IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S206 of 2014

BETWEEN:

CASCADE COAL PTY LIMITED
First Plaintiff
MT PENNY COAL PTY LIMITED
Second Plaintiff
GLENDON BROOK COAL PTY LIMITED
Third Plaintiff

AND

THE STATE OF NEW SOUTH WALES
Defendant

DEFENDANT'S SUBMISSIONS

I. CERTIFICATION

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

II THE ISSUES

2. The defendant accepts the plaintiffs' statement of the issues arising in this proceeding and in *Duncan v State of New South Wales* (No. S119 of 2014) (the **Duncan proceeding**).

III SECTION 78B OF THE JUDICIARY ACT 1903

3. The plaintiffs have given adequate notice under s. 78B of the *Judiciary Act 1903*.

IV MATERIAL FACTS

4. The defendant does not contest the facts as outlined by the plaintiffs, including in their chronology. The defendant adopts the further facts as stated in its submissions in the Duncan proceeding.

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V APPLICABLE PROVISIONS

5. The defendant accepts the accuracy of the statutory provisions as set out by the plaintiffs. The defendant also adopts the provisions in Annexure A to its submissions in the Duncan proceedings.

VI ARGUMENT

6. The defendant adopts its written submissions in the Duncan proceedings and the abbreviations used therein.

7. In these submissions, the defendant addresses the plaintiffs' contentions:

   (a) that Schedule 6A to the *Mining Act* is not a "law" within the meaning of s. 5 of the *NSW Constitution*; and

   (b) that Schedule 6A is inconsistent, within the meaning of s. 109 of the *Commonwealth Constitution*, with the *Copyright Act 1968* (Cth) (***Copyright Act***).

Schedule 6A is a "law" within the meaning of s. 5 of the *NSW Constitution*

8. The plaintiffs offer various reasons as to why Schedule 6A does not constitute a "law" within the meaning of s. 5 of the *NSW Constitution*. At one point, they submit that the concept of a "law" "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" (PS [10]). The idea that Schedule 6A entails an "adverse finding" against Cascade Coal/the plaintiff/other Cascade Coal investors and/or imposes a "punishment" upon those parties should be rejected for the reasons set out in the defendant's submissions in the Duncan proceeding.

9. The plaintiffs also submit that Schedule 6A is not a "law" because it is a determination made in the exercise of judicial power or having a judicial character (PS [20]). That submission should also be rejected for the reasons set out in the defendant's submissions in the Duncan proceeding. In any event, the authorities cited by the plaintiff do not support the proposition that a "law" may not itself impose a penalty. Nor do they support the proposition (at PS [12]) that an exercise of power by a legislature that makes adverse findings and imposes consequences in respect of such findings is not a "law". It has not been suggested or held in any of the cases in which the validity of alleged bills of pains and penalties has been considered that the instrument in question lacks the character of a "law". In *Kable v DPP (NSW)* (1996) 189 CLR 51 at 64 Brennan CJ observed, in relation to the *Community Protection Act 1994* (NSW), that "Acts of Attainder were nonetheless laws, as Sir Edward Coke accepted".[1]

10. The plaintiffs submit that Schedule 6A is not a "law" because it does not prescribe a "rule of conduct" (PS [12], [19]). That characterisation of Schedule 6A is too narrow. The substantive provisions of Schedule 6A do effectively

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[1] See also at 76 (Dawson J).

prescribe rules of conduct, in that they control the administration of the *Mining Act* and the *Planning Act*[2] and the determination of rights and liabilities concerning the past and future administration of those Acts. In *HA Bachrach P/L v Queensland* (1998) 195 CLR 547 at 564, [22] the Court described the *Local Government (Morayfield Shopping Centre Zoning) Act 1996* (Qld) as establishing "a legal regime affecting the Morayfield shopping centre land, binding the developer, the Council, and all other persons including the plaintiff." The same characterisation applies in respect of the legal regime affecting the "relevant licences" and "associated applications" regulated by Schedule 6A to the *Mining Act.*

