IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S119 of 2014

BETWEEN:

TRAVERS WILLIAM DUNCAN
Plaintiff

and

10 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 plaintiff's statement of issues arising in this proceeding.

20 III SECTION 78B OF THE JUDICIARY ACT 1903

3. The plaintiff has 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 plaintiff, including in his chronology, but adds the following facts about the findings and recommendations made by the Independent Commission Against Corruption (the **ICAC**).

5. The ICAC published its report entitled *Investigation into the conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and others* on 31 July 2013 (the **Jasper Report**). The Report recorded the ICAC's findings of the investigation
30 styled "Operation Jasper". The ICAC made findings, pursuant to s. 13(3A) of the

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Independent Commission Against Corruption Act 1988 (NSW) (***ICAC Act***), that a number of individuals had engaged in "corrupt conduct" within the meaning of s. 7 of the *ICAC Act*.

6. The Mount Penny and Glendon Brook licences: The ICAC found that Mr Ian Macdonald, in his capacity as the Minister for Mineral Resources, had created a mining tenement over an area near Mount Penny (the **Mount Penny tenement**) as a result of a corrupt agreement between him, Edward Obeid Snr and Moses Obeid (SCB 194). The tenement was designed to include land owned by the Obeid family, known as Cherrydale Park (SCB 188). The ICAC also found that Mr Macdonald had leaked information to Moses Obeid that Monaro Mining NL (**Monaro**) would be one of the companies invited to submit an expression of interest (**EOI**) for the tenement (SCB 229-231). The Obeids subsequently entered into a joint venture with Monaro (SCB 235) which lodged an EOI for the Mount Penny tenement as well as the nearby Glendon Brook tenement (SCB 239).

7. The EOI process was later re-opened by Mr Macdonald as a favour to the plaintiff, Travers Duncan (SCB 248). No findings of "corrupt conduct" were made against the plaintiff in this respect. Cascade Coal Pty Ltd (**Cascade Coal**) (a corporate vehicle for the investment activities of the plaintiff and others: SCB 264) then lodged an EOI for the Mount Penny and Glendon Brook tenements. In May-June 2009, Cascade Coal struck a deal with an Obeid-controlled company, Buffalo Resources Pty Ltd (**Buffalo**), under which Cascade Coal agreed to grant Buffalo a 25% interest in any joint venture should Cascade Coal be awarded the exploration licences (the **Buffalo Agreement**) (SCB 253-254). The ICAC found that, at that stage, the plaintiff and others associated with Cascade Coal knew that the Obeids were behind Buffalo (SCB 258-262). The ICAC found that Cascade Coal agreed to the joint venture in return for Buffalo arranging the withdrawal of Monaro (which was then the front-runner, according to advice given to Moses Obeid by Mr Macdonald) from the EOI process (SCB 254-256). Monaro withdrew from the process and Cascade Coal, being the runner-up, was awarded the Mount Penny and Glendon Brook exploration licences in October 2009. The Mount Penny exploration licence (EL 7406) and the Glendon Brook exploration licence (EL 7405) were issued to Cascade Coal's wholly owned subsidiaries Mt Penny Coal Pty Limited and Glendon Brook Coal Pty Limited respectively.

8. On the basis of these matters, the ICAC found that Mr Macdonald had engaged in "corrupt conduct" within the meaning of s. 7 of the *ICAC Act* by:

   (a) entering into an agreement with Edward Obeid Snr and Moses Obeid for the creation of the Mount Penny tenement for the purpose of benefitting members of the Obeid family (SCB 288-289);

   (b) entering into an agreement with Edward Obeid Snr and Moses Obeid for the provision of confidential information to Moses Obeid and other members of the Obeid family for the purpose of benefitting members of the Obeid family (SCB 288-289);

   (c) deciding to reopen the EOI process for the exploration licences in order to favour the plaintiff (SCB 291); and

(d) providing the plaintiff with confidential information, being a document entitled "Proposed NSW Coal Allocations" and advice that the EOI process was to be re-opened (SCB 291).

9. The Cascade Coal/White Energy deal: In about February 2010, Cascade Coal entered into negotiations with White Energy Company Ltd (**White Energy**) for the sale of the Mount Penny licence for $500 million (SCB 264-265). A number of Cascade Coal investors – namely the plaintiff, John Kinghorn, John Atkinson, John McGuigan and Brian Flannery – were also directors of White Energy (SCB 264). By April 2010, the plaintiff had realised that the Obeids' involvement in the Mount Penny joint venture (through their company Buffalo) was a problem that needed to be "fixed" (SCB 267). He issued a direction that their interest in the joint venture be terminated (SCB 267). The ICAC found that the plaintiff felt it was necessary to remove the Obeids from the joint venture because their continuing involvement posed a risk to the value of the Mount Penny tenement, in particular because of the risk "that a mining lease would never be granted" (SCB 267-268). The Obeids' interest in the joint venture was terminated by payments made to an Obeid-related company in September and October 2010 (SCB 270-271).

10. In November 2010 an offer was made by Cascade Coal to White Energy for the sale of 100% of the shares in Cascade Coal (SCB 274). To address the conflict of interest that arose from the plaintiff, among others, also being Cascade Coal investors, White Energy appointed an Independent Board Committee (**IBC**) to oversee the transaction, including by investigating the Obeid family involvement (SCB 274-275). The ICAC found that the plaintiff and others deliberately concealed the history of the Obeid family involvement from the IBC (SCB 275-280; 291-296). That conduct formed the basis of the "corrupt conduct" findings by the ICAC against each of those individuals (SCB 291-296).

11. The ICAC published a further report, entitled *Operations Jasper and Acacia – Addressing Outstanding Questions*, on 18 December 2013 (the **Further Report**). That Report addressed matters which the ICAC had been invited to address by the Premier concerning the appropriate government response to the matters under investigation (SCB 140-141). The ICAC concluded in the Further Report that the grant of the Mount Penny and Glendon Brook exploration licences was so "tainted by corruption that those authorities should be expunged or cancelled and any pending applications regarding them should be refused" (SCB 325). It recommended that the NSW Government consider enacting legislation to expunge the authorities or, as the less preferable alternative, cancel the authorities and refuse pending applications for mining leases under s. 380A of the *Mining Act* (SCB 325). The relevant findings and recommendations were based in part on the ICAC's findings in the Jasper Report that the Mount Penny tenement was created by Mr Macdonald in accordance with a corrupt agreement with Edward Obeid Snr and Moses Obeid (SCB 336). As to the impact of the proposed responses on Cascade Coal, the ICAC considered that Cascade Coal "had not made any valid argument capable of justifying the continued existence of the Mount Penny tenement in its present form" (SCB 336). The ICAC accepted the submission that at the time Cascade Coal entered into the Buffalo Agreement its management knew that the Obeid family was behind Buffalo and that it was

given and improperly used confidential information (SCB 336). The ICAC also accepted the submission that Cascade Coal had acquired the Glendon Brook tenement only because of the Buffalo Agreement (which it referred to as a "corrupt agreement") and in the circumstances it would be inappropriate to permit Cascade Coal to retain the benefit of that tenement (SCB 336).

