IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No. S119 of 2014**

BETWEEN:

TRAVERS WILLIAM DUNCAN
Plaintiff

AND

STATE OF NEW SOUTH WALES
Defendant

No. S206 of 2014

BETWEEN:

CASCADE COAL PTY LIMITED
First Plaintiff

MY PENNY COAL PTY LIMITED
Second Plaintiff

GLENDON BROOK COAL PTY LIMITED
Third Plaintiff

AND

STATE OF NEW SOUTH WALES
Defendant

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

PART I: SUITABILITY FOR PUBLICATION

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

PART II: BASIS OF INTERVENTION

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

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

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PART IV: RELEVANT CONSTITUTIONAL PROVISIONS AND LEGISLATION

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

PART V: SUBMISSIONS

5. In the *Duncan* and *Cascade Coal* matters the Plaintiffs advance four propositions as to invalidity of clauses 1–13 of Schedule 6A to the *Mining Act 1992* (NSW); that Chapter III of the Commonwealth *Constitution* precludes the exercise of judicial power by State Parliaments[1]; that the impugned legislation is an exercise of judicial power by the Parliament of New South Wales[2]; that the impugned legislation is not a law within the meaning of s.5 of the *Constitution Act 1902* (NSW)[3] and that the impugned legislation is inconsistent with the *Copyright Act 1968* (Cth)[4].

6. The Attorney General for Western Australia intervenes to address the first, second and third issues.

7. The second issue should be addressed first. If, as submitted, the impugned legislation is not an exercise of judicial power by the Parliament of New South Wales, the first question does not arise and need not be addressed.

THE PLAINTIFFS' SECOND ISSUE

Whether the impugned legislation 'involves' or 'constitutes' an exercise of judicial power

8. As understood, there are two aspects to this contention. *First*, that the operation of Schedule 6A involves the legislature making a finding of the existence of a fact[5]. Finding the existence of facts, it is contended, is an exercise of judicial power, which can only be done by a court, and such findings must be able to be reviewed (or supervised or restrained[6]) by courts within the structure provided by Chapter III of the Commonwealth *Constitution*. It may be that the submission is more nuanced – Schedule 6A involves making a finding of a particular kind—the existence of "serious corruption"—and this is an exercise of exclusive judicial power.

9. The *second* aspect of the contention approaches the matter from a different perspective[7] – Schedule 6A is an exercise of judicial power by the legislature because it decides, and precludes judicial review of, the fact of involvement of "persons associated with Cascade Coal" in serious corruption and punishes them for this by forfeiting the exploration licenses.

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[1] Stated at [22(a)] of the Plaintiff's submissions in *Duncan* and addressed in those submissions.
[2] Stated at [22(b)] of the Plaintiff's submissions in *Duncan* and addressed in those submissions.
[3] Stated at [22(c)] of the Plaintiff's submissions in *Duncan* but addressed in the Plaintiffs' submissions in *Cascade Coal*.
[4] Stated at [8(b)] of the Plaintiffs' submissions in *Cascade Coal* and addressed in those submissions.
[5] Culminating in [44] and [45] of the Plaintiff's submissions in *Duncan*.
[6] Plaintiff's submissions in *Duncan* at [45].
[7] Plaintiff's submissions in *Duncan* at [51].

Some things that are trite

10. For each of the Plaintiffs' arguments about judicial power, the question is really the same; whether the thing that the impugned legislation does is only a thing that a Chapter III court can do. What this legislation does is principally and substantively provided for in clauses 4 and 7 of Schedule 6A; cancellation of the three exploration licenses without compensation.

11. It is plainly untenable, and not contended by the Plaintiffs, that only a court can do the thing that the legislation principally does, being cancellation of exploration licenses without compensation. It must be supposed that mining titles are cancelled, without compensation, by executive action, exercised under legislation[8], on a daily basis. *Prima facie*, clauses 4 and 7 of Schedule 6A achieve by direct legislative means what is uncontroversially done by executive or administrative action pursuant to legislation.

The significance of clause 3

12. Because the operation of clauses 4 and 7 of Schedule 6A is so facile, the Plaintiffs' arguments for invalidity all derive from clause 3.

13. Plainly enough, clause 3 is an objects provision; the modern preamble[9]. Although not all legislative declarations of objects are "exercise[s] in apologetics"[10], some, probably most, are. Some objects provisions assist in resolving ambiguity or guide the proper exercise of legislatively conferred discretionary power[11]. So much is uncontroversial. Here, of course, the words of clauses 4 and 7 of Schedule 6A are unambiguous and do not create a discretion[12].