11. In any event, the premise is flawed. The submission pays insufficient regard to Latham CJ's often-cited[3] observation in *Commonwealth v Grunseit* (1943) 67 CLR 58 at 82 that legislation determines "the content of a law as a rule of conduct *or a declaration as to power, right or duty*" (emphasis added). The plaintiffs seize upon the first part of this observation, submitting that Schedule 6A "does not lay down a norm or rule of conduct, nor does it prescribe a penalty for breach of that norm" (PS [19]). However, it has never been suggested that the prescription a "rule of conduct", particularly if understood in this narrow sense, is a necessary element of a "law" for the purposes of s. 5 of the *NSW Constitution* (or for s. 51 of the *Commonwealth Constitution*). The passages which the plaintiffs cite from *Momcilovic v The Queen* (2011) 245 CLR 1 (PS [16]-[18]) must be understood in context. At [326], Hayne J was not purporting to define in a comprehensive way the concept of a "law" but was merely identifying when s. 109 might be satisfied. Gummow J's observations (at [233]) were directed towards identifying the "law" to which s. 109 attached and thus reflect the particular context of determining inconsistency in a case concerning criminal statutes.

12. A "law" which declares rights or duties, even without prescribing a "rule of conduct", remains a "law" for the purposes of s. 5 of the *NSW Constitution*, as well as under the *Commonwealth Constitution.* That is reinforced by the cases discussed at paragraphs 30-38 of the defendant's submissions in the Duncan proceeding, where the relevant legislation did no more than declare certain acts to be valid. As the majority observed in *Haskins v The Commonwealth* (2011) 244 CLR 22 at 38 [30], there is a long history of enactment of statutes which treat as effective transactions which when conducted lacked legal authority. The plaintiffs merely assert, without explanation, that Schedule 6A is not a law which declares rights, duties or powers (PS [19]). The submission should be rejected.

13. The limitations that have been identified in relation to s. 51 of the *Constitution* (even if they apply to s. 5) are not transgressed here. The plaintiffs rely on a number of examples of legislative provisions which the Court has characterised as failing to answer the description of a "law" for the purposes of s. 51 (PS [11]-

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[2] In *Kable v DPP (NSW)* (1995) 189 CLR 51 at 76 Dawson J, in dealing with a similar submission, observed that the *Community Protection Act 1991* (NSW) did "oblige those persons charged with its administration to a course of conduct".

[3] *Momcilovic v The Queen* (2011) 245 CLR 1 at [400] (Heydon J); *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at [56]; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CR 476 at [102] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

[13]). Those are examples of provisions which effectively abdicate legislative power to the executive.[4] It cannot be said (and plaintiffs do not appear to submit) that Schedule 6A involves an abdication of legislative power.

14. The plaintiffs in the Duncan and Cascade Coal proceedings raise a series of propositions regarding the scope of the inherent powers of the houses of the legislature, in the absence of legislation, to control contempt. Those propositions have no bearing on the questions at hand. The present case involves the scope of the power to pass legislation. Neither the power to pass laws nor the concept of a "law" itself is constrained by considerations that affect the inherent powers of the houses of parliament.

Clause 11 of Schedule 6A is not inconsistent with the *Copyright Act*

15. Clause 11(1) of Schedule 6A authorises the "appropriate official" to use[5] and disclose[6] any information obtained in connection with the administration or execution of the *Mining Act* or the *Planning Act* in respect of the Mount Penny or Glendon Brook licences[7] or licence areas[8] provided that the use or disclosure is "in connection with" any application or tender under the *Mining Act* or any application under the *Planning Act* or is for any other purpose approved by the Minister.

16. The "appropriate official" is defined in cl. 11(2) as the Director-General under the *Mining Act* (in the case of information obtained in connection with the administration or execution of that Act) or the Director-General under the *Planning Act* (in the case of information obtained in connection with the administration or execution of that Act).

17. Clause 11(4) provides that "no liability" attaches to the State or any other person in connection with the use or disclosure of information as authorised by cl. 11.