12. The Jasper Report was laid before the Legislative Assembly on 13 August 2013 and before the Legislative Council on 20 August 2013 (SCB 40 [23]-[24]). The Further Report was laid before the Legislative Assembly and Legislative Council on 30 January 2014 (SCB 41 [27]). It was against this factual background that the legislature enacted Schedule 6A of the *Mining Act*. Schedule 6A was inserted into the *Mining Act* by the *Mining Amendment (Operations Jasper and Acacia) Act 2014* (NSW) (*Amending Act*) (SCB 43 [32]-[34]).

13. To summarise, the ICAC as an administrative body of the State found that a Minister of the State had, in the administration of the *Mining Act*, acted corruptly by creating mining tenements without regard to the proper processes and public interest and in order to favour private individuals. The same Minister was then found to have acted corruptly in the process which led to exploration licences under the *Mining Act* being granted to the Cascade Coal entities. The corruption was discovered before further administrative steps had been completed under the *Mining Act* and the *Environmental Planning and Assessment Act 1979* (NSW) (*Planning Act*) which would have allowed for the further commercial exploitation of State owned resources by the holders of those exploration licences. The ICAC recommended in the Further Report that legislative action be taken to expunge the exploration licences or, alternatively, executive action be taken under existing legislative provisions to cancel the licences or refuse the pending applications for mining leases. The legislature then passed the *Amending Act*, which had the effect of expunging the exploration licences and preventing any further progress of applications for mining leases under the *Mining Act* or project approval under the *Planning Act*. The *Amending Act* thus involved an entirely conventional exercise of legislative power to alter existing rights and duties arising from the administration of State law.

V APPLICABLE PROVISIONS

14. The defendant accepts the statutory provisions as set out by the plaintiff, but would add provisions from the *ICAC Act* as set out at Annexure A to these submissions.

VI ARGUMENT

15. These submissions address the first two propositions advanced by the plaintiff (PS [22]), although in a different order. In keeping with the approach adopted by the plaintiff, the proposition that the *Amending Act* is not a "law" within the meaning of s. 5 of the *Constitution Act 1902* (NSW) (*NSW Constitution*) is addressed in the defendant's submissions in the Cascade Coal proceeding. The defendant adopts those submissions in this proceeding (as well as in the NuCoal proceeding).

16. Before addressing those propositions, it is necessary to consider the terms of the *Amending Act*. The *Amending Act* introduced a new Schedule 6A into the *Mining*

Act. Putting aside the copyright issue which arises in the Cascade Coal and NuCoal proceedings, the relevant operative provisions of Schedule 6A are:

(a) Clause 4, which cancels the Mount Penny (EL 7406), Glendon Brook (EL 7504) and Doyles Creek (EL 7270) exploration licences, with effect from the date of assent to the *Amending Act*. The language of "cancellation" is consistent with the existing provision for cancellation of licences under Part 7 Div 3 of the *Mining Act*. Clause 4 of Schedule 6A thus amounts to a direct legislative cancellation, which (subject to cl. 4(3)) has the same effect as an administrative act of cancellation by a decision-maker under s. 125(1) of the *Mining Act*;

(b) Clause 5, which renders "void and of no effect" any "associated application" made under the *Mining Act* or the *Planning Act* as well as any environmental assessment requirements issue by the Director-General. This is reinforced by cl. 5(2) which provides that any such associated application is not to be dealt with any further. An "associated application" is defined to include, among other things, Mt Penny Coal's application under Part 3A of the *Planning Act* for project approval: cl. 5(3)(b). Clause 5 thus has the effect of terminating and declaring void, by direct legislative action, administrative processes that would otherwise have been required to proceed under the *Mining Act* and the *Planning Act*. This is consistent with the objects stated in cl. 3(2)(a), (b) and (c);

(c) Clause 6 provides that certain application fees paid by the licence holders are refundable. The clause is consistent with the purpose articulated in cl. 3(1)(c), namely "placing the State, as nearly as possible, in the same position as it would have been in had those relevant licences not been granted". Clause 6 is wholly inconsistent with the plaintiff's argument that Schedule 6A is punitive in character;

(d) Clause 7 provides that compensation is not payable by or on behalf of the State because of the enactment or operation of Schedule 6A, any direct or indirect consequence of any such enactment or operation, or because of any conduct relating to any such enactment or operation. Clause 8 declares that the State and any present or former employee of the State (acting honestly and in good faith) are not liable for conduct in relation to the cancelled licences. Contrary to the plaintiff's submission at PS [66], the denial of compensation and the exclusion of liability by these clauses does not reveal a punitive intention. Rather, it is entirely in keeping with the purpose of placing the State "in the same position as it would have been had those relevant licences not been granted" (cl. 3(1)(c)) and to "protect the State against the potential for further loss or damage and claims for compensation" (cl. 3(2)(d)). There is nothing exceptional about legislation that limits or excludes the liability of the State and its officers.

Schedule 6A is not an exercise of judicial power

17. The plaintiff submits that Schedule 6A constitutes an exercise of judicial power (PS [22(b)]). That general submission involves three overlapping propositions:[1]

    (a) that cl. 3(1) of Schedule 6A amounts to a "finding" of serious corruption against Cascade Coal (PS [22(b)]), the plaintiff (PS [45]), or Cascade Coal investors (PS [55]-[56]);

    (b) that Schedule 6A purports to determine pre-existing rights and obligations in such a way as to indicate an exercise of judicial, rather than legislative, power; and

10 (c) that Schedule 6A "metes out punishment or imposes a penalty" for that conduct (PS [22(b)]). The plaintiff submits that Schedule 6A is "akin to a bill of pains and penalties".

18. Each proposition should be rejected.

No "finding" in any relevant sense

19. The plaintiff's submission regarding judicial power depends entirely upon the proposition stated in PS [16], namely that the reference in cl. 3(1) of Schedule 6A to the Parliament being "satisfied" of certain matters amounts to a "finding of fact" by the New South Wales Parliament. The constitutional significance of this observation depends upon the notion that the Parliament made a "finding" of a
20 kind that is indicative of an exercise of judicial power. The submission is flawed for the following reasons.

20. First, the alleged "finding" must be understood in its proper statutory context. Clause 3 sets out the purposes and objects of the *Amending Act*. The reference in cl. 3(1) to Parliament being satisfied that "the grant of the relevant licences, and the decisions and processes that culminated in the grant of the relevant licences, were tainted by serious corruption" is no more than part of an explanation of the context in which the Parliament has enacted the *Amending Act* for the "purposes" specified in cl. 3(1)(a)-(c). Clause 3(2) provides that, to achieve those ends, the specific objects of the *Amending Act* are as set out in cl. 3(2).

30 21. The reference to the Parliament being satisfied of certain matters is no more than a reflection of the unexceptional reality that legislatures are moved to act because their members have made judgments as to the appropriateness of the legislation being passed. Such judgments may be informed by any number of factual, evaluative and political considerations. The correctness or otherwise of such judgments is a matter for democratic accountability.[2] It is commonplace for the views of the legislature about particular matters to find expression in legislation

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[1] There is an additional argument made in relation to cl. 5 (PS [48]-[50]), namely that it declares a "juridical consequence" and "directs the manner and outcome of the exercise of [the Court's] jurisdiction". This is addressed separately below.

