IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S119 of 2014

BETWEEN

TRAVERS WILLIAM DUNCAN
Plaintiff

AND

STATE OF NEW SOUTH WALES
Defendant

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PLAINTIFF'S REPLY

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I INTERNET PUBLICATION

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

II SUBMISSIONS IN REPLY

Underlying considerations

2. "Hitherto unrecognised limit[s] on State legislative power"[1] emerge in response to hitherto unseen assertions of State legislative power.

3. The Defendant's best analogy for Sched 6A is the *Builders Labourers' Federation (Cancellation of Registration) Act 1986* (Cth) ("**the BLF Act**"), which provided for the cancellation of the registration of a named union.[2] At the time of enactment, there were extant findings and declarations of the Australian Conciliation and Arbitration Commission on the basis of which the government could, under existing legislation, have directed the cancellation of the union. While those declarations were under challenge in the courts, the Commonwealth Parliament enacted the new law. But it did so on the basis, stated in the preamble to that statute, that: "the Parliament considers that it is desirable … to cancel the registration". That preamble thus did no more than to explicate the policy judgments that informed the enactment of the law. In contrast, cl 3(1) of Sched 6A to the *Mining Act* records the satisfaction of the NSW Parliament with respect to a matter which, if true, would favour the conclusion that the exploration licences purportedly cancelled by that Schedule had invalidly been granted. In other words, Parliament expressed a view concerning facts from which certain legal consequences might follow, and on that basis, sought to effect, by means of the operative provisions of Sched 6A, the realisation of those legal consequences, chief among them the inefficacy of the relevant licences. This was accordingly no mere alteration of existing rights and obligations in accordance with the preferred policy of the legislature. That being so, no true analogy is afforded by the BLF Act.

4. A safer guide in the present case is the Defendant's very telling reliance upon the constitutionally invalid *Communist Party Dissolution Act 1950* (Cth).[3] The High Court did not decide whether the recitals of fact in that Act usurped the judicial power of the Commonwealth, though Dixon J said that the plaintiffs' arguments to that effect "illustrate[d] the substantial effect and nature of the provisions in question".[4] The Court did decide that those recitals of fact could not establish the requisite connection between the law and a head of power in s 51 of the Constitution. Of course, in the present case, the Defendant does not need to demonstrate any connection with s 51, and the "satisfaction" as to the "taint" of "serious corruption" does not serve the purpose of connecting Sched 6A with a head of power.

5. The Defendant (and several interveners) therefore make much of the fact that the relevant limits on the powers of the NSW Parliament are not constitutional limits but political limits: that "the correctness or otherwise of [Parliament's] judgments is a matter for democratic accountability".[5] The deep problem with this submission is that New

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[1] Defendant's Submissions (**DS**)[59].

[2] **DS** [34]–[36]. See also **Cth** [61]; **SA** [35]; **Vic** [21]; **WA** [29]; *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88.

[3] **DS** footnote 3.

[4] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 200.

[5] **DS** [21]. See also **Cth** at [60] ("full accountability to the electorate"); **Qld** at [60] ("electoral oversight"); **SA** at [54] ("responsible government … scrutiny within Parliament itself, and ultimately at the hands of the electorate").

South Wales now tells this Court that Sched 6A is a matter for democratic accountability, while at the same time it tells the electorate that Sched 6A is a matter for legal accountability. It tells that to the electorate, in effect, by explicitly structuring Sched 6A upon a juridical premise that the targeted mining licences are, in fact, "tainted" by "serious corruption", that concept taking its meaning from express legislative reference to the proceedings of ICAC, a well-established legal and institutional matrix.