14. Clause 3 has no consequence for the operative provisions of the Schedule 6A. Operative in this sense means the provisions that require something to be done or prohibit something from being done. That clause 3 has no consequence for these provisions is proved by (hypothetically) deleting clause 3 from Schedule 6A. All other provisions of Schedule 6A operate in the same way with or without clause 3.

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[8] See Division 3 of Part 7 of the *Mining Act 1992* (NSW). Notably, s.127 of that Act provides that the holder of an authority is not entitled to compensation merely because the authority is cancelled. Thus clause 7(1) of Schedule 6A does no more than achieve parity with the pre-existing legislative scheme.

[9] See, D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 7th ed, 2011) at 156 [4.49]: "A modern day variant on the use of a preamble to indicate the intended purpose of legislation is the inclusion of a statement of intention as to how an Act is to operate. This is often done by way of an objects clause".

[10] *Russo v Alello* [2003] HCA 53; (2003) 215 CLR 643 at 645 [5] (Gleeson CJ).

[11] See, eg, *IW v City of Perth* [1997] HCA 30; (1997) 191 CLR 1.

[12] See, similarly, *Victims Compensation Fund v Brown* [2003] HCA 54; (2003) 77 ALJR 1797. Heydon J, with whom McHugh ACJ, Gummow, Kirby and Hayne JJ agreed, noted at 1804 [33] that although the *Victims Support and Rehabilitation Act 1996* (NSW) had "remedial and beneficial objectives", including the objective "to give effect to a statutory scheme of compensation for victims of crimes of violence" in s.3(a) of the Act, the specific words of the clause in question had the effect that it was not open to "apply much liberality of construction" to achieve those objects.

The Plaintiffs' first contention – Schedule 6A involves making a finding of the existence of a fact

15. As noted, this contention is that Schedule 6A (really clause 3) involves the legislature making a finding of the existence of a fact, which is said to be doing a thing that only a Court can do[13].

16. No 'fact' is 'found' in clause 3. The statements in clause 3 have no legal consequence or effect. A provision to like effect[14] was noted in *Plaintiff S156/2013*[15]. That provision, like clause 3 in this matter, simply states the political reason for the relevant substantive provisions[16].

10 17. The inclusion of explicit 'legislative findings' in Australian legislation is (happily) rare[17]. It may be that the Plaintiffs' contentions in this respect are inspired by the fashion in the United States[18], where much federal legislation commences with the recital of "Congressional findings", "Legislative findings" or "Findings and purpose" clauses[19]. Many of these are lengthy[20] and range from statements of existing verifiable fact to expressions of hope about the future[21].

18. Whatever be the relevance of such material in the United States, clause 3 does not make a finding of fact in the sense in which Courts do when exercising judicial power. The 'satisfaction' of the taint of serious corruption is satisfaction for the

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[13] Plaintiff's submissions in *Duncan* at [44] and [45].
[14] Section 198AA of the *Migration Act 1958* (Cth).
[15] *Plaintiff S156/2013 v Minister for Immigration and Border Protection* [2014] HCA 22; (2014) 88 ALJR 690 ('*Plaintiff S156/2013*').
[16] *Plaintiff S156/2013* [2014] HCA 22; (2014) 88 ALJR 690 at 693–694 [10] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).
[17] This rarity has attracted some criticism – Henry Burmester, 'The Presumption of Constitutionality' (1983) 13 *Federal Law Review* 277 at 290: "Australian statutes, unlike most United States Acts, do not contain factual recitals concerning the rationale for a piece of legislation. This is to be regretted." Of course, the eminence of the author notwithstanding, some might think this absence a very good thing.
[18] See, however, US House of Representatives Office of the Legislative Counsel, *House Legislative Counsel's Manual on Drafting Style* HLC 104–1 (1995), which states at 28 that both findings and purposes clauses "are more appropriately and safely dealt with in the committee report than in the bill". The US Senate Office of the Legislative Counsel, *Legislative Drafting Manual* (1997) states at 19 that findings are "congressional assertions of fact", and that findings and purposes "may contain statements that would be more appropriate to include in a committee report".
[19] Instances of each may be found in, for example, Part 1, Volume 84 of the United States *Statutes at Large* compilation. The *Job Evaluation Policy Act of 1970* opens with "Title 1 – Congressional findings with respect to job evaluation and ranking in the Executive branch". Section 101 then starts with the words "The Congress hereby finds that...". In the *Emergency Home Finance Act of 1970,* the first heading following "Title V – Funds for Financing Middle-Income Housing" is "Findings and Purpose". Section 501, being the first section under that heading, begins with the words "The Congress finds that..." Finally s 2 of the *Egg Products Inspection Act*, which appears under the heading "Legislative Findings", contains a lengthy recitation of findings beginning with the words: "Eggs and egg products are an important source of the Nation's total supply of food, and are used in food in various forms".
[20] The *Belarus Democracy and Human Rights Act of 2011* (US), for example, makes 23 separate Congressional findings, over 3 pages.
[21] This has resulted in the suggested classification of different legislative findings as "empirical facts", "evaluative facts" or "value-based facts" – William D Araiza, 'Deference to Congressional Fact-Finding in Rights-Enforcing and Rights-Limiting Legislation' (2013) 88 *New York University Law Review* 878 at 893.

purpose of enacting legislation[22]. Parliament is satisfied that legislation is needed or desirable. This satisfaction is political and not justiciable[23].

