IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S138 of 2014

BETWEEN:

NUCOAL RESOURCES LIMITED
Plaintiff

and

THE STATE OF NEW SOUTH WALES
Defendant

ANNOTATED SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

PART I: CERTIFICATION

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

PART II: ISSUES

2. The issues are reflected in the questions for the Court's opinion, which are set out on page 12 of the special case. The following submissions of the Attorney-General for the State of Queensland ("**Queensland**") address the first question, which is:

   (a) Are clauses 1 to 13 of Schedule 6A to the *Mining Act 1992* (NSW) ("**the Mining Act**"), or any of them, invalid?

PART III: BASIS OF INTERVENTION

3. Queensland intervenes under s 78A of the *Judiciary Act 1903* (Cth) in support of the defendant.

Intervener's submissions

Filed on behalf of the Attorney-General for the
State of Queensland
Form 27C
Dated: 26 November 2014
Per Wendy Ussher
Ref ATT110/3157

Document No: 5446669

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PART IV: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

4. Not applicable.

PART V: STATUTORY PROVISIONS

5. Queensland adopts the defendant's statement of applicable legislative provisions.

PART VI: ARGUMENT

6. The relevant facts are agreed between the Plaintiff (**NuCoal**) and the Defendant (**New South Wales**) and are set out in the special case at paragraphs 1 to 64.

7. NuCoal submits that the issues that arise are as follows:[1]

   (i) Does s 5 of the *Constitution Act 1902* (NSW) (the ***Constitution Act***) confer judicial power on the New South Wales Parliament?

   (ii) Is Schedule 6A to the Mining Act wholly or partly invalid because it constitutes an exercise of judicial power?

   (iii) Is clause 11 of Schedule 6A to the Mining Act inconsistent with the *Copyright Act 1968* (Cth) and inoperative to the extent of the inconsistency because of s 109 of the Constitution?

9. These submissions address issues (i) and (ii). In relation to issue (iii), Queensland adopts the defendant's submissions.

Summary of argument

10. NuCoal submits that clauses 1 to 13 (the ***impugned provisions***) of Schedule 6A to the *Mining Act 1992* (NSW) (the ***Mining Act***), or alternatively, any of them, are invalid. Its major premise is that the New South Wales Parliament does not have judicial power (a) because such power was never conferred on it, and (b) because of the effect on the New South Wales constitution of the Commonwealth Constitution. Its minor premise is that the enactment of the impugned provisions was an exercise of judicial power, akin to a bill of pains and penalties.[2]

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1 PS [2](i)-(ii).
2 PS [26]-[28]

11. Queensland submits that both the major and the minor premises of NuCoal's submission are wrong. That is, firstly, the power of the New South Wales Parliament is as full and plenary as that of the Imperial Parliament itself, and includes judicial power. To the extent that NuCoal also submits that the impugned enactment is invalid for inconsistency with Chapter III of the Commonwealth Constitution, Queensland rejects that proposition and adopts its submission in S119 of 2014 (***Duncan***) in that respect.

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12. Secondly, the impugned provisions properly construed do not amount to an exercise of judicial power. Specifically, contrary to NuCoal's submissions, the impugned provisions do not 'adjudge persons complicit in serious corruptions and [impose] a punishment for such acts'[3], 'adjudge persons guilty and sentence them'[4] or 'pass criminal judgment'.[5]

20 **1. Powers of the New South Wales Parliament**

1A The New South Wales Parliament may exercise judicial power

13. The New South Wales Parliament, even before federation, was:[6]

> ... not in any sense an agent or delegate of the Imperial Parliament, but [had], and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself.

30 14. Respectfully, NuCoal's submissions mischaracterise the State parliaments. The statements from *Attorney-General (NSW) v Trethowan*[7] that they are not 'sovereign and omnipotent bodies' must be understood in context. In 1931 the State legislatures were subordinate to the Imperial parliament.