[2] See *Building Constructions Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372 at 405 (Kirby P) and cases there cited.

in one form or another through objects clauses, long titles and preambles.[3] They may also be indirectly disclosed in other contextual material that is not part of the legislation itself. Such indications serve to identify the mischief at which legislation is directed, which may be a useful aspect of the context bearing on the construction of the legislation.[4] This does not in any meaningful sense involve the legislature in the making of "findings" that are unique to, or even analogous with, an exercise of judicial power.

22. Nor does the inclusion of material of this kind in legislation convert an exercise of legislative power into an exercise of judicial power. One of the curiosities of the plaintiff's case is that there would apparently be no cause for complaint if the legislation did not contain any explanation of why the legislature had been moved to pass the *Amending Act*. The fact that the legislature has chosen through cl. 3(1) of Schedule 6A to explain the purposes of the *Amending Act* in part by reference to particular factual circumstances does not change the character of the exercise of power by the legislature. The constitutional character of the *Amending Act* turns on the rights, duties, powers and privileges which the statute changes, regulates or abolishes.[5] The matters referred to in cl. 3(1) of Schedule 6A do no more than form part of the context in which the effect of the legislation is to be considered.

23. Secondly, to describe cl. 3(1) of Schedule 6A as constituting a "finding" is constitutionally meaningless unless it is said that the "finding" is one of a kind unique to, or at least characteristic of, an exercise of judicial power. Clause 3(1) involves no such "finding". Bodies that exercise judicial power make "findings" in a particular sense for a particular purpose. An exercise of judicial power involves "the application to the facts of a pre-existing or antecedent legal principle or standard"[6] or (in the language of a criminal prosecution) "the determination of guilt or innocence by the application of the law to the facts as found".[7] To similar effect, in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374 Kitto J described the exercise of judicial power as involving "an inquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined to the facts as

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[3] For example, the long title of the *Australia Act 1986* (Cth) describes that Act as "An Act to bring constitutional arrangements affecting the Commonwealth and the States into conformity with the status of the Commonwealth of Australia as a sovereign, independent and federal nation". The preamble to the *Communist Party Dissolution Act 1950* (Cth) stated, *inter alia*, that the Australian Communist Party was a revolutionary party using violence, fraud, sabotage, espionage and treasonable or subversive means for the purpose of bringing about the overthrow or dislocation of the established system of government of Australia: *Communist Party Case* (1951) 83 CLR 1 at 129.

[4] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 31, 34; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 265, [34]; *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at 599, [98] per Heydon and Crennan JJ; *Carr v Western Australia* (2007) 232 CLR 138 at 143, [6] per Gleeson CJ.

[5] *HA Bachrach P/L v Queensland* (1998) 195 CLR 547 at 561, [12] *per curiam*.

[6] *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 532 (Mason CJ). See also *Luton v Lessels* (2002) 210 CLR 333 at 345, [21] (Gleeson CJ).

[7] *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 704 (Gaudron J).

determined".[8] The plaintiff seeks to define judicial power, at PS [41], by quoting part of the reasoning of Kitto J but without reference to this critical element. A body exercising judicial power thus makes "findings" for the particular purpose of facilitating the application of existing law according to the facts as found. By this process controversies as to existing rights and duties are judicially resolved.

24. No meaningful analogy can be drawn between this type of "finding" that is made as a step in the exercise of judicial power and the Parliament's satisfaction as to particular matters referred to in cl. 3(1) of Schedule 6A. The legislation does not in form or substance involve the application of the existing law to the facts as "found" in cl. 3(1) of Schedule 6A. Nor does it reflect the legislature itself having, in some antecedent way, applied the existing law based on the facts as "found" in cl. 3(1). Clause 3(1) of Schedule 6A has no greater significance than to indicate the factual context in which the Parliament chose to take these measures, reflecting as it does a statement of general conclusion by elected representatives about the matters the subject of investigation by the ICAC. Contrary to the plaintiff's submission (PS [44]), cl. 3(1) cannot be read as if it were a judgment on the application of particular provisions in the *ICAC Act*. The words of cl. 3(1) do not correspond to any particular provisions. The *ICAC Act* refers to "corrupt conduct" s. 7 (read with ss. 8 and 9) and ss. 12A and 74C refer to "serious corrupt conduct" (a phrase which is not defined). However, the *ICAC Act* makes no reference to the concept of "serious corruption" or matters being "tainted" by serious corruption.

25. Even if cl. 3(1) *did* involve the application of law to a factual finding, that does not render it an exercise in judicial power.[9] The plaintiff's submissions pay insufficient regard to the chameleon character of certain powers that may be exercised by judicial bodies, but not exclusively so.[10] Like the deregistration of a trade union,[11] the cancellation of a licence is something that, depending upon the context (including the body exercising the power) could be characterised as an exercise of judicial, administrative or legislative power.

26. Thirdly, for the reasons developed below, the "finding" was not part of an exercise of applying the existing law but rather a declaration of new rights and duties.

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[8] Cited subsequently in a number of cases, as listed in *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542, [94] (Hayne J), footnote 124.

[9] As Gleeson CJ observed in *Luton v Lessels* (2002) 210 CLR 333 at 345, [21], a characteristic of many administrative functions is that they involve the application of legal criteria to the facts as found.

[10] *HA Bachrach P/L v Queensland* (1998) 195 CLR 547 at 562, [15] *per curiam*; *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1 at 18 (Aickin J); *Pasini v United Mexican States* (2002) 209 CLR 246 at 253-254, [12]-[13] (Gleeson CJ, Gaudron, McHugh and Gummow JJ); *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 136 (Gummow J).

[11] *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth* (1986) 161 CLR 88 at 95, citing *Re Ludeke; Ex parte Australian Building Construction Employees' and Builders Labourers' Federation* (1985) 159 CLR 636 at 653.

Declaration of new rights and duties rather than a determination according to existing law

27. An essential characteristic of the exercise of judicial power is that it involves the determination of existing rights and duties by reference to the existing law. Schedule 6A involved no such exercise. Instead, it varied the existing law and declared and created new rights and duties. As noted by the plaintiff (PS [13]), there were existing provisions in the *Mining Act* concerning the cancellation of authorities (including exploration licences). The *Amending Act* did not involve any purported application of those existing provisions or any purported determination of existing rights according to those provisions. The plaintiff accurately describes the *Amending Act* as "wholly bypassing" the law which hitherto existed (PS [17]). That observation is fatal to the plaintiff's argument that the *Amending Act* involved an exercise of judicial power in respect of the application of existing laws.

28. The plaintiff (at PS [47]) places particular reliance on cl. 3(1)(c) as indicating that Schedule 6A purports to determine existing rights. That sub-clause in fact supports the opposite conclusion. Clause 3(1)(c) states that one of the purposes of Schedule 6A is to place the State "as nearly as possible, in the same position as it would have been in had those relevant licences not been granted". That purpose, which is given effect through the operative clauses, reflects a recognition that the *Amending Act* was extinguishing existing rights and duties, with a view to replicating a prior state of affairs (that is, historical rights and duties which were acknowledged to be different from the existing rights and duties).