19. There is no finding of the fact of 'serious corruption'. That this is so is demonstrated by the Plaintiffs' complaint[24] as to the uncertainty of the undefined term, 'serious corruption'. The term is unclear, but it does not need to be otherwise because its meaning is irrelevant to the legal operation of Schedule 6A. The relevant licences are cancelled without compensation, whether the words have a clear meaning or not. Similarly, no 'finding' is made in respect of any person being involved in serious corruption, whatever it might mean.

20. Rather than the making of such findings being things that only a court can do, the making of the statements in clause 3 are things that a court could not do. It is difficult to imagine an exercise of judicial power involving the making of a finding that (unnamed and unidentified) people were tainted by (undefined) serious corruption.

The Plaintiffs' second contention – the 'bill of pains and penalties' argument

21. This contention is that Schedule 6A is an exercise of judicial power by the legislature because its provisions decide, and preclude judicial review of, the fact of involvement of "persons associated with Cascade Coal" in serious corruption and punishes them for this by forfeiting the exploration licenses. In times past such a contention would be advanced by asking whether the legislation constitutes a bill of pains and penalties. As has been made plain in decisions of this Court, this is not the question[25], and purported characterisation of Australian legislation as, or as equivalent to, what under the United States *Constitution* would be considered a bill of pains and penalties is apt to confuse.

22. The question is whether there is any basis in Australian law to confine the legislative power of State Parliaments to preclude them from enacting legislation of the character complained of here; that is, legislation that (the Plaintiffs say) determines whether "persons associated with Cascade Coal[26] have been guilty of or

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[22] In the same sense that the Commonwealth Parliament enacted subdivision B of Division 8 of Part 2 of the *Migration Act 1958* (Cth) because it "considered" that "people smuggling, and its undesirable consequences including the resulting loss of life at sea, are major regional problems that need to be addressed" – s.198AA of the *Migration Act 1958* (Cth), considered by this Court in *Plaintiff S156/2013* [2014] HCA 22; (2014) 88 ALJR 690 at 693–694 [10] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

[23] *Thomas v Mowbray* [2007] HCA 33; (2007) 233 CLR 307 at 354 [107] (Gummow and Crennan JJ), citing *Gerhardy v Brown* [1985] HCA 11; (1985) 159 CLR 70 at 138–139. Gummow and Crennan JJ stated that "[i]t is not for an issuing court to enter upon any dispute as to the assessment made by the executive and legislative branches of government of the "terrorist threat" to the safety of the public before the enactment of the 2002 Act, the 2003 Act and the 2005 Act."

[24] Plaintiff's submissions in *Duncan* at [44].

[25] *Polyukhovich v Commonwealth* [1991] HCA 32; (1991) 172 CLR 501 at 536 (Mason CJ), 649–650 (Dawson J), 685–686 (Toohey J), 721 (McHugh J); *Haskins v The Commonwealth* [2011] HCA 28; (2011) 244 CLR 22 at 37 [25] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[26] Though it is not for an Intervener to take points of standing, it is assumed that this contention is relied upon to give standing to Mr Duncan.

associated with serious corruption"[27] and penalises them for it by cancelling the Cascade Coal exploration licenses.

23. Even if there be a basis to contend for such a limitation on Commonwealth legislative power, this says nothing of the States. In all decisions of this Court, where bills of pains and penalties type contentions have been advanced in respect of State legislation, the Court has not had to consider whether the limitation applies to the States[28]. This contention can be disposed of in this matter in the same manner as the Court has done in such cases.

24. Schedule 6A is not directed to or at an individual or group, nor does it impose punishment on a person or any persons.

25. Clause 3 expresses that the reason for the legislation is the defined 'tainted process'. Many people, including many who suffer no detriment from forfeiture of the tenements, were inevitably within the contemplation of the Parliament in enacting Schedule 6A, as participants in the tainted process. Every member of the community of New South Wales must be considered to be the object of the legislation, because all are concerned with whether valuable assets are granted following processes tainted by serious corruption and irregular government processes.