18. No inconsistency arises between these provisions and the *Copyright Act* because:

    (a) Clause 11 of Schedule 6A does not authorise or purport to authorise any act which is prohibited or which would constitute infringement of copyright within the meaning of the *Copyright Act*; and

    (b) Clauses 11(4) and 7 of Schedule 6A do not, on their proper construction, exclude or purport to exclude any obligation to pay terms or remuneration which may arise under ss. 183 and/or 183A of the *Copyright Act*.

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[4] Cf *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73.

[5] Defined in cl. 11(7) to include "reproduce".

[6] Defined in cl. 11(7) to include "publish or communicate".

[7] The Mount Penny and the Glendon Brook licences are "relevant licences", the latter being defined in cl. 2 as "an exploration licence referred to in clause 4(1)(a), (b) or (c)". The Mount Penny licence is EL 7406 dated 21 October 2009 (cl. 4(1)(b)) and the Glendon Brook licence is EL 7405 dated 21 October 2009 (cl. 4(1)(c)).

[8] The defendant uses the phrase "licence areas" in substitution for "relevant land", on the basis that "relevant land" is defined in cl. 2 of Schedule 6A as the "exploration area of a relevant licence or any part of the exploration area of a relevant licence".

Some of the acts authorised to be carried out by State officials under cl. 11 are acts comprised in the plaintiffs' copyright

19. There appears to be little, if any, substantial disagreement between the parties about the application of the *Copyright Act* to acts of the kind contemplated by cl. 11 of Schedule 6A.

20. As accepted by the plaintiffs, copyright under the *Copyright Act* subsists not in "ideas or information" but in the "particular form of expression in which the ideas or information are conveyed"[9] (PS [35]). The "particular form of expression" is the "words, figures and symbols in which the pieces of information are expressed, and the selection and arrangement of that information"[10] (PS [35]).

21. "Information" is not defined for the purposes of cl. 11. The defendant agrees with the submission of the plaintiffs (PS [36]-[39]) that "information" is apt to include both "information" in the general sense (in which copyright does not subsist) and the expression of that information (in which copyright may subsist). Construing "information" in cl. 11 as being broad enough to include the particular form of expression in which information is conveyed (such as the Final Geological Reports) is consistent with the fact that reproducing information is a form of "use", and publishing and communicating information are forms of "disclosure", as defined in cl. 11(7).

22. The Final Geological Reports were submitted to the Department of Trade and Investment in response to notices from the Department requiring their lodgment (SCB 61 [52]-[57]). They were provided under s. 163C of the *Mining Act*. The licence holders were obliged to provide such reports under s. 163C despite the cancellation of the licences: cl. 9 of Schedule 6A. It follows that the Final Geological Reports were "obtained in connection with the administration or execution of [the *Mining Act*] in respect of a relevant licence". Clause 11(1) of Schedule 6A is therefore enlivened, so that the Directors-General are authorised to use or disclose the Final Geological Reports or any information contained therein for the purposes specified in cl. 11(1).

23. It is agreed in the special case that parts of the Final Geological Reports are original literary and/or artistic works in which copyright subsists under s. 32 of the *Copyright Act* (SCB 61 [54]) and that the second and third plaintiffs own the copyright in their respective Reports (SCB 61 [55]).

24. Section 36 of the *Copyright Act* relevantly provides that, subject to the Act, copyright in a literary or artistic work is infringed by a person who, not being the owner of the copyright, and without the licence of the owner of the copyright, does in Australia or authorises the doing in Australia of any act comprised in the copyright.

25. An "act comprised in the copyright" in a work is any act that, under the *Copyright Act*, the owner of the copyright has the exclusive right to do: s. 13(1). Under

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[9] *Computer Edge Pty Ltd v Apple Computer Inc* (1986) 161 CLR 171 at 181 (Gibbs CJ).