29. It has been consistently held that State and Commonwealth legislation which "declares" new rights and duties in this manner does not constitute an exercise of judicial power. Nor does it involve any impermissible usurpation of judicial power. The relevant authorities, which are outlined below, deal broadly with two different situations: legislation which declares as valid something that has been held invalid and legislation which declares something which is ostensibly valid to have no force or effect. From a constitutional perspective the underlying proposition is the same – the legislature may declare the law, including by confirming or altering the legal status of prior administrative acts.

30. Declaring valid what was invalid: In *Nelungaloo Pty Ltd v The Commonwealth* (1948) 75 CLR 495, the Court dismissed a challenge to the validity of the *Wheat Industry Stabilization Act (No 2) 1946* (Cth).[12] The Act validated an executive order for the acquisition of wheat, the validity of which was in issue in proceedings pending when the statute was enacted. Section 11 of the Act provided that the order "shall be deemed to be, and at all times to have been, fully authorised" by the relevant regulation. Dixon J held (at 579): "It is simply a retrospective validation of an administrative act and should be treated in the same

[12] At 531 (Latham CJ, agreeing with the reasons of Williams J below), 545-546 (Starke J), 579 (Dixon J), 584 (McTiernan).

way as if it said that the rights and duties of the growers and of the Commonwealth should be the same as they would be, if the order was valid".[13]

31. *Reg. v. Humby; Ex parte Rooney* (1973) 129 CLR 231 concerned legislation which was enacted following decisions of this Court[14] holding that orders in matrimonial causes purportedly made by certain officers of State Supreme Courts could not lawfully be made by them. Section 5 of the *Matrimonial Causes Act 1971* (Cth) applied where a purported order had been made by such an officer and provided that "[t]he rights, liabilities, obligations and status of all persons are ... declared to be, and always to have been, the same as if ... the purported decree had been made by the Supreme Court of that State constituted by a single Judge". This Court rejected an argument that such a provision was an interference with judicial power infringing Ch III of the *Constitution*.

32. *Re Macks; Ex parte Saint* (2000) 204 CLR 158 involved an application of the same principle to similar legislation.[15] McHugh J at 200 described *Humby* as standing for the principle that:

> Subject to the Constitution, it is within the legislative power of either the Commonwealth or of a State to provide, by legislation, that the rights and liabilities of certain persons will be as declared by reference to the rights and liabilities as purportedly determined by an ineffective exercise of judicial power.

33. The plaintiff seeks to distinguish *Humby* and *Re Macks* on the basis that the legislation in those cases altered rights and liabilities on the basis of a "deemed or fictitious state of affairs" whereas cl. 5 of Schedule 6A simply declares the "juridical consequence" of the application (PS [49]). As far as the legislative power of the State is concerned, no relevant distinction arises. To declare that a particular application under the *Planning Act* is "void and of no effect" does not involve any uniquely judicial concept that is beyond the scope of legislative power. As confirmed by cl. 5(2), the effect of the statutory language is to stipulate that the application in question is "not to be dealt with any further under ... the *Planning Act*." Moreover, as the observations of Dixon J in *Nelungaloo Pty Ltd v The Commonwealth* (1948) 75 CLR 495 at 579 indicate, even where the "juridical consequence" is simply declared by legislation, that does not amount to an exercise of judicial power.

34. Declaring invalid what was valid: Legislation of a different nature was the subject of *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth* (1986) 161 CLR 88 (***Commonwealth BLF Case***). The Australian Conciliation and Arbitration Commission had declared, pursuant to the *Building Industry Act 1985* (Cth), that it was satisfied that the Federation had engaged in conduct that constituted a contravention of certain

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[13] Cited with approval in *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 533 (Mason CJ).

[14] *Kosis v Kostis* (1970) 122 CLR 69 and *Knight v Knight* (1971) 122 CLR 114.

[15] The relevant legislation provided that "[t]he rights, liabilities, obligations and status of all persons are ... declared to be, and always to have been, the same as if ... the purported decree had been made by the Supreme Court of that State constituted by a single Judge".

undertakings and agreements. The Minister was empowered as a result of that declaration to order the deregistration of the Federation. The organisation applied to the High Court to quash the Commission's declaration. Before the hearing of that application, the Parliament passed the *Builders Labourers' Federation (Cancellation of Registration) Act 1986* (Cth). That Act provided that "The registration of [the Federation] under the *Conciliation and Arbitration Act 1904* is, by force of this section, cancelled".[16] The plaintiffs submitted that the Act was an exercise of judicial power or alternatively an impermissible interference with it. The Court observed (at 95):

> [There is nothing in the nature of] deregistration which makes deregistration uniquely susceptible to judicial determination ... Nor is there anything in the nature of deregistration which makes it unsusceptible to legislative determination. Just as it is entirely appropriate for Parliament to select the organisations which shall be entitled to participate in the system of conciliation and arbitration, so it is appropriate for Parliament to decide whether an organisation so selected should be subsequently excluded and, if need be, to exclude that organisation by an exercise of legislative power.

35. The Court, with reference to *R v Humby* and *Nelungaloo* held at 96 that it is "well established that Parliament may legislate so as to affect and alter rights in issue in pending litigation without interfering with the exercise of judicial power in a way that is inconsistent with the Constitution." The Court went on to note at 96, by reference to *Liyanage v The Queen* [1967] 1 AC 259, that different considerations arise when legislation "interferes with the judicial process itself, rather than with the substantive rights which are at issue in the proceedings".

36. Adapting the language used in the *Commonwealth BLF Case*, there is nothing about the continued validity of an exploration licence under the *Mining Act* that makes it "uniquely susceptible to judicial determination" or "unsusceptible to legislative determination".[17] Just as Parliament can specify who is eligible to apply for an exploration licence, so it is open to Parliament to decide whether the holder of an exploration licence should be permitted to continue to hold that licence. In other words, just as Parliament can determine who may apply for or hold an exploration licence under the *Mining Act*, so too can Parliament legislate to take such a licence away. If such legislation can be enacted by the Commonwealth Parliament, notwithstanding the separation of powers, then plainly it can be enacted by the State legislature.

37. The *Commonwealth BLF Case* was applied in *HA Bachrach P/L v Queensland* (1998) 195 CLR 547 at 564, [20]. The Court dismissed a challenge to the validity of the *Local Government (Morayfield Shopping Centre Zoning) Act 1996* (Qld),

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[16] The preamble to the Act stated (see (1986) 161 CLR 88 at 92-3):

"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 any one State, to cancel the registration of the Australian Building Construction Employees' and Builders Labourers' Federation under the *Conciliation and Arbitration Act* 1904"

[17] See also *Building Constructions Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372, where Street CJ observed (at 379) that "[i]t was directing outcome of litigation, *not mere cancellation*, that was judicial power" (emphasis added).

which had the effect of permitting a particular proposed development. The administrative approval for that development was, at the time of the Act, the subject of proceedings. The Court held that the Act was neither an impermissible interference with judicial processes nor incompatible with Ch III of the *Commonwealth Constitution*. The Court's observations at 559 [3] about the options available to the legislature in regulating planning matters are equally applicable to the powers of the New South Wales legislature in regulating planning matters and mining authorities:

> When a State legislature enacts legislation which sets up a general scheme of town planning and development control it does not thereby surrender its power to deal differently, by legislation, with particular areas of land where this, for a reason which commends itself to Parliament, is regarded as appropriate. Whether such a power should be exercised in relation to a given area becomes a political question.