26. Schedule 6A does not impose *ad hominem* punishment. It can be accepted that cancellation of the exploration license resulted in a detriment to license holders and on those with a financial interest in the license holders. Not all involuntary detriment amounts to punishment in this sense[29].

27. As Gleeson CJ observed in *Re Woolley*[30], in discussing the proposition said to be derived from *Chu Kheng Lim*[31] that involuntary detention by the State is ordinarily penal or punitive in character; not "all hardship or distress inflicted upon a citizen by the State constitutes a form of punishment, although colloquially that is how it may sometimes be described"[32]. As his Honour observed, detention may in some circumstances be a punishment, in others not. To similar effect is the observation in *Fardon* that the involuntary detention (of a citizen) there was not punishment for

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[27] Plaintiff's submissions in *Duncan* at [51].

[28] See *Fardon v Attorney-General (Qld)* [2004] HCA 46; (2004) 223 CLR 575 at 654–656 [218]–[219] (Callinan and Heydon JJ) ('*Fardon*'); *Durham Holdings Pty Ltd v New South Wales* [2001] HCA 7; 205 CLR 399 at 408 [8] (Gaudron, McHugh, Gummow and Hayne JJ, Callinan J agreeing), 429–430 [67]–[69] (Kirby J); *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24; (1996) 189 CLR 51 at 88 (Dawson J), 99 (Toohey J) ('*Kable*').

[29] *Re Woolley; Ex parte M276/2003* [2004] HCA 49; (2004) 225 CLR 1 at 12 [17] (Gleeson CJ) ('*Re Woolley*'); referred to in *Pollentine v Bleijie* [2014] HCA 30; (2014) 88 ALJR 796 at 808 [70] (Gageler J).

[30] [2004] HCA 49; (2004) 225 CLR 1 at 12 [16]–[17].

[31] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* [1992] HCA 64; (1992) 176 CLR 1.

[32] Of course Gleeson CJ went on to observe: "Punishment, in the sense of the inflicting of involuntary hardship or detriment by the State, is not an exclusively judicial function. On the other hand, the particular form of detriment constituted by the deprivation of liberty usually (although not always) follows adjudgment of criminal guilt" – *Re Woolley* [2004] HCA 49; (2004) 225 CLR 1 at 12 [17].

past conduct, but a public protective measure[33]. Whether, in this context, detention constitutes punishment is resolved by considering the nature of what is imposed or denied, and the purpose for its imposition or denial. Relevant to this is the observation of McHugh J in *Re Woolley* to the effect that characterisation of detention as punitive or not "depended on all the circumstances of the case"[34] and referring to the reasoning of Callinan J in *Al-Kateb*[35], "... it is the purpose of the law ... that is the "yardstick" for determining whether the law is punitive in nature"[36].

28. It is for New South Wales to make submissions as to the relevant purpose or purposes of Schedule 6A. Be that so, plainly relevant to characterisation of Schedule 6A is the nature of what the Plaintiffs say has been denied them; an exploration license. An exploration license is not a thing that exists other than by legislation. The Parliament of New South Wales could, and has undoubted power to, enact legislation simply cancelling all such licences in New South Wales. All statutory licenses are things of fragility. By Schedule 6A, Parliament does not deny something which exists independently of Parliament.

29. Relevant is the decision in the *BLF Case*[37]. It involved a challenge as to the validity of legislation cancelling the registration of a union registered under the *Conciliation and Arbitration Act 1904* (Cth). The legislation cancelling registration was introduced into Parliament days after the Australian Conciliation and Arbitration Commission published adverse findings in respect of the union[38]. In addition to cancelling the registration, the legislation prohibited (what was) the union from applying for re-registration for 5 years. De-registration had severe consequences for the union and its members. The union ceased to have legal personality. The challenge to the validity of the legislation cancelling registration failed[39]. One of the matters put by the union was that the purpose of the cancelling

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[33] *Fardon* [2004] HCA 46; (2004) 223 CLR 575 at 655 [219] (Callinan and Heydon JJ). See also *Pollentine v Bleijie* [2014] HCA 30; (2014) 88 ALJR 796 at 808–809 [70]–[72] (Gageler J).

[34] *Re Woolley* [2004] HCA 49; (2004) 225 CLR 1 at 24 [58].

[35] *Al-Kateb v Godwin* [2004] HCA 37; (2004) 219 CLR 562 at 660 [294].

[36] *Re Woolley* [2004] HCA 49; (2004) 225 CLR 1 at 26 [60].