15. The *Australia Act 1986* (Cth) abolished any subordination to the Imperial Parliament. Subsection 2(2) declares that:

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> ... the legislative powers of the Parliament of each State include all legislative powers that the Parliament of the United Kingdom might have exercised before the commencement of this Act for the peace, order and good government of that State ...

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3 PS [28].
4 PS [71].
5 PS [72].
6 *R v Burah* (1878) 3 App Cas 889, 904.
7 (1931) 44 CLR 394, 418 (Rich J), 422 (Starke J) and 425 (Dixon J), cited at PS [42].

16. That provision should not be construed as excluding or withdrawing judicial power from the State Parliaments. On one view it is simply silent about the Parliaments' judicial power. On another view, it confers powers which would, if exercised by a court, be regarded as judicial, but when exercised by a State Parliament are properly characterised as legislative.[8]

17. Thus, it is now well settled that the State Parliaments' powers now are 'as ample and plenary as the power possessed by the Imperial Parliament itself'.[9] Queensland adopts the submission of New South Wales in Duncan that there are limitations on that power, but that none of them is engaged here.[10]

18. NuCoal submits that the Constitution Act is subject to the Commonwealth Constitution, which is itself based on the assumption of the rule of law, and that the rule of law requires that there be independent and impartial courts.[11] Queensland accepts those propositions, but rejects NuCoal's implication that it is the exclusive province of those courts to exercise judicial power.

19. NuCoal submits that the existence of judicial power in the legislature would create a jurisdiction that was not required to afford fairness, could act upon prejudice, could ignore evidence and could impose arbitrary or disproportionate punishment.[12] But it is wrong to characterise a legislative power, even one which if exercised by a court would be judicial power, as a 'jurisdiction'. The doctrine of parliamentary supremacy means that the Parliament may exercise its power to make laws with or without fairness, prejudice, evidence or punitive effect. In any case, it has not here abrogated fairness, acted upon prejudice, ignored evidence or imposed punishment. Further, and as Queensland submitted in relation to Duncan, Parliament *is* subject to supervision and restraint in the exercise of legislative power. It is answerable to the electorate.

20. NuCoal submits that that since the executive controls the legislature, the same objections to executive supremacy over the judiciary apply to legislative supremacy

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8 Victoria submissions [49] citing *R v Spicer; Ex parte Australian Builders' Labourers' Federation* (1957) 100 CLR 277, 305 (Kitto J)

9 *Union Steamship Company of Australia Ltd v King* (1988) 166 CLR 1, 10.

10 NSW Duncan submission [54].

11 PS [42]-[44].

12 PS [50].

over the judiciary.[13] The conventions of responsible government do not have the effect that the executive controls the legislature; quite the reverse.[14] But in any case, the rule of law itself, which NuCoal elsewhere asserts as a basis for denying judicial power to the legislature,[15] requires that the courts administer the law. NuCoal does not dispute that the impugned provisions are a law.[16] They are the product of an orthodox exercise of law-making power. As these submissions show later, the impugned provisions do not trench upon any exercise of judicial power by the courts. They simply ordain what the law is in particular cases.

21. Put another way, NuCoal's submissions deny the doctrine of parliamentary supremacy, which is 'as deeply rooted as any in the common law'.[17] What the Parliament gives (in this case, a statutory licence whose characteristics are explored below), the Parliament may take away.

22. NuCoal's submission that the absence of an inherent power to punish for contempt in the constituent houses of the New South Wales Parliament demonstrates that the Parliament as a whole cannot exercise judicial power[18] should be rejected for the reasons given in the Commonwealth's submissions in proceeding S206 of 2014 (***Cascade***).[19] In short, the plenary legislative power of the Parliament is not tethered to the inherent power of its constituent chambers to punish for contempt.