38. It is clear in light of these authorities that an Act such as the *Amending Act* which cancels existing authorities and declares certain administrative processes to be void does not amount to an exercise of judicial power.

Schedule 6A does not punish the plaintiff and is not akin to a bill of pains and penalties

39. The plaintiff submits that Schedule 6A is akin to a bill of pains and penalties and, on this basis, is beyond the power of the State legislature. In *Haskins v Commonwealth* (2011) 244 CLR 22 at 37 [25] French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ referred with approval to the observations of Mason CJ, Dawson, Toohey and McHugh JJ in *Polyukhovich* that the relevant question is not whether an Act matches the description of a bill of pains and penalties but rather whether it exhibits that characteristic of a bill of pains and penalties which is said to represent a legislative intrusion upon judicial power. A legislative intrusion upon judicial power requires at least a "legislative determination of guilt" and punishment for the conduct the subject of that finding[18] or, in other words, a "legislative enactment adjudging a specific person or specific persons guilty of an offence constituted by past conduct and imposing punishment in respect of that offence".[19] Particularly in light of those observations, it is inappropriate to rely on principles drawn from United States cases, which concern the express prohibition on Bills of Attainder in Article 1 s. 9 cl. 3 of the *United States Constitution* (contra PS [60]-[65]).[20]

40. Schedule 6A of the *Mining Act* has none of these characteristics. In *Polyukhovich* at 537 Mason CJ noted that in *Kariapper v Wijesinha* [1968] AC 717 the Privy Council referred with approval to the statement of Frankfurter J in *United States v Lovett* (1946) 328 US 303 at 322-323 that "[a]ll bills of attainder specify the offence for which the attainted person was deemed guilty and for which

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[18] *Haskins v The Commonwealth* (2011) 244 CLR 22 at 37 [26] (French CJ, Gummow, Hayne, Crennan, Kiefel, Bell JJ); see also at 39 [33] (Heydon J)

[19] *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 535 (Mason CJ).

[20] See *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 535-536 (Mason CJ).

punishment was imposed". Consistently with that approach, in *HA Bachrach P/L v Queensland* (1998) 195 CLR 547 at 563, [18] the Court noted that "quite different considerations" arise with legislation that affects "litigation with respect to the guilt of a particular individual or group of individuals charged with criminal offences" as opposed to legislation which affects "litigation as to rights which the Parliament may choose to have determined either by a judicial or non-judicial body".

41. Neither cl. 3 nor any other provision of Schedule 6A constitutes a "legislative determination of guilt" by reference to a specified offence. Nor does Schedule 6A impose punishment for the conduct the subject of that finding. The two points are closely related. In particular, if cl. 3(1) of Schedule 6A does not amount to a finding of guilt against Cascade Coal or the plaintiff, it cannot reasonably be said that the consequences that flow from Schedule 6A constitute "punishment" for their conduct. In any event, the matters enacted by the substantive clauses of Schedule 6A are not punitive in character.

42. The "tainted processes" referred to in cl. 3(1) of Schedule 6A concern the grant of the relevant licences and the decisions and processes culminating in the grant of the relevant licences. As noted in the factual summary above (and as the plaintiff himself seeks to emphasise: PS [10]), the "corrupt conduct" findings made against the plaintiff and other Cascade Coal investors were directed towards conduct that took place *after* the grant of the Mount Penny and Glendon Brook licences: namely, their deliberate concealment of the Obeid family involvement from the IBC. Insofar as the grant of the licences is concerned, the ICAC only made "corrupt conduct" findings against Mr Macdonald, Edward Obeid Snr and Moses Obeid Snr. In this context, cl. 3(1) cannot sensibly be described as involving a legislative determination that the holders of the relevant licences were guilty of offences, in respect of which they were to be punished by the measures in clauses 4-8 of Schedule 6A. Nor is there any relevant judicial process that could have been directed to the proposition described in cl. 3(1), with the consequences described in clauses 4-8. In other words, it cannot be said that there are pending or potential criminal proceedings which have been rendered nugatory because the legislature has already declared the guilt of particular persons. It follows that no such judicial process has been usurped (contra PS [51]).

43. The idea of "punishment" necessarily requires a link between the conduct as found and the consequences imposed, such that it can be said that the consequences are a punishment *for* the conduct as found. As Frankfurter J observed in *United States v Lovett* (1946) 328 US 303 (at 323-324): "Punishment presupposes an offense, not necessarily an act previously declared criminal, but an act for which retribution is exacted". His Honour went on to emphasise that legislative provisions that impose adverse consequences on a person are not, simply for that reason, to be characterised as punitive:

> The fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking all discomforting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there may be reasons other than punitive for such deprivation.

44. This reasoning was applied by the Privy Council in *Kariapper v Wijesinha* [1968] AC 717. A commission of inquiry had found that allegations of bribery against certain persons, being members of the Senate, House of Representatives and State Council of Ceylon, had been proved. The Parliament of Ceylon subsequently passed the *Imposition of Civic Disabilities (Special Provisions) Act* No 14 of 1965, which imposed civic disabilities on persons, including the appellant, to whom the statute applied, namely "each person specified in the schedule to this Act in regard to whom the relevant commission in its reports found that any allegation or allegations of bribery had been proved." It also provided for the vacation of the appellant's seat as a Member of Parliament.

45. It was common ground that the Constitution of Ceylon provided for a separation of powers, at least to the extent that judicial power was vested in the courts to the exclusion of the legislature. The appellant argued that the statute was an exercise of judicial power because it imposed punishment for guilt without trial. The Privy Council rejected the argument on the grounds that the statute contained no declaration of guilt and the disabilities which it imposed did not have the character of punishment for guilt. Sir Douglas Menzies, speaking for the Judicial Committee, observed (at 736): [21]

> The question of the guilt or innocence of the persons named in the schedule does not arise for the purpose of the Act and the Act has no bearing upon the determination of such a question should it ever arise in any circumstances. Secondly, the disabilities imposed by the Act are not, in all the circumstances, punishment. It is, of course, important that the disabilities are not linked with conduct for which they might be regarded as punishment, but more importantly the principal purpose which they serve is clearly enough not to punish but to keep public life clean for the public good.

46. It may be accepted that there is a distinction between the *Kariapper* legislation and the form of Schedule 6A. However, the distinctions are not material. As with the legislation considered in *Kariapper*, the guilt or innocence of Cascade Coal and other licence holders "does not arise" for the purposes of Schedule 6A and Schedule 6A "has no bearing upon the determination of such a question should it ever arise in any circumstances". Further, the consequences that flow from Schedule 6A "are not linked with conduct for which they might be regarded as punishment".

47. The description of the purposes and objects of Schedule 6A in cl. 3 indicate that Schedule 6A was intended to remedy the impacts of the "tainted processes" and seek to restore the State to the position it would have been in had those licences not been granted. Notably, cl. 3(2)(d), while articulating the aim of protecting the State from compensation claims, expressly preserves "actions for personal liability" against public officials and private persons implicated in the tainted processes. This implies that their liability should be dealt with at another time in another forum (and, implicitly, that Schedule 6A is not intended to address their guilt, innocence or liability in respect of that conduct).