[10] *IceTV Pty Limited v Nine Network Australia Pty Limited* (2009) 239 CLR 458 at 472 [28] (French CJ, Crennan and Kiefel JJ); at 495 [102] (Gummow, Hayne and Heydon JJ).

s. 31, the owner of the copyright in a literary or artistic work has the exclusive right to, *inter alia*, reproduce the work in a material form,[11] publish the work[12] and communicate the work to the public.[13]

26. The "use" and "disclosure" of "information" which is authorised by cl. 11 of Schedule 6A to the *Mining Act* could include certain "acts comprised in copyright". However, it is not limited to such acts. Any overlap with the *Copyright Act* is only partial. The plaintiffs apparently accept this and go no further than to submit that the two laws overlap because use or disclosure of information could encompass acts comprised in copyright (PS [32]-[40]). An appropriate official may "use" or "disclose" information in a manner that does not infringe any copyright in the works in which such information is contained. For example, an appropriate official may use or disclose information without in any way using or disclosing the particular expression of that information in which copyright may subsist. Alternatively, the appropriate official may use or disclose the information without reproducing, publishing or communicating (within the particular meaning of the *Copyright Act*) the information.

27. Having regard to the alleged inconsistency, it is accepted that cl. 11 of Schedule 6A authorises "appropriate officials", being officers of the defendant, to do acts which could include acts comprised in the second and third plaintiffs' copyright. To that extent, and to that extent only, there is potential for inconsistency between the *Copyright Act* and the State law. However, having regard to other provisions of the *Copyright Act* and Schedule 6A, that potential for inconsistency is not realised.

The Copyright Act itself authorises the acts which are authorised by cl. 11 of Schedule 6A

28. Section 183(1) of the *Copyright Act*, which is in Division 2 of Part VII, relevantly provides that the copyright in a literary or artistic work is not infringed by a State, or by a person authorised in writing by a State, doing any acts comprised in the copyright if the acts are done for the services of the State.

29. There remains some room for debate about the outer limits of the concept of acts being done "for the services of the State".[14] However, it is clear that an act done

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[11] The word "reproduce" is not defined in the Act, although s. 14(1)(b) provides that a reference to reproduction of a work shall be read as including a reference to a reproduction of a "substantial part" of the work. "Material form" is defined in s. 10(1), in relation to a work, as including "any form (whether visible or not) of storage of the work...or a substantial part of the work...(whether or not the work...or a substantial part of the work...can be reproduced)". Section 21 deems certain acts to be reproductions of certain kinds of works.

[12] Under s. 29(1)(a), a literary or artistic work shall be deemed to have been published if, but only if, reproductions of the work have been supplied (whether by sale or otherwise) to the public.

[13] "Communicate" is defined in s. 10(1) as to "make available online or electronically transmit (whether over a path, or a combination of paths, provided by a material substance or otherwise) a work or other subject-matter, including a performance or live performance within the meaning of this Act".

[14] See *Pfizer Corporation v Ministry of Health* [1965] AC 512 which considered an analogous phrase in s. 46(1) of the *Patents Act 1949* (UK). The majority in *Pfizer* considered that it could encompass duties performed for the benefit of the public: at 535 (Lord Reid), at 543–4 (Lord Evershed), at 551–2 (Lord Upjohn). The minority took the view that it was limited to duties that directly benefit the Crown: at

by a public official for the purposes of performing a statutory duty or exercising a statutory power (at least where that is done for the benefit of the State) is an act done "for the services of the State".[15] More particularly for present purposes, an act of use or disclosure of information by one of the appropriate officials for one of the purposes authorised in cl. 11(1) would be an act done "for services of the State".[16] The plaintiffs appear to accept that this is so, given their submissions as to the application of s. 183.

30. As far as the suggestion of inconsistency is concerned, it is sufficient to note that s. 183(1) of the *Copyright Act* effectively authorises acts done by the State for the services of the State, in the sense that such an act does not infringe the copyright in a literary or artistic work. In other words, where the doing of the act falls within s. 183(1), it will not be an infringement for the purposes of s. 36 (and will not be actionable pursuant to s. 115). As the Court noted in *Copyright Agency Limited v State of New South Wales* (2008) 233 CLR 279 (***CAL v NSW***) at 301, [68] the purpose of the scheme is "to enable governments to use material subject to copyright 'for the services of the Crown' without infringement."