6. Sched 6A might have said that Parliament considered it "desirable", all-things-considered, to cancel the mining licences (or said nothing at all) (that is the *BLF Case*) and thereby "squarely confront what it is doing and accept the political cost";[6] it might have said that the cancellation provisions would apply "consequent on the findings of [ICAC]", that is, apply to persons or licences the subject of valid (and supervisable) findings (that is *Kariapper v Wijesinha*).[7] Had it done so, the plaintiff's argument in the present case might be different; the principles in those previous cases might be applicable. But Sched 6A does something entirely different. It enacts the Parliament's satisfaction that named licences "*were*" "*tainted*" by "*serious corruption*". This finding is not, contrary to the Defendant's submissions, simply an "explanation of the context".[8] It is, in substance, the fulcrum upon which the cancellation provisions turn.

7. Against the background of these fundamental underlying considerations, some more should be said on the specific topics of existing rights, punishment, and *Kirk*.

Existing rights

8. The Parliament's finding is not divorceable from the question of whether Sched 6A determines existing rights and liabilities. It is no answer to the Plaintiff's submissions to point out in general terms that the Act alters rights prospectively.[9] After all, even an exercise of judicial power "creates a new charter by reference to which [a question of existing right] is in future to be decided".[10] The question is whether Sched 6A — by selecting a criterion of "serious corruption" drawn from a well-established institutional and legal context; and by expressing its satisfaction as to the existence of a "taint" of such "serious corruption" in named licences — purports, as a matter of substance, to resolve certain questions of existing right, among them: whether the named licences were in fact tainted by serious corruption; whether the holders of the named licences had an existing entitlement to them; and whether the holders of the named licences deserved adverse, even punitive, consequences to be visited upon them.

Punishment

9. As to those punitive consequences: it is not an essential characteristic of a Bill of Pains and Penalties that there be an express declaration or finding of guilt for a specified offence.[11] In *Chu Kheng Lim v Minister for Immigration*, Brennan, Deane and Dawson JJ identified "the adjudgment and punishment of criminal guilt" as a function "exclusively judicial in character".[12] Their Honours observed, on the basis of the *Constitution*'s concern with substance over form, that it would be beyond the legislative power of the

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[6] R *v Home Secretary; Ex parte Simms* [2000] 2 AC 115 at 131 (Lord Hoffmann).

[7] [1968] AC 717 at 730; **Cth** at [43]; **Vic** at [39]; **SA** at [38].

[8] **DS** [20]. See also **Vic** [8] ("no bearing on the operation or proper characterisation of Sch 6A"); **Qld** [77] ("no substantive effect"); *contra* s 64 of the *Interpretation Act 1987* (NSW).

[9] **DS** [27]ff; **SA** [20]; **Vic** [25].

[10] R *v Trade Practices Tribunal; Ex parte Tasmanian Breweries* (1970) 123 CLR 361 at 374 (emphasis added).

[11] **DS** [39]–[40].

[12] (1992) 176 CLR 1, 27. See also *Magaming v The Queen* (2013) ALJR 1060, 1070 [47] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

Commonwealth "to invest the Executive with the arbitrary power to detain citizens in custody notwithstanding that the power was conferred in terms which sought to divorce such detention ... from both punishment and criminal guilt".[13] This proposition is entirely at odds with the notion, supposedly endorsed in *Kariapper v Wijensinha*,[14] that the *ad hominem* legislative infliction of harm can only constitute an incursion upon the exclusive province of the judicature if accompanied by an express declaration or finding of guilt for a specified offence. Attention is required to substance and not merely form. Furthermore, it is not inherent in the nature of "punishment" that it be "*for*" the conduct as found:[15] "a bill of attainder may designate the persons it seeks to penalize by means of some characteristic ... that is independent of and not equivalent to the criminal activity which it is the purpose of the law to prohibit or prevent".[16]