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[21] This reasoning was cited approvingly by Mason CJ in *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 537-538.

48. Nor does the circumstance that the enactment of Schedule 6A was preceded by the Further Report of ICAC in any way suggest that Schedule 6A has the character of a bill of pains and penalties. As noted above, the ICAC formed the view that the grant of the Mount Penny and Glendon Brook licences was "so tainted by corruption" that they should be expunged or cancelled and pending applications regarding them should be refused (SCB 325). That recommendation was based on the "corrupt agreement" between Mr Macdonald and the Obeids (SCB 336). In no way did the Further Report suggest that the licences should be cancelled by way of punishment or retribution for the "corrupt conduct" of those who held those licences. At most, the ICAC concluded that cancellation was justified because of the tainted processes involving Mr Macdonald and the Obeids and that Cascade Coal had not made "any valid argument capable of justifying its continued existence" (SCB 336).

49. In any event, it is not beyond the legislative power of the State to enact a law which has the character of a Bill of Pains and Penalties. That is a topic addressed in detail in the submissions of the plaintiff in the NuCoal proceeding. The defendant will address that topic in its submissions in that proceeding. It adopts those submissions for the purpose of this proceeding (and the Cascade Coal proceeding).

Clause 5(2) of Schedule 6A does not interfere with judicial power

50. The plaintiff makes a related argument at PS [50] that cl. 5(2) of Schedule 6A directs the manner and outcome of the exercise of courts' jurisdiction because it instructs courts to treat the "associated applications" as void and not to deal with them any further. That submission cannot stand in the light of the cases discussed above. In each of those cases, the legislation in question declared certain administrative acts to be valid or invalid. To say that this involves an instruction to courts as to how they are to treat the administrative acts in question is merely another way of saying that the legislation varies the law to be applied by the courts. This does not involve any element of directing the courts as to the exercise of their jurisdiction.

51. Different considerations may apply where there are features of the legislation and the facts indicating that there is an element of directing the outcome of particular litigation.[22] That is not this case. None of the licences affected by the *Amending Act* were the subject of extant proceedings at the time of the Act. Nor is it sensible to contemplate future litigation about those licences, in circumstances where they have been declared void and they are not to be the subject of any further administrative action. In any event, it may be observed that many of the cases considered above did involve legislation which impacted on pending proceedings, yet the challenges to the validity of such legislation failed.

The NSW Parliament is competent to exercise judicial power

[22] As demonstrated by *Building Constructions Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372, discussed at paragraph 56 below.

52. Even if the plaintiff's characterisation of Schedule 6A as involving an exercise of judicial power were correct, Schedule 6A remains valid because the NSW Parliament has the power to enact laws of such a kind.

53. Section 5 of the *NSW Constitution* relevantly provides:

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

54. In *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, the Court observed that, within the limits of the grant, a power such as that conferred on the NSW Parliament by s. 5 is "as ample and plenary as the power possessed by the Imperial Parliament itself" (at 10). There are, of course, some limitations on the power of the NSW Parliament. Its power is subject to the terms of the *NSW Constitution* itself, including that it only has the power to make "laws" (the meaning of which is addressed in the defendant's submissions in the Cascade Coal proceeding). Its powers are also subject to *Commonwealth Constitution*.[23] The limitations on State legislative power arising from the *Commonwealth Constitution* include limitations arising by implication.[24] Thus, for example, the NSW Parliament may not pass laws breaching the principle in *Kable v DPP (NSW)* (1996) 189 CLR 51. Further, as this Court held in *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, the Parliament cannot pass legislation that would deprive the Supreme Court of its jurisdiction to review the exercise of power by inferior courts and tribunals for jurisdictional error.

55. Other alleged limitations have been rejected. The words "peace, order and good government" in s. 5 are not words of limitation.[25] State legislative power is not constrained by common law rights.[26] Courts have consistently rejected the submission that there is a separation of powers at the State level.[27] Indeed, in *Building Constructions Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372 (***NSW BLF Case***), the NSW Court of Appeal held that the NSW Parliament was competent to exercise judicial power.

56. In the *NSW BLF Case*, the relevant Minister had made a declaration under the *Industrial Arbitration (Special Provisions) Act 1984* (NSW), the effect of which

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[23] *Australia Act 1986* (Cth), s. 5. See also *Durham Holdings Pty Limited v State of New South Wales* (2001) 205 CLR 399 at [10] (Gaudron, McHugh, Gummow and Hayne JJ), at [74] (Kirby J).

[24] *Durham Holdings Pty Limited v State of New South Wales* (2001) 205 CLR 399 at 410, [14] (Gaudron, McHugh, Gummow and Hayne JJ),

[25] *Durham Holdings Pty Limited v State of New South Wales* (2001) 205 CLR 399 at [55] (Kirby J); *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 72 (Dawson J); *Eagle v Rozzoli* (1990) 20 NSWLR 188 at 201 (Kirby P), at 204 (Priestley and Handley JJA); *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 10; *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 605-606 (Deane J), 635-636 (Dawson J), 695 (Gaudron J), 714 (McHugh J).

[26] *Durham Holdings Pty Limited v State of New South Wales* (2001) 205 CLR 399.

[27] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 65 (Brennan CJ), 77-78 (Dawson J), 93-94 (Toohey J), 109 (McHugh J) and cases there cited.

was to bring into force s. 3(2) of that Act. That subsection, "by operation of this Act", cancelled the registration of the Federation under the *Industrial Arbitration Act 1940* (NSW). The Federation's application for judicial review of the declaration was dismissed. The Federation appealed. Before the appeal was heard, the State Parliament passed the *Builders Labourers Federation (Special Provisions) Act 1986* (NSW) (***BLF Act***), s. 3(1) of which provided: "The registration of the State union under the Industrial Arbitration Act 1940 shall, for all purposes, be taken to have been cancelled on 2 January 1985 by the operation of, and pursuant to, the Industrial Arbitration (Special Provisions) Act 1984". Section 3(2) provided that the Minister's certificate should be treated as valid. Section 3(3) provided that subsections (1) and (2) had effect notwithstanding any proceedings instituted before the commencement of the Act. Section 3(4) provided that "the costs of or incidental to the proceedings incurred by a party to the proceedings shall be borne by the party, and shall not be the subject of any contrary order of any court".

57. The Court of Appeal concluded that the *BLF Act* involved an exercise of judicial power because it directed the outcome of particular litigation (not because it cancelled the registration that was at issue in the litigation).[28] The Court held that the NSW legislature could exercise judicial power and that the *BLF Act* was valid.[29]

58. In *Kable* at 93-94 Toohey J referred with approval to the *NSW BLF Case* in rejecting an argument that the NSW Parliament could not exercise judicial power. That argument was also effectively rejected by Brennan CJ at 65 and Dawson J at 77-78 (both of whom were in dissent in the result, but not on this issue) and McHugh J at 109.

59. The plaintiff seeks to distinguish the *NSW BLF Case* and identify a hitherto unrecognised limit on State legislative power by relying on an implication said to be found in Ch III of the *Commonwealth Constitution.* In particular, the plaintiff relies on *Kirk* as establishing that the NSW Parliament is precluded from exercising judicial power because the exercise of that power by the Parliament is not amenable to appeal or review for jurisdictional error.