[37] *Australian Building Construction Employees' & Builders Labourers' Federation v Commonwealth* [1986] HCA 47; (1986) 161 CLR 88 (*'BLF Case'*). The impugned legislation in that case is similar to Schedule 6A, in that it also contains a recitation, by which the Parliament made certain findings. The recital is set out at 92–93 of the reported decision: "WHEREAS the Parliament considers that it is desirable, in the interest of preserving the system of conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of anyone State, to cancel the registration of The Australian Building Construction Employees' and Builders Labourers' Federation under the Conciliation and Arbitration Act 1904".

[38] These were summarised in the *BLF Case* [1986] HCA 47; (1986) 161 CLR 88 at 92 as follows: "(a) engaged in industrial action that constituted a contravention of certain undertakings and agreements; (b) engaged in industrial action in support of claims that constituted a contravention of such undertakings; (c) engaged in industria] action that was inconsistent with the undertakings and agreements already referred to; and (d) engaged in conduct that prevented or seriously hindered the achievement of certain objects of the Conciliation and Arbitration Act."

[39] See, in particular, *BLF Case* [1986] HCA 47; (1986) 161 CLR 88 at 95 (Gibbs CJ, Mason, Brennan, Deane and Dawson JJ): ..."[T]here is nothing in the nature of participation in that system or in deregistration which makes deregistration uniquely susceptible to judicial determination ... Just as it is entirely appropriate for Parliament to select the organizations which shall be entitled to participate in the system of conciliation and arbitration, so it is appropriate for Parliament to decide whether an organization so selected should be subsequently excluded and, if need be, to exclude that organization by

Act was to deny the union a right to continue with other litigation that was on foot; on the basis that if de-registered the union ceased to have legal personality. In response to this, Gibbs CJ, Mason, Brennan, Deane and Dawson JJ observed that the cancelling Act "simply deregisters the Federation, thereby making redundant the legal proceedings which it commenced in this Court. It matters not that the motive or purpose of the Minister, the Government and the Parliament in enacting the statute was to circumvent the proceedings and forestall any decision which might be given in those proceedings"[40]. Their Honours also noted that the provisions in "Ch. III governing the judicial power [do not] prevent Parliament from exercising its legislative power so as to abrogate or alter rights and liabilities which would otherwise be subject to a judicial determination"[41].

30. It is also notable in this matter that Schedule 6A does not preclude anyone from applying for an exploration license over the land the subject of the cancelled licenses. No doubt any future application by any future applicant will be dealt with according to law[42].

Conclusion on the Plaintiffs' second issue and the effect of this on the Plaintiffs' first issue

31. For the reasons outlined, Schedule 6A cannot be characterised as being or involving an exercise of judicial power by the Parliament of New South Wales.

32. If the Court comes to this conclusion, in respect of the Plaintiffs' second issue, it ought not, consistent with the usual practice[43], decide the first issue. It is unnecessary to do so.

THE FIRST ISSUE

That Chapter III of the Commonwealth *Constitution* precludes the exercise of judicial power by State Parliaments

33. The Plaintiffs do not contend that the *Constitution Act 1902* (NSW) or the Commonwealth *Constitution* impose or require separation of powers in New South Wales[44]. This is particularised by the Plaintiffs as acceptance that State courts can exercise non-judicial powers and that judicial power can be conferred on State executive bodies. Similarly there is no re-opening of *Kable*[45] in this matter.

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an exercise of legislative power." This was unanimously confirmed by the High Court in *Owens v Commonwealth* [1991] HCA 20; (1991) 100 ALR 513 at 513 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

[40] *BLF Case* [1986] HCA 47; (1986) 161 CLR 88 at 96–97.

[41] *BLF Case* [1986] HCA 47; (1986) 161 CLR 88 at 96.

[42] It should be noted that the *Mining Act 1992* (NSW) was further amended by the *Mining and Petroleum Legislation Amendment Act 2014* (NSW) which came into force on 14 May 2014. That legislation repealed and re-enacted s 380A *Mining Act 1992* (NSW) so as to allow, *inter alia*, for the cancellation of mining rights, or the refusal to grant or renew mining rights, in the event that the holder of the mining right is found not to be a fit and proper person.

[43] See, *Williams v Commonwealth (No.2)* [2014] HCA 23; (2014) 88 ALJR 701 at 710 [36] (French CJ, Hayne, Kiefel, Bell and Keane JJ, Crennan J agreeing at 718 [99]) and the authorities cited therein.

[44] Plaintiff's submissions in *Duncan* at [24].

[45] [1996] HCA 24; (1996) 189 CLR 51.

34. The Plaintiffs' proposition is that Chapter III of the Commonwealth *Constitution* requires that all exercises of judicial power – whether in State or federal jurisdiction – be amenable to supervision by courts and ultimately the High Court. This can also be expressed in prohibitive terms; that Chapter III prohibits exercise of judicial power, in State and federal jurisdiction, that cannot be reviewed by or appealed to the High Court.