23. NuCoal submits that 'various limitations implicit upon the otherwise "plenary" legislative powers of State parliaments have been found'.[20] The loose suggestion is that a series of such limitations should now be supplemented with a limitation in respect of judicial power. The submission continues:[21]

> In addition, principles limiting permissible changes to the law while proceedings are on foot have been developed in a succession of cases such as

13 PS [53].
14 *Brown v West* (1990) 169 CLR 195.
15 PS [43]-[44].
16 cf Cascade PS [9]-[26] and Duncan PS [69].
17 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (***Kable***), 76 (Dawson J); see *Kable* generally at 71-77 (Dawson J) and 65-66 (Brennan CJ); *Kruger v Commonwealth* (1997) 190 CLR 1, 61, 66, 73 (Dawson J), 154-155 (Gummow J).
18 PS [62].
19 Commonwealth Cascade submissions [19].
20 PS [65].
21 PS [65].

> *Nicholas v R*[22] and *[H A] Bachrach [Pty Ltd] v Queensland.*[23] Many of these limitations arise, in one form or another, from an acceptance of the necessity for a system of government by laws, that is to say, an acceptance of the rule of law and the consequence for the judiciary of the rule of law for its position of the judiciary *vis-à-vis* the legislature and the executive.

24. With respect, *Nicholas* and *Bachrach* demonstrate the amplitude, not the limitations, of permissible changes to the law while proceedings are pending. *Bachrach* declared the law with respect to facts and persons at least as confined as those in the present case. *A fortiori*, in the present case where the impugned provisions did not affect any pending judicial proceeding, the Parliament may declare the law in respect of the licences and processes in question.

25. NuCoal's reliance on the necessity for a system of government by laws undermines its own case. The 'consequence for the judiciary for its position ... *vis-à-vis* the legislature and the executive' is no more and no less than that the legislature makes the law (subject to judicial review for constitutional validity, as in the present proceeding), the executive administers the law (subject to responsibility to the legislature and judicial review for legality) and the judiciary applies the law as enacted by the legislature.

26. In this case, the legislative power of the State has been exercised validly; the executive government of the State has done nothing that is impugned; and the judicial power of the State has not been invoked, let alone 'traduced'.[24]

1B Power of the NSW Parliament to enact a bill of pains and penalties

27. It is settled that the Constitution deprives the Commonwealth Parliament of power to enact a bill of attainder or a bill of pains and penalties. As McHugh J explained in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (***Lim***):[25]

> An Act of the [Commonwealth] Parliament which sought to punish individuals or a particular group of individuals for their past conduct without the benefit of a judicial trial or the procedural safeguards essential to such a trial would be an exercise of judicial power of the Commonwealth and impliedly prohibited by the doctrine of the separation of powers. Such an Act would infringe the separation of judicial and legislative power by substituting

22 (1998) 193 CLR 173.
23 (1998) 195 CLR 547.
24 PS [50].
25 (1992) 176 CLR 1, 70.

> a legislative judgment of guilt for the judgment of the courts exercising federal judicial power.

28. The doctrine of the separation of powers does not, however, apply to the States. As noted above, subject to the *Constitution*, the States have legislative power as plenary as that of the Parliament at Westminster. Although no bill of pains and penalties has been brought in the United Kingdom Parliament since 1820, that Parliament retained the power to pass such legislation in 1901 (the time of Federation) and in 1986 (at the time of the enactment of s 2(2) of the *Australia Act*).[26] It follows that the States are not prohibited from enacting such statutes.

29. This view is supported by the reasons of McHugh J in *Kable*:[27]

> The Parliament of New South Wales has the constitutional power to pass legislation providing for the imprisonment of a particular individual. And that is so whether the machinery for the imprisonment be the legislation itself or the order of a Minister, public servant or tribunal.

30. The reasons of Callinan and Heydon JJ in *Fardon*[28] suggest that State legislation otherwise meeting the description of a bill of pains and penalties will only be invalid if a State court is involved in its administration (that is, for *Kable* reasons). Here, no State court is involved in the administration of the impugned provisions in a way that would impair its institutional integrity and make it an unfit repository for the conferral of federal judicial power.