60. To say that the NSW Parliament may pass laws that constitute the exercise of judicial power is not to say that the NSW Parliament is immune from review (contra PS [32]-[34]). In accordance with well-established principles dating back to *Marbury v Madison* [1803] USSC 16; 5 US 137 (1803), the courts are able to review legislation for compliance with the constitutional limitations on the legislature.[30] Those Courts have the power to declare such legislation invalid or

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[28] At 379 (Street CJ).

[29] At 381 (Street CJ); at 406 (Kirby P); at 413 (Mahoney JA); at 420 (Priestley JA, Glass JA agreeing).

[30] See *Communist Party Case* (1951) 83 CLR 1 at 262-263 (Fullagar J); *State of NSW v Kable* (2013) 87 ALJR 737 at [50] (Gageler J).

(in the case of s. 109 of the *Commonwealth Constitution*) inoperative if it exceeds those limitations.[31]

61. The plaintiff's submission must therefore be understood as being that, in order to maintain the federal system of judicial power established by Ch III of the *Commonwealth Constitution*, it is necessary that all exercises of judicial power must be amenable to a particular kind of review, namely appeal through the Ch III hierarchy. This involves a false analogy between judicial power exercised by courts, judicial power as exercised by the legislature in the form of legislation and administrative power exercised by the executive of the State.

10 62. The Court in *Kirk* was concerned with s. 179 of the *Industrial Relations Act 1996* (NSW) which provided that a decision of the Industrial Court was final and might not be appealed against, reviewed, quashed or called into question by any court or tribunal. The plurality concluded that s. 179 could not validly deprive the Supreme Court of its ability to review the Industrial Court's decision for jurisdictional error. The plurality observed that to "deprive a State Supreme Court of its supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power by persons and bodies other than that Court would be to create islands of power immune from supervision and restraint" (at [99]). It concluded: "Legislation which would take from a State Supreme Court power to
20 grant relief on account of jurisdictional error is beyond State legislative power" (at [100]).

63. The defining characteristic of State Supreme Courts which was found in *Kirk* to be constitutionally entrenched was the supervisory jurisdiction by which such Courts enforce "the limits on the exercise of State executive and judicial power by persons and bodies other than that Court". The critical point in *Kirk* is therefore that limits on power that apply to bodies exercising executive and judicial power must be enforced by Courts exercising supervisory jurisdiction (which in turn are subject to the appellate jurisdiction of the High Court). That concept cannot sensibly be understood as extending to State legislatures. The
30 laws made by the State legislature operate to set and redefine the limits of executive and judicial power. To the extent that the State legislature is itself subject to limits, those are the limits enforced by review for constitutional validity. No further implication under Ch III of the *Commonwealth Constitution* is required to safeguard those limits.

64. Judicial power as exercised by a State legislature is not equivalent to judicial power exercised by a court or a tribunal for at least two reasons. First, any exercise of the judicial power of a State by the State legislature could not offend the principle of superintendence by the High Court under Ch III. The plaintiff (at PS [25]-[32]) invokes the principle, identified by Gummow J in *Kable* at 138, that

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[31] At the State level, the problem of legislation that purports to confer on an administrator the power to determine conclusively issues on which the constitutional validity of the law depends does not arise: compare the cases cited in *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth* (1986) 161 CLR 88 at 95-96. As the Court noted at 96, that limitation says nothing about the power of the Parliament to exercise its legislative power "so as to abrogate or alter rights and liabilities which would otherwise be subject to a judicial determination".

Ch III requires the maintenance of an integrated judicial system[32] and that the High Court's superintendence achieves that aim by ensuring "the unity of the common law of Australia".[33] That system is in no way undermined by the enactment of legislation which involves the exercise of the judicial power of a State. Such legislation, by definition, does not involve the application of the common law and could not distort or interfere with the High Court's superintendence over the common law as administered by the courts.

65. Secondly, the State legislature is, in this context, supreme and has the authority to make such law as it thinks fit. The doctrine of parliamentary supremacy is, as held by Dawson J in *Kruger v Commonwealth* (1997) 190 CLR 1 at 73, "a doctrine as deeply rooted as any in the common law".[34] Putting to one side the policing of constitutional limits, it is meaningless to speak of judicial review or appellate review of laws made by the State legislature. The point of the supervisory jurisdiction and appellate review is to enforce limits on power and correct error.[35] While tribunals are constrained by jurisdictional limits set by the legislature, State legislatures are not so constrained. Contrary to the plaintiff's submission at PS [34], it is a very large step indeed to say that because inferior courts and administrative tribunals of the State must be subject to the supervisory jurisdiction of the Supreme Court, the legislature of a State cannot exercise judicial power because it cannot be allowed to do so without being subject to judicial or appellate review. The constitutional difference between such bodies is profound.

66. In light of these considerations, there is no basis for finding in Ch III of the *Commonwealth Constitution* an implication of the kind sought to be drawn by the plaintiff.

VII ESTIMATE OF TIME

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

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[32] The point was emphasised by the plurality in *Kirk* at 581, [99] as explaining the limitation on State legislative power there identified by the Court.

[33] See also *Kable v DPP (NSW)* (1996) 189 CLR 51 at 112-114 (McHugh J).

[34] See also *Durham Holdings Pty Limited v State of New South Wales* (2001) 205 CLR 399 at 419 [42] (Kirby J).

[35] In the context of the separation of powers at the Commonwealth level, in *Boilermakers' Case* (1956) 94 CLR 254 at 276 Dixon CJ, McTiernan, Fullagar and Kitto JJ described the federal judicature as having the "ultimate responsibility for the maintenance and enforcement of the boundaries within which governmental power might be exercised".

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ANNEXURE A

Independent Commission Against Corruption Act 1988 (NSW)

– as at 12 November 2014

7 Corrupt conduct

(1) For the purposes of this Act, corrupt conduct is any conduct which falls within the description of corrupt conduct in either or both of subsections (1) and (2) of section 8, but which is not excluded by section 9.

(2) Conduct comprising a conspiracy or attempt to commit or engage in conduct that would be corrupt conduct under section 8 (1) or (2) shall itself be regarded as corrupt conduct under section 8 (1) or (2).

(3) Conduct comprising such a conspiracy or attempt is not excluded by section 9 if, had the conspiracy or attempt been brought to fruition in further conduct, the further conduct could constitute or involve an offence or grounds referred to in that section.

8 General nature of corrupt conduct

(1) Corrupt conduct is:

(a) any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority, or

(b) any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions, or

(c) any conduct of a public official or former public official that constitutes or involves a breach of public trust, or

(d) any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.