10. Insofar as the Defendant and interveners rely upon the opinion of Frankfurter J in *United States v Lovett*[17] as authority for the proposition that a bill of pains and penalties must be attended by an express declaration of guilt, it is necessary to bear in mind that only did his Honour's approach sit ill alongside what had earlier been said in *Cummings v Missouri*,[18] it was rejected by the majority in *Lovett*. And it does not suffice to negative the relevance to these proceedings of the cases that have followed *Lovett*, particularly *United States v Brown*,[19] merely to point to the inclusion in the United States Constitution of the Bill of Attainder Clause. This is so for two reasons. First, the analysis of Dawson J and of Toohey J in *Polyukhovich*, which has not since been the subject of disapproval in this Court, was informed by the decision in *Brown*.[20] Secondly, the Bill of Attainder Clause does no more than to "make express what was, in any event, implicit in the doctrine of the separation of judicial from legislative and executive powers".[21] Consequently, the absence of any analogue to the Bill of Attainder Clause in Australia's constitutional arrangements affords no reason to adopt a narrower conception of the circumstances in which the *ad hominem* legislative infliction of harm might be said to intrude upon exclusively judicial functions.

11. Heydon J was, with respect, correct in rejecting the submission, advanced in *Haskins v The Commonwealth*,[22] that a bill of pains and penalties must provide for a finding of guilt in addition to the infliction of punishment. And even though his Honour was in dissent in *Haskins*, there is nothing in the reasons of the majority to indicate a contrary position. Their Honours merely concluded that the legislation impugned in that case neither imposed punishment nor constituted a legislative determination of guilt, and thus lacked "the prohibited features of a bill of pains and penalties".[23] This is quite different from suggesting that a statute can be characterised as a bill of pains and penalties, or a

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[13] *Ibid.*
[14] [1968] AC 717.
[15] **DS** [43].
[16] *Polyukhovich v The Queen* (1991) 172 CLR 501 at 647 (Dawson J). See also at 537 (Mason CJ), 685 (Toohey J).
[17] 328 US 303, 322-323 (1946).
[18] 71 US 277 (1867).
[19] 381 US 437 (1965).
[20] **PS** [65].
[21] *Polyukhovich* (1991) 172 CLR 501, 617 (Deane J). See *Calder v Bull* 3 US 386, 389 (1798); *United States v Brown* 381 US 437, 442 (1965).
[22] (2011) 244 CLR 22, 57 [96].
[23] (2011) 244 CLR 22, 37 [26].

usurpation of judicial power, only if any punishment that it exacts is consequential upon an express determination of guilt.

12. Accordingly, the proposition that Sched 6A to the *Mining Act* is invalid does not depend upon the inclusion in cl 3(1) of reference to Parliament's satisfaction as to the "taint" of "serious corruption".[24] That provision serves to reinforce the conclusion that Sched 6A imposes punishment. But that conclusion sufficiently follows from the manner in which the harm inflicted by the operative provisions of Sched 6A goes beyond what is necessary to achieve its stated objects.

13. Moreover, the Defendant is hardly assisted by its assertion[25] that Sched 6A does not inflict punishment upon Cascade or its subsidiaries because the matters about which Parliament had expressed itself to be satisfied were confined to the alleged corrupt acts of Mr Macdonald and various members of the Obeid family. This is said to follow from the circumstance that cl 3(1) speaks of the taint of serious corruption attaching to the grant of the relevant exploration licences and the processes by which those licences were granted, which, on the case advanced by the Defendant, necessarily excluded the subsequent alleged corrupt conduct of individuals associated with Cascade. Nonetheless, the grant of a licence can be tainted by subsequent corruption. In particular, the corruption may be of such a character as to cast some doubt upon the appropriateness, if not the propriety, of the grant. That would especially be so where, as on the version of events found by ICAC, the purpose of that subsequent conduct, including that of the Plaintiff, was to prevent the disclosure of a fact which could be seen as calling the propriety of the grant into question, namely, the fact that Cascade was once involved in a form of joint venture relationship with entities ultimately controlled by the Obeid family. In other words, the language of cl 3(1) does not readily lend itself to a reading that avoids any suggestion of corruption on the part those persons associated with Cascade who were the subject of adverse findings by ICAC. Accordingly, it is not sufficient to dispel the impression that Cascade and its subsidiaries are being punished merely to say that the serious corruption of which Parliament was satisfied was not that of, say, the Plaintiff.