35. This prohibition is contended to be inferred or implied from the requirements of Chapter III of the Commonwealth *Constitution*. In respect of non-federal and non-Territory jurisdiction, to date the only limitation implied or inferred from Chapter III which affects State institutions is the *Kable* doctrine. The imperative of the existence of State Supreme Courts[46] is different, in this sense. This imperative is founded in the words of s.77(ii) and perhaps s.73(ii). The doctrinal underpinning, or basis for implication, of *Kable* derives from the express words of s.77(iii), which require that State courts be capable of being invested with federal jurisdiction or suitable repositories for it[47].

36. There are no words in Chapter III that refer to or deal with State jurisdiction or State judicial power. Section 73(ii) refers to appeals from the Supreme Courts of the States, but this merely establishes the hierarchy of judicial appellate review. The High Court is empowered to hear and determine appeals from judgments, decrees, orders and sentences of State courts. Naturally, s.73(ii) does not require that, if State judicial power or State jurisdiction is reposed in or exercised by a body other than the Supreme Court of a State, the High Court has appellate jurisdiction over decisions of that body. Chapter III is simply silent on the matter and says nothing of the repositories of State judicial power. Chapter III requires only that State courts exercise and be suitable to exercise federal jurisdiction, and that in respect of matters of and in State jurisdiction decided by State courts, there is an appeal to the High Court.

37. The Plaintiffs seek to infer from Chapter III an imperative that all matters of State jurisdiction and all matters requiring the exercise of the judicial power of the States only be decided and determined by courts. Because there is nothing in the words of Chapter III that grounds such a proposition, the Plaintiffs rely ultimately and solely upon a passage from the joint judgment in *Kirk*[48] as inchoative or inceptive of this proposition[49].

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[46] Recognised in *Kable* [1996] HCA 24; (1996) 189 CLR 51 at 111 (McHugh J), 139 (Gummow J); *Forge v Australian Securities and Investments Commission* [2006] HCA 44; (2006) 228 CLR 45 at 76 [63] (Gummow, Hayne and Crennan JJ); and confirmed in *Kirk v Industrial Court of New South Wales* [2010] HCA 1; (2010) 239 CLR 531 at 566 [55], 580 [96] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) ('*Kirk*').

[47] See the most recent application of the *Kable* principle by this Court in *Pollentine v Bleijie* [2014] HCA 30; (2014) 88 ALJR 796 at 804 [42] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ). Gageler J in his separate judgment at 808 [68] phrased the question in similar terms; whether the impugned legislation was "incompatible with the status of the District Court as a court capable of being invested with federal jurisdiction".

[48] [2010] HCA 1; (2010) 239 CLR 531 at 580 [98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[49] Plaintiff's submissions in *Duncan* at [28]–[29].

38. Before dealing with the passage in *Kirk* upon which the Plaintiffs' contention stands or falls, it is instructive to note that the Plaintiffs' contention as to limitation on State legislative power proceeds from a fundamental and correct premise; that, other than for any limitation flowing from the Commonwealth *Constitution*, State Parliaments can exercise judicial power. This derives from the plenary nature of State legislative power[50], the breadth of which is confirmed by the *Australia Acts 1986* s.2(2). An illustration of this is the undoubted power of the United Kingdom Parliament, having the equivalent plenary legislative power of the States, at federation and since to enact bills of attainder and of pains and penalties. This was stated clearly in the first edition of *Halsbury's Laws of England* and has been undoubted since[51]. A further interesting illustration is the Australian response to the Privy Council decision in *Liyanage v The Queen*[52]. Perhaps this was stated best by Toohey J in *Kable*[53]; "there is nothing in the Constitution (NSW) which prevents the legislature from exercising judicial power."

39. The ambit of State legislative power is limited only by the imperatives of the Commonwealth *Constitution*, laws being for the peace order and good government and any manner and form requirements[54]. None of this is doubted by the Plaintiffs here. The Plaintiffs contend for a limit on State legislative power derived by implication from Chapter III, based upon reasoning in *Kirk*.