(2) Corrupt conduct is also any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the exercise of official functions by any public official, any group or body of public officials or any public authority and which could involve any of the following matters:

(a) official misconduct (including breach of trust, fraud in office, nonfeasance, misfeasance, malfeasance, oppression, extortion or imposition),

(b) bribery,

(c) blackmail,

(d) obtaining or offering secret commissions,

(e) fraud,

(f) theft,

(g) perverting the course of justice,

(h) embezzlement,

(i) election bribery,

(j) election funding offences,

(k) election fraud,

(l) treating,

(m) tax evasion,

(n) revenue evasion,

(o) currency violations,

(p) illegal drug dealings,

(q) illegal gambling,

(r) obtaining financial benefit by vice engaged in by others,

(s) bankruptcy and company violations,

(t) harbouring criminals,

(u) forgery,

(v) treason or other offences against the Sovereign,

(w) homicide or violence,

(x) matters of the same or a similar nature to any listed above,

(y) any conspiracy or attempt in relation to any of the above.

(3) Conduct may amount to corrupt conduct under this section even though it occurred before the commencement of this subsection, and it does not matter that some or all of the effects or other ingredients necessary to establish such corrupt conduct occurred before that commencement and that any person or persons involved are no longer public officials.

(4) Conduct committed by or in relation to a person who was not or is not a public official may amount to corrupt conduct under this section with respect to the exercise of his or her official functions after becoming a public official.

(5) Conduct may amount to corrupt conduct under this section even though it occurred outside the State or outside Australia, and matters listed in subsection (2) refer to:

(a) matters arising in the State or matters arising under the law of the State, or

(b) matters arising outside the State or outside Australia or matters arising under the law of the Commonwealth or under any other law.

(6) The specific mention of a kind of conduct in a provision of this section shall not be regarded as limiting the scope of any other provision of this section.

9 Limitation on nature of corrupt conduct

(1) Despite section 8, conduct does not amount to corrupt conduct unless it could constitute or involve:

(a) a criminal offence, or

(b) a disciplinary offence, or

(c) reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official, or

(d) in the case of conduct of a Minister of the Crown or a member of a House of Parliament—a substantial breach of an applicable code of conduct.

(2) It does not matter that proceedings or action for such an offence can no longer be brought or continued, or that action for such dismissal, dispensing or other termination can no longer be taken.

(3) For the purposes of this section:

applicable code of conduct means, in relation to:

(a) a Minister of the Crown—a ministerial code of conduct prescribed or adopted for the purposes of this section by the regulations, or

(b) a member of the Legislative Council or of the Legislative Assembly (including a Minister of the Crown)—a code of conduct adopted for the purposes of this section by resolution of the House concerned.

criminal offence means a criminal offence under the law of the State or under any other law relevant to the conduct in question.

disciplinary offence includes any misconduct, irregularity, neglect of duty, breach of discipline or other matter that constitutes or may constitute grounds for disciplinary action under any law.

(4) Subject to subsection (5), conduct of a Minister of the Crown or a member of a House of Parliament which falls within the description of corrupt conduct in section 8 is not excluded by this section if it is conduct that would cause a reasonable person to believe that it would bring the integrity of the office concerned or of Parliament into serious disrepute.

(5) Without otherwise limiting the matters that it can under section 74A (1) include in a report under section 74, the Commission is not authorised to include a finding or opinion that a specified person has, by engaging in conduct of a kind referred to in subsection (4), engaged in corrupt conduct, unless the Commission is satisfied that the conduct constitutes a breach of a law (apart from this Act) and the Commission identifies that law in the report.

(6) A reference to a disciplinary offence in this section and sections 74A and 74B includes a reference to a substantial breach of an applicable requirement of a code of conduct required to be complied with under section 440 (5) of the *Local Government Act 1993*, but does not include a reference to any other breach of such a requirement.

13 Principal functions

(1) The principal functions of the Commission are as follows:

(a) to investigate any allegation or complaint that, or any circumstances which in the Commission's opinion imply that:

(i) corrupt conduct, or

(ii) conduct liable to allow, encourage or cause the occurrence of corrupt conduct, or

(iii) conduct connected with corrupt conduct,

may have occurred, may be occurring or may be about to occur,

(b) to investigate any matter referred to the Commission by both Houses of Parliament,

(c) to communicate to appropriate authorities the results of its investigations,

(d) to examine the laws governing, and the practices and procedures of, public authorities and public officials, in order to facilitate the discovery of corrupt conduct and to secure the revision of methods of work or procedures which, in the opinion of the Commission, may be conducive to corrupt conduct,

(e) to instruct, advise and assist any public authority, public official or other person (on the request of the authority, official or person) on ways in which corrupt conduct may be eliminated,

(f) to advise public authorities or public officials of changes in practices or procedures compatible with the effective exercise of their functions which the Commission thinks necessary to reduce the likelihood of the occurrence of corrupt conduct,

(g) to co-operate with public authorities and public officials in reviewing laws, practices and procedures with a view to reducing the likelihood of the occurrence of corrupt conduct,

(h) to educate and advise public authorities, public officials and the community on strategies to combat corrupt conduct,

(i) to educate and disseminate information to the public on the detrimental effects of corrupt conduct and on the importance of maintaining the integrity of public administration,

(j) to enlist and foster public support in combating corrupt conduct,

(k) to develop, arrange, supervise, participate in or conduct such educational or advisory programs as may be described in a reference made to the Commission by both Houses of Parliament.

(1A) Subsection (1) (d) and (f)–(h) do not extend to the conduct of police officers, Crime Commission officers or administrative officers within the meaning of the *Police Integrity Commission Act 1996*.

(2) The Commission is to conduct its investigations with a view to determining:

(a) whether any corrupt conduct, or any other conduct referred to in subsection (1) (a), has occurred, is occurring or is about to occur, and

(b) whether any laws governing any public authority or public official need to be changed for the purpose of reducing the likelihood of the occurrence of corrupt conduct, and

(c) whether any methods of work, practices or procedures of any public authority or public official did or could allow, encourage or cause the occurrence of corrupt conduct.

(2A) Subsection (2) (a) does not require the Commission to make a finding, on the basis of any investigation, that corrupt conduct, or other conduct, has occurred, is occurring or is about to occur.

(3) The principal functions of the Commission also include:

(a) the power to make findings and form opinions, on the basis of the results of its investigations, in respect of any conduct, circumstances or events

with which its investigations are concerned, whether or not the findings or opinions relate to corrupt conduct, and

(b) the power to formulate recommendations for the taking of action that the Commission considers should be taken in relation to its findings or opinions or the results of its investigations.

(3A) The Commission may make a finding that a person has engaged or is engaging in corrupt conduct of a kind described in paragraph (a), (b), (c) or (d) of section 9 (1) only if satisfied that a person has engaged in or is engaging in conduct that constitutes or involves an offence or thing of the kind described in that paragraph.

(4) The Commission is not to make a finding, form an opinion or formulate a recommendation which section 74B (Report not to include findings etc of guilt or recommending prosecution) prevents the Commission from including in a report, but section 9 (5) and this section are the only restrictions imposed by this Act on the Commission's powers under subsection (3).

(5) The following are examples of the findings and opinions permissible under subsection (3) but do not limit the Commission's power to make findings and form opinions:

(a) findings that particular persons have engaged, are engaged or are about to engage in corrupt conduct,

(b) opinions as to:

(i) whether the advice of the Director of Public Prosecutions should be sought in relation to the commencement of proceedings against particular persons for criminal offences against laws of the State, or

(ii) whether consideration should or should not be given to the taking of other action against particular persons,

(c) findings of fact.