31. Under ss. 183 and 183A of the *Copyright Act,* the State becomes subject to certain obligations when it does an act of the kind described in s. 183(1). This is the statutory quid pro quo for the qualification of exclusive rights in s. 183(1): *CAL v NSW* at 301, [68]. The particular obligations which apply depend upon whether or not the act of the State involves the making of a "government copy".[17] If it does, the regime in s. 183A applies and "equitable remuneration" must be paid to the relevant collecting society: s. 183A(2). As the Court observed in *CAL v NSW* at 290, [19] these provisions "alleviate the administrative burden of giving notice and fixing terms for each individual 'government copy' under s 183(4) and (5)."

32. If the act in question does not involve the making of a "government copy", then the State is instead subject to the obligations in subs. 183(4) and (5). In such circumstances the State must notify the owner of the copyright in accordance with s. 183(4) (such notice being required after the act has been done). The terms for

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549-550 (Lord Pearce), at 566-567 (Lord Wilberforce). Which of these views prevails in Australia has not yet been settled: see *CAL v NSW* (2008) 233 CLR 279 at 299, [56]-[57] and 305, [90]; *Minogue v Department of Justice* [2004] VCAT 1194 at [58]; *Stack v Brisbane City Council* (1995) 59 FCR 71 at 88; *In the Matter of the Copyright Act 1968* (1982) 65 FLR 437 at 444-445.

[15] See *CAL v NSW* (2008) 233 CLR 279 at 299, [56], 305 [90] and, in relation to the equivalent provision in s. 163 of the *Patents Act*, *Embertec Pty Limited v Energy Efficient Technologies Pty Ltd* [2013] FCA 2 at [66]; *Stack v Brisbane City Council* (1995) 59 FCR 71 at 88.

[16] This conclusion is reinforced by cl. 11(6), which provides that the disclosure of information under cl. 11 is "taken to be in connection with the administration or execution of this Act and the Planning Act".

[17] A "government copy" is defined in s. 182B as "a reproduction in material form of copyright material made under subsection 183(1)". The other element of s. 183A(1) which must be satisfied is that there must be a relevant collecting society for the purposes of Div 2 of Part VII of the *Copyright Act* and the company has not ceased operating as that collecting society. A "collecting society" is defined as a company in respect of which a declaration is in force under s. 153F: s. 182B(1). By declaration made on 18 December 1998 under s. 153F, the Copyright Tribunal declared the Copyright Agency Limited to be the collecting society for the purposes of Division 2 of Part VII "in relation to Government copies of works and published editions of works, other than works that are included in a sound recording, cinematograph film or a television or sound broadcast". This is referred to in *CAL v NSW* at 290, [21].

the doing of the act are such terms as are, whether before or after the act is done, agreed between the State and the owner of the copyright or, in default of agreement, as are fixed by the Copyright Tribunal: s. 183(5). The decision of the Australian Copyright Tribunal in *Copyright Agency Ltd v New South Wales* (2013) 102 IPR 85 is an example of an exercise of the jurisdiction conferred by s. 183(5).

33. The plaintiffs submit that s. 183A applies only to the act of reproducing in material form copyrighted material and not other acts comprised in copyright such as publication or communication (PS [46]). It is inappropriate to seek to resolve this question in the abstract, given the range of acts that could occur pursuant to cl. 11(1) of Schedule 6A.[18] Moreover, it is unnecessary for present purposes to determine whether particular acts by the appropriate officials under cl. 11(1) in relation to the Final Geological Reports may include the making of "government copies", such that the obligations of the State would be governed by s. 183A. That is because nothing presently turns on the distinction between the two regimes. The defendant does not submit that cl. 11 of Schedule 6A would or could operate to displace its obligations under ss. 183 or 183A, if and when such obligations arise.