14. The matter may be approached in another way. Let it be assumed that the serious corruption referred to in cl 3(1) went no further than the conduct of Mr Macdonald and those members of the Obeid family with whom he dealt in the course of creating the Mount Penny tenement. On that hypothesis, Cascade and its subsidiaries were, even more so than the general body of New South Wales voters and residents, victims of corrupt activity by officers of the State, particularly given the expenses incurred by those companies in exploring the Mount Penny and Glendon Brook tenements. Nonetheless, Sched 6A denies those companies any possible basis for making a claim against the State. Thus, to proceed upon the premise that it was only the serious corruption of Mr Macdonald and members of the Obeid family upon which parliamentary attention was focused in enacting Sched 6A leads to the extraordinary proposition that one of the objects of that Schedule is to deny effective redress to victims of that serious corruption. In the Plaintiff's submission, the absurdity of that proposition lends greater force to the notion that the enactment of Sched 6A was directed, in part, towards the infliction of punishment upon Cascade and various interests associated with it. Not least among these is the Plaintiff himself.

Kirk

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[24] **DS** [22].

[25] **DS** [42], [48].

15. At bottom, the Court must resolve whether a State Parliament can decide that valuable rights do not exist on the basis of its own declared satisfaction as to a "taint" of "serious corruption"; or otherwise punish the plaintiffs.

16. In relation to Proposition 1, the question of overarching principle, the Plaintiff basically accepts the Defendant's submissions at [65] that "it is meaningless to speak of judicial review or appellate review of laws made by the State legislature" and that the "constitutional difference between [the Supreme Court and the legislature] is profound". They are reasons why State legislatures cannot exercise judicial power consistent with the Commonwealth Constitution.

17. The Defendant suggests that an exercise of judicial power by the State legislature is not "immune from review" because of the principle in *Marbury v Madison*.[26] The constitutional necessity that exercises of judicial power be amenable to supervision and restraint would not, however, be satisfied by the availability of *Marbury* review alone: such review would be confined by the High Court's own limited original jurisdiction so that, for example, a transgression by Parliament-exercising-judicial-power of jurisdictional limits owing their existence only to State law may not be reviewable. The Defendant's submission, antipathetic to the Constitution, contemplates "different grades or qualities of justice" in the Commonwealth, one for Parliament-exercising-judicial-power and another for the ordinary courts.[27]

18. It is not correct to say that the integrated system for the exercise of judicial power is confined to an integrated system for the exercise of *federal* judicial power.[28] There is nothing, for example, about the entrenched supervisory jurisdiction of the State Supreme Courts that necessarily or especially supports or facilitates any exercise of *federal* judicial power; that jurisdiction is "the mechanism for the determination and the enforcement of the limits on the exercise of State executive and judicial power".[29] The mechanism cannot reach State Parliaments, which bespeaks the constitutional incapacity of those State Parliaments to exercise State judicial power.

19. Nor is it correct to say that the constitutional requirement of review for jurisdictional error in the exercise of State power should be confined, in theory, to exercises of power by *officers* or *judges* but not by a *legislature*.[30] It is the *power* itself that is jurisdictionally limited, and for that reason constitutionally required to be amenable to supervision and restraint. The Plaintiff's argument cannot be avoided by seeking to limit the reach of *Kirk* to certain kinds of decision-maker.

20. The Defendant submits both that the NSW Parliament can exercise judicial power and that it is a body "not … constrained" by "jurisdictional limits". They are necessarily contradictory submissions, which underscore the correctness of the Plaintiff's argument that the NSW Parliament cannot exercise judicial power.

Adoption of submissions

21. The Plaintiff adopts the written submissions in reply of the plaintiffs in S206 of 2014 except in relation to s 109 inconsistency.

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[26] 5 US 137 (1803); **DS** [60].

[27] *Condon v Pompano Pty Ltd* (2013) 87 ALJR 458 at [123] (Hayne, Crennan, Kiefel and Bell JJ).

[28] **Cth** [11]

[29] *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 580–581 [98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) (emphasis added).

[30] **DS** [64]; **Cth** [26]–[28]; **Qld** [30];

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