31. On the other hand, in *Totani*, Gummow J doubted whether a State law may authorise a body other than a court to punish criminal guilt by ordering the detention of the person.[29]

32. There is no clear statement from this Court that State Parliaments may enact laws with the characteristics of a bill of pains and penalties. While a number of State laws have

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26 *Halsbury's Laws of England* (4th ed), at [354]; *Erskine May's Parliamentary Practice* (22nd ed, 1997) at 63; McBain, Abolishing 'high crimes and misdemeanours' and the criminal processes of impeachment and attainder (2011) 85 ALJ 810.

27 *Kable* (1996) 189 CLR 51, 121; see also *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 (***Fardon***), 600 [40] (McHugh J), 655-656 [219] (Callinan and Heydon JJ).

28 *Fardon* (2004) 223 CLR 575, 655-656 [219].

29 *South Australia v Totani* (2010) 242 CLR 1, 66-67 [146]-[147].

been challenged on the basis that they constitute bills of pains and penalties,[30] the Court has invariably decided those matters by rejecting that characterisation of the laws, rather than by declaring that there is no constitutional prohibition on States enacting laws of that kind.

33. In any event, for reasons which follow, the impugned provisions do not adjudge guilt and impose punishment. It follows that they are not a bill of pains and penalties, and it is therefore not necessary to decide whether the New South Wales Parliament has power to enact such a bill.

2. The cancellation of the licences was not an exercise of judicial power

34. Queensland adopts New South Wales' submissions that the impugned provisions do not constitute a finding of guilt against NuCoal or anyone else.[31] Queensland also submits that, whether the impugned provisions are a finding of guilt or not, they are not a punishment. Queensland argued in its submission in proceeding S119 of 2014 (***Duncan***) that:[32]

> The rights in the licences were not rights of general application. They were rights conferred exclusively, by parliament, on the licensees. The selective extinguishment of those rights merely returns those licensees to parity with the general population. Further, the actual effects of the licence cancellations were both speculative and purely economic. The licenses were only for exploration, and profitable production was still highly contingent. At their highest, the Plaintiff lost an interest in a mere chance to earn exclusive economic profit, and expenditure "thrown away" in pursuit of that chance. The common law has, traditionally, been reluctant to protect pure economic loss, even in tort, and has severely constrained both liability and recoverable damages for it.

35. In this submission Queensland elaborates on those propositions.

36. As the impugned provisions do not deprive NuCoal of general rights, the highest it can claim is that it has been deprived of future economic profit. The law does not, however, recognise a right to future economic profit per se. The loss of future economic profit consequent upon an otherwise legal act cannot, therefore, constitute a punishment in

30 *International Finance Trust Co v NSW Crime Commission* (2009) 240 CLR 319; *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; *Kable v Director for Public Prosecutions (NSW)* (1996) 189 CLR 51.

31 See DS in Duncan [19]-[26].

32 Queensland submission in Duncan [63].

law. In any event NuCoal has not established that it has been deprived of future economic profit, or even the expectation of future economic profit, and in their past expenditures both NuCoal and its shareholders explicitly contemplated, valued and accepted the risk that the licenses may be lost.

37. NuCoal also appears to argue that what it calls the "censure" and "stigmatisation" of some of the directors of the license holders is, in itself, also a punishment.[33] Queensland rejects that argument in part 2C below. Queensland says that clause 3 did not censure or stigmatise NuCoal, and that the mere statement objected to by NuCoal does not otherwise have the character of a judicial declaration and so cannot be akin to a judicial remedy.