40. *Kirk* concerned the question of whether a privative clause in State legislation could exclude review by the Supreme Court for jurisdictional error of a body with a defined statutory jurisdiction. As was made clear[55], it mattered not in *Kirk* that the body, the decisions of which were sought to be excluded from Supreme Court review, was judicial or executive. What was critical was that the body had a statutory jurisdiction which *ex hypothesi* could be exceeded. That the body that exceeded its jurisdiction was the Industrial Court of New South Wales, that was designated in its constitutive legislation as a "superior court of record", and that the

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[50] *Union Steamship Co of Australia Pty Ltd v King* [1988] HCA 55; (1988) 166 CLR 1 at 10 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

[51] Earl of Halsbury, *The Laws of England* (Butterworth & Co, 1st ed, 1912) vol.21 at 727 [1351]. Indeed, see Lord Mackay, *Halsbury's Laws of England* (LexisNexis Butterworths, 5th ed, 2010) vol.24 at [643] (emphasis added): "The power [to pass a bill of attainder] has not been resorted to since the Act of 1746 which attainted 47 men for their part in the Jacobite rising begun the previous year. A lesser punishment than the capital penalty attached in the past to attainder can be achieved by a bill of pains and penalties. Such bills follow the same procedure as that for attainder. The procedure is of historical rather than current interest *but the power has not been abolished.*" See also Michael P Lehmann, 'The Bill of Attainder Doctrine: A Survey of the Decisional Law' (1978) 5 *Hastings Constitutional Law Quarterly* 767 at 772 fn.20.

[52] [1967] 1 AC 259, in particular at 283–285. Discussed in *Builders' Labourers Federation v Minister for Industrial Relations* (1986) 7 NSWLR 372, referred to by the Plaintiffs. See also, *Nicholas v Western Australia* [1972] WAR 168 at 173 (Jackson CJ, with whom Virtue SPJ agreed), 175 (Burt J); *Clyne v East* (1967) 68 SR (NSW) 385 at 400–402 (Sugerman JA, Herron CJ agreeing at 396 and Asprey JA agreeing at 403); *Gilbertson v South Australia* (1976) 15 SASR 66 at 85 (Bray CJ); *City of Collingwood v Victoria* [1994] 1 VR 652 at 662–663 (Brooking J, with whom Southwell and Teague JJ agreed).

[53] *Kable* [1996] HCA 24; (1996) 189 CLR 51 at 94.

[54] *Australia Acts 1986* ss.2 and 3. Section 109 of the Commonwealth *Constitution* is not a limitation on State legislative power in this sense.

[55] *Kirk* [2010] HCA 1; (2010) 239 CLR 531 at 580–581 [98]–[99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). The reasoning of their Honours in these passages made no distinction between reviewing the exercise of judicial or executive power.

power that it was exercising was judicial power, is critical to an understanding of the passage in the joint judgment in *Kirk* which is so centrally relied upon by the Plaintiffs here.

41. It is well to set out this passage[56]:

> The supervisory jurisdiction of the Supreme Courts was at federation, and remains, the mechanism for the determination and the enforcement of the limits on the exercise of State executive and judicial power by persons and bodies other than the Supreme Court. That supervisory role of the Supreme Courts exercised through the grant of prohibition, certiorari and mandamus (and habeas corpus) was, and is, a defining characteristic of those courts. And because, "with such exceptions and subject to such regulations as the Parliament prescribes", s 73 of the *Constitution* gives this Court appellate jurisdiction to hear and determine appeals from all judgments, decrees, orders and sentences of the Supreme Courts, the exercise of that supervisory jurisdiction is ultimately subject to the superintendence of this Court as the "Federal Supreme Court" in which s 71 of the *Constitution* vests the judicial power of the Commonwealth.

42. The passage does not address the exercise of judicial power by Parliament. The first sentence must be understood having regard to the matters with which the Court was dealing, and refers to bodies exercising executive and judicial power that have a statutory jurisdiction, which, if exceeded, would be 'supervised' by the Supreme Court by the grant of prerogative relief. Prerogative relief is not available to deal with excesses of legislative power of State Parliaments. The reference in the first sentence to the supervisory jurisdiction of the Supreme Court enforcing "limits on the exercise of State executive and judicial power by persons and bodies other than the Supreme Court" is stated in the precise context that the body exercising judicial power in that matter was the Industrial Court of New South Wales.

43. Properly understood, the passage in *Kirk* upon which the Plaintiffs rely for the limitation on State legislative power that they contend, says nothing of it.

44. There is no such proposition in Australian law.

45. The proposition contended for by the Plaintiffs also overlooks, and cannot accommodate the unquestioned and well understood circumstances in which Australian Parliaments exercise what, on any analysis, is judicial power that is not judicially reviewable. Inquiry into and punishment for contempt of Parliament is an example[57]. The power exercisable by the federal Parliament under s.72(ii) of the Commonwealth *Constitution* is another.

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[56] *Kirk* [2010] HCA 1; (2010) 239 CLR 531 at 580–581 [98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[57] While the existence of the power to punish for contempt may be determined by the courts, the manner of its exercise may not. See *R v Richards; Ex parte Fitzpatrick* [1955] HCA 36; (1955) 92 CLR 157 at 162–164, 166–167 (Dixon CJ, for the Court comprising his Honour and McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ); *Egan v Willis* (1998) 195 CLR 424 at 446 [27] (Gaudron, Gummow and Hayne JJ), 460 [66] (McHugh J), 493–494 [133]–[134], 499 [147] (Kirby J).