Schedule 6A is not inconsistent with the Copyright Act

34. The plaintiffs submit that Schedule 6A is inconsistent with the *Copyright Act* in two respects: first, because the *Copyright Act* is intended as "complete statement of the law in respect of the authority of the State to do acts comprised in a person's copyright for the services of the State" (PS [53]) and, secondly, because ss. 183 and 183A require the provision of "terms" whereas Schedule 6A excludes liability and the payment of compensation (PS [54]). Both submissions should be rejected.

35. The first submission involves an overstatement. If the submission were correct the *Copyright Act* would cover a large field of activity and legislation such as that considered in *CAL v NSW* at 293-294 (which required surveyors' plans to be registered and made available for inspection and copying) would seemingly intrude upon that field. The *Copyright Act* is not and does not purport to be a complete statement of the power of a State to do acts in relation to information, which acts may involve an act comprised in the copyright such as reproducing, publishing or communicating works in which copyright subsists. Relevantly for the purposes of s. 109 of the *Commonwealth Constitution*, the *Copyright Act* regulates the circumstances in which reproducing, publishing or communicating etc copyrighted works will and will not constitute an infringement of copyright. The *Copyright Act* is not directed to the authority of States to engage in particular

[18] It is too narrow a construction to say that s. 183A only applies to the act of reproduction and not to other acts comprised in copyright such as communication. Much will depend upon the circumstances in which a "government copy" is created. The effect of s. 183A is to disapply ss. 183(4) and 183(5) "in relation to a government copy". There are likely to be circumstances where that will encompass acts other than merely the reproduction which produces the physical object described as a government copy, for example where a work is uploaded (thereby reproducing the work in a material form and communicating its contents). The practical utility of s. 183A would be significantly undermined if the regime in ss. 183(4) and (5) applied to one aspect of the act (the communicating) and s. 183A applied to another aspect (the reproducing).

activities. It is instead directed to the consequences of particular acts that relate to acts comprised in copyright.

36. Clause 11 of Schedule 6A does not purport to authorise anything which is prohibited by the *Copyright Act* or treated under that Act as an infringement of copyright. As noted above, the use and disclosure authorised by cl. 11 would not, to the extent that it involves any act comprised in the copyright, infringe the copyright in a literary or artistic work. That is because s. 183(1) of the *Copyright Act* expressly provides that the doing of such acts by a State, or by a person authorised in writing by a State, does not infringe copyright.

37. Under the scheme of the *Copyright Act*, the authority conferred on a State to do acts that would otherwise infringe copyright is separate from the obligation imposed on the State to pay terms/equitable remuneration in respect of such acts. The obligations which apply to the State under ss. 183(4), 183(5) and 183A(2) do not expressly or implicitly qualify the operation of s. 183(1). That is, the doing of an act that falls within s. 183(1) does not constitute an infringement, irrespective of whether or not there has been compliance with ss. 183(4), 183(5) and 183A(2) (as applicable). None of the requirements in ss. 183(4), 183(5) and 183A are preconditions, in either the legal or the temporal sense, to the doing of acts referred to in s. 183(1). This is confirmed by the Court's analysis in *CAL v NSW* at [68], cited at paragraph 30 above.[19] It is therefore not accurate to describe the authorisation conferred on States by s. 183(1) of the *Copyright Act* as being "dependent upon the negotiation or determination of 'terms'" (contra PS [50]).

38. It follows that, in addressing the plaintiffs' contention that the mere authorisation of use and disclosure in cl. 11 of Schedule 6A is inconsistent with the *Copyright Act*, questions as to the payment of terms or equitable remuneration may be put to one side. This understanding as to the operation of the *Copyright Act* becomes important in determining whether it is in any significant way "altered", "impaired", "detracted from" or "undermined" by cl. 11 of Schedule 6A.[20] To the extent that there is an overlap between the use and disclosure of information authorised by the State law and the acts comprised in the copyright as regulated by the Commonwealth law, the two laws operate harmoniously. That which is authorised by the State law is also authorised by the Commonwealth law (in the sense that acts which might otherwise infringe copyright are stated not to infringe copyright). In so far as it concerns intellectual property rights arising under the *Copyright Act*, cl. 11(3) should not be construed as conferring any greater authority to engage in acts comprised in the copyright than follows from the application of s. 183(1) of the *Copyright Act* (or, in the alternative, should be read down to that effect).[21]

39. The plaintiffs' second submission is that Schedule 6A "collides" with the *Copyright Act* by "expressly providing that no compensation is payable". The

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[19] See also *Copyright Agency Ltd v New South Wales* (2013) 102 IPR 85 at [4]-[7].