2A The exploration licence

38. The Exploration Licence granted to Doyles Creek Mining Pty Ltd by the NSW Minister for Mineral Resources dated 15 December 2008 (EL 7270) was a licence "for the purpose of prospecting for the minerals" in the piece or parcel of land described in the licence[34] for a four year term.[35]

39. Prospecting operations approved under the licence were limited to operations that did not cause more than minimal impact (such as on the environment). The licence permitted reconnaissance and low intensity activities only and included geological mapping, shallow drilling, minor clearing of vegetation, minor excavation and the like (Category 1).[36] Any prospecting beyond Category 1 activities required additional approval.[37]

40. The licence was not a licence to extract any minerals.

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33 PS [15] (footnote 22) and [16].
34 SCB [63].
35 SCB [64].
36 SCB [71].
37 SCB [73] clause 2.

2B Licence cancellation is not a punishment

41. NuCoal argues that the NSW Parliament acted for the purpose of punishing it.[38] Queensland submits that there was no such purpose, and adopts the submissions of New South Wales in Duncan that respect.[39]

42. NuCoal says the impugned provisions deprived the licence holders of rights in property, citing this Court in *Commonwealth v WMC Resources Ltd*[40] (***WMC Resources***) for the proposition that an exploration license is property for the purposes of s 51(xxxi) of the Commonwealth Constitution.[41] However a finding that a licence is property for the purposes of s 51(xxxi) is not a finding that the deprivation of that license is punishment for the purposes of determining whether the Parliament exercised judicial power.

43. NuCoal rightly admits that:[42]

> This case does not concern the question whether there has been an acquisition of rights constituted by the exploration licence. What matters is that the license holders have been deprived of their rights.

44. But while correctly identifying the issue, NuCoal assumes away the real question. Why does the deprivation of those particular "rights" make the impugned enactment a judicial act? Or, more directly to the issue, what is the class of things whose deprivation will be recognised in law as a punishment?

45. In *Lim*, Brennan, Deane and Dawson JJ held that:[43]

> ... the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.

46. Their Honours cited Blackstone who in turn relied on Coke[44] as support for that proposition:[45]

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38 PS [20], [22], [24], [25].
39 NSW Duncan Submission [47], [48].
40 (1998) 194 CLR 1, 56 (McHugh J) and 73 (Gummow J).
41 PS [21] (footnote 34).
42 PS [21] (footnote 34).
43 (1992) 176 CLR 1, 27 (emphasis added).
44 Coke, *Institutes of the Laws of England* (1809), Pt 2, p 589.
45 Blackstone, *Commentaries* (17th ed, 1830) Bk 1, paras 136-137.

> The confinement of the person, in any wise, is an imprisonment. So that the keeping (of) a man against his will ... is an imprisonment ... To make imprisonment lawful, it must either be by process from the courts of judicature, or by warrant from some legal officer having authority to commit to prison; which warrant must be in writing, under the hand and seal of the magistrate, and express the causes of the commitment, in order to be examined into (if necessary) upon a habeas corpus.

47. Their Honours in *Lim* characterise involuntary detention as a penal or punitive because it would be, but for its imposition by an authority empowered to do so, an unlawful deprivation of rights.

48. NuCoal seeks the protection of the law. Queensland submits, therefore, that the only things whose deprivation can be a punishment in law are rights the law recognises and would otherwise protect. This is the logical generalisation of their Honours' analysis in *Lim*. It is also the logical policy choice.

49. The alternative is to allow that an action is a punishment in law because it deprives something that is not recognised as a right by the law. Such an approach would divorce punishment from the whole common law schema of rights. It would leave the legal status of punishment entirely at large. Queensland submits that such a proposition should be rejected. In *ABC v Lenah Game Meats Pty Ltd*[46] ***(Lenah)***, Gaudron J said in the context of injunctive relief that:[47]

> It is beyond controversy that the role of Australian courts is to do justice according to law - not to do justice according to idiosyncratic notions as to what is just in the circumstances.