THE THIRD ISSUE

That the Act is not a law

46. With respect to the elaborate reasoning in respect of this contention in the Plaintiffs' submissions, it simply states the second proposition in a different way. It could also be contended (it must be supposed), with equivalent force, that Schedule 6A is not a law for the peace order and good government of New South Wales.

47. The Plaintiffs cite no decision of an Australian court or that of any other Common Law jurisdiction that an enactment of a Parliament, derived from the Westminster tradition and genus, is not a law. A law enacted contrary to manner and form requirements is an invalid law and may even be void. Similarly, Commonwealth legislation that the Commonwealth Parliament lacks power to make is an invalid law, and declared accordingly. The *Community Protection Act 1994* (NSW) was declared to be invalid in *Kable*[58], but was a law[59].

48. Reliance by the Plaintiffs[60] upon certain statements in judgments dealing with s.109 of the Commonwealth *Constitution* is misplaced. The decisions referred to say nothing about a qualitative judicial determination that, because of subject matter, an enactment is not a law. The passages from judgments in *Momcilovic*[61] upon which the Plaintiffs rely[62] are simply shorn from their context. The issue addressed in the cited passages is the meaning to be given to the terms "law of a State" and "law of the Commonwealth" to determine inconsistency for the purpose of s.109. Even less relevant is the commonly recited passage from the judgment of Latham CJ in *Grunseit*[63] in seeking to characterise ministerial orders as of an executive or a legislative character, for the purposes of determining whether they needed to be laid before Parliament pursuant to s.5(4) of the *National Security Act 1939* (Cth). The case, and the passage cited, says nothing about whether an Act of Parliament is a

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[58] [1996] HCA 24; (1996) 189 CLR 51.

[59] Note also the comment in *Kable* [1996] HCA 24; (1996) 189 CLR 51 by Brennan J (although in dissent) at 64: "True it is that it singles out the appellant as the sole subject of a detention order, but a purported law has never been held to lack the character of a law simply because it affects the liberty or property of only a single individual. Acts of Attainder were nonetheless laws, as Sir Edward Coke accepted, albeit protesting that, in the procedure of imposing the attaint, the high court of Parliament ought to give example of justice to inferior courts. The Act may be a law which, by reason of its specificity, is enacted in exercise of a power that is not purely legislative, but it is nonetheless a law. Specificity does not deny the character of law to an enactment that is otherwise within power." (footnotes omitted). See also Dawson J at 76–77. McHugh J agreed with Brennan and Dawson JJ on this point at 109. Indeed, in *New South Wales v Kable* [2013] HCA 26; (2013) 87 ALJR 737 at 746 [36] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), in distinguishing between different bases for giving the Supreme Court's order effect, their Honours did not deny the invalid law the character of a law; "...the effect which is given to the order made beyond jurisdiction comes not from the *law* which purported to confer the relevant jurisdiction but from the status or nature of the court making the order" (emphasis added).

[60] Plaintiffs' submissions in *Cascade Coal* at [15]–[18].

[61] *Momcilovic v The Queen* [2011] HCA 34; (2011) 245 CLR 1 at 106 [226], [229], 107 [232] (Gummow J), 126–127 [292] (Hayne J).

[62] Plaintiffs' submissions in *Cascade Coal* at [16]–[18].

[63] *Commonwealth v Grunseit* [1943] HCA 47; (1943) 67 CLR 58 at 82, relied upon by the Plaintiffs in the Plaintiffs' submissions in *Cascade Coal* at [12]–[14].

"law". The various observations in *Grunseit*, *Plaintiff S157/2002*[64], and the *Work Choices*[65] case to which the Plaintiff refers are all confined to matters relating to subsidiary legislation. The Courts' observations in the latter two cases were concerned solely to the degree of specificity in which a regulation power must be framed. None of these cases are authority for the proposition that legislation which effects the cancellation of a mining licence is not a "law". Were it otherwise, then the legislation in the *BLF Case*[66] which cancelled the registration of the relevant union would similarly, it must be supposed, not be a law.

PART VI: LENGTH OF ORAL ARGUMENT

10 49. It is estimated that the oral argument for the Attorney General for Western Australia will take 30 minutes.

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[64] *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2; (2003) 211 CLR 476 at 512–513 [102] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
[65] *New South Wales v Commonwealth* [2006] HCA 52; (2006) 229 CLR 1 at 175–181 [400]–[417] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).
[66] [1986] HCA 47; (1986) 161 CLR 88.