[20] *Jemena Asset v Coinvest Ltd* (2011) 244 CLR 508 at 524, [41].

[21] Such a construction is consistent with the principles of construction in s. 31 of the *Interpretation Act 1987* (NSW), which gives effect to the principles considered in *Public Service Association of South Australia Inc v Industrial Relations Commission (SA)* (2012) 249 CLR 398 at 408 [16], 414-415 [35].

submission assumes that the reference to "no liability" in cl. 11(4) and/or the reference to "compensation" in cl. 7(1) of Schedule 6A would include the making of a payment on agreed or fixed terms (pursuant to s. 183(5)) and/or the payment of equitable remuneration to the relevant collecting society (pursuant to s. 183A(2)).

40. The defendant submits that neither provision has such an effect. It accepts that neither provision could have such an effect, having regard to s. 109 of the *Commonwealth Constitution*. If and to the extent that the defendant (or a person authorised in writing by the defendant) engages in acts within the scope of s. 183(1) of the *Copyright Act* then the defendant accepts that it will be required to pay agreed terms or terms as fixed by the Copyright Tribunal (to the extent that the acts are covered by s. 183(5)) or equitable remuneration (to the extent that the acts are covered by s. 183A(2)).

41. Properly construed, neither cl. 11(4) nor cl. 7 of Schedule 6A has the effect of excluding the obligations that may arise under those provisions. The payments required to be made under ss. 183(5) and 183A(2) of the *Copyright Act* (as the case may be) do not constitute "compensation" of the kind referred to in cl. 7 of Schedule 6A. Nor are they are a form of "liability" of the kind referred to in cl. 11(4).

42. If those clauses would otherwise be construed as purporting to deny the State's obligations to make payments pursuant to ss. 183(5) and 183A(2) of the *Copyright Act*, then pursuant to s. 31 of the *Interpretation Act 1987* (NSW) those provisions should be construed as not having that effect or otherwise read down.[22]

Answer to the question stated relating to inconsistency

43. The question stated for the opinion of the Full Court in relation to inconsistency is "Is clause 11 of Schedule 6A of the *Mining Act* inconsistent with the *Copyright Act 1968* (Cth) and inoperative to the extent of that inconsistency?". For the reasons set out above, there is no inconsistency between cl. 11 of Schedule 6A and no part of cl. 11 is rendered inoperative by s. 109 of the *Commonwealth Constitution*. Clauses 11(4) and 7 of Schedule 6A should be construed as not purporting to exclude the State's obligations to make payments pursuant to ss. 183(5) and 183A(2) of the *Copyright Act*, to the extent that any such obligations may arise from the use or disclosure authorised by cl. 11. Alternatively, those clauses should be read down to achieve that result.

44. There is no justification for going further and finding that cl. 11 as a whole is invalid because of inconsistency with the *Copyright Act*.

The defendant does not rely on condition 46 of the cancelled licences as answering the allegation of inconsistency

45. In response to the plaintiffs' submissions regarding condition 46 of the cancelled licences (PS [55]-[60]), the defendant does not submit that condition 46 is

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[22] *Public Service Association of South Australia Inc v Industrial Relations Commission (SA)* (2012) 249 CLR 398 at 408 [16], 414-415 [35].

relevant to the question of inconsistency between Schedule 6A and the *Copyright Act*.

VII ESTIMATE OF TIME

46. The defendant will require 1.5 hours in total for the presentation of its oral argument in the Duncan, Cascade and NuCoal proceedings.

Dated: 12 November 2014

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