by s 183(4), then cl 11(4) would be inconsistent, to that extent, with the requirement in s 183(4).

36. It is not clear whether there is a dispute between the parties as to whether the use or disclosure of information authorised by cl 11(1) will necessarily be acts 'done for the services of the ... State' within s 183(1).[29] In the event that it were contended and found that the acts will not be done 'for the services of the ... State', s 109 will have a larger scope of operation. To the extent that the appropriate official uses or discloses information under cl 11(1), that provision, along with cls 11(3) and (4), would in those circumstances be inconsistent with
20 ss 13, 31, 36 and 115 of the Copyright Act and, consequently, invalid.

A copyright licence

37. In its defence,[30] the defendant pleads in the alternative that the second and third plaintiffs granted[31] the Minister for Mineral Resources the right in copyright 'to publish, print, adapt, and reproduce all exploration reports lodged ... in any form and for the full duration of the copyright'. It is further said that such a copyright licence (i) subsists despite the cancellation of the mining licences and (ii) constitutes a licence for the purposes of s 36 of the Copyright Act.

38. As it is presently unclear how the parties intend (if at all) to deploy s 109
30 arguments in relation to this alleged licence, the Commonwealth reserves its position on this matter.

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29 As to which see *Copyright Agency Ltd v NSW* (2008) 233 CLR 279 at 299 [56], 305 [90].

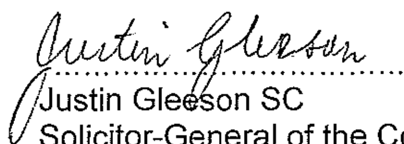
30 Special Case Book (**SCB**) at 42. The plaintiffs address this point in the plaintiffs' submissions at [55]-[60].

31 Pursuant to condition 46 of the cancelled mining licences: SCB at 129; 190.

PART V ESTIMATED HOURS

It is estimated that one hour will be required for the presentation of the oral argument of the Commonwealth in this proceeding and the Duncan proceeding.

Dated: 12 November 2014



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