50. Queensland's approach is consistent with that proposed by American jurist Anthony Dick, writing in respect of the prohibition of Bills of Attainder in the United States Constitution:[48]

> ... "punishment" under the Bill of Attainder Clause must be understood in terms of the baseline of individual entitlements that the Constitution is designed to protect .... The corollary of this view is that no bill of attainder problem arises in the absence of a life, liberty, or property deprivation. The legislature, just as the executive branch, can single people out for special treatment as long as it does not deprive them of life, liberty, or property. Both

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46 (2001) 208 CLR 199.

47 (2001) 208 CLR 199, 231 [59].

48 Anthony Dick, 'The Substance of Punishment Under the Bill of Attainder Clause' (2010-11) *63 Stan L Rev* 1177, 1179-1180 (emphasis added).

> branches may grant unique subsidies and, once granted, both branches may revoke them. Such revocation by itself is not unconstitutional because it does not inflict the requisite deprivation, as measured against the proper baseline of rights.

51. Dick's commentary is also apposite in respect of the issue in this case. He identifies the revocation of subsidies previously granted by parliament, akin to revocation of a license license, as the definitive case of a deprivation not rising to the level of punishment.

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52. New South Wales does not have any equivalent to the rights provisions of the United States Constitution, and nor does it have any equivalent to the prohibition of Bills of Attainder in the United States Constitution. That is why the baseline of rights in New South Wales must be identified from the common law schema of rights.

53. If it is accepted that punishment is a strictly legal concept that must be defined in terms of the existing common law schema of rights, the relevant inquiry resolves to one that is
20 entirely orthodox. Would the action in question ordinarily, but for being undertaken by parliament, be a legal wrong? NuCoal entirely glosses over this inquiry, but in Queensland's submission it is the critical analysis and requires the rigorous application of legal principle.

The schema of common law wrongs

30 54. A tort is a civil wrong. The law of tort is thus the classification of rights recognised and ordinarily protected by the law.

55. In *Lenah* this court was asked to decide on the validity of an injunction. Gummow and Hayne JJ held that the necessary inquiry for the court in that case was whether the right asserted by the plaintiff in that case was one which was the subject of a particular tort:[49]

> Here, the statute did not confer on the Court power to make an order on the
40 application of Lenah other than in protection of some legal or equitable right of Lenah which the Court might enforce by final judgment. It becomes necessary then to consider the submission by Lenah that, in any event, there is such a right which is the subject of the tort dealing with invasions of privacy.

56. Their Honours went on the identify the legal method to be employed in identifying whether there is a tort that protected the asserted right, and referred with approval to the

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49 (2001) 208 CLR 199, 248 [105].

approach of Dixon J in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*[50] and Deane J in *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)*.[51] Gummow and Hayne JJ continued:[52]

> In the present appeal, Lenah encountered similar difficulty in formulating with acceptable specificity the ingredients of any general wrong of unjustified invasion of privacy. Rather than a search to identify the ingredients of a generally expressed wrong, the better course, as Deane J recognised, is to look to the development and adaptation of recognised forms of action to meet new situations and circumstances.

What right does the plaintiff assert in substance?

57. Deprivation of a thing characterised, for some purposes, as property may be a legal wrong, but not necessarily. While this Court found in *WMC Resources* that a petroleum exploration permit was property for the purposes of a s 51(xxxi) just terms claim, it is without controversy that in *WMC Resources* the Commonwealth Parliament had the power to acquire the exploration permit it had itself created.[53] Section 51 (xxxi) just terms are not damages for an unlawful deprivation of rights, which is why it has no common law equivalent. It is also why New South Wales might choose not to enact any equivalent statutory provisions in respect of things, such as the exploration licence in question, that have been classified as property for s 51(xxxi) purposes.[54]

58. But in any event, whether the New South Wales Parliament can legally deprive citizens of things that are classified as property for s 51(xxxi) purposes is not the relevant question. The relevant question is whether the equivalent action by a private party would be a breach of legal rights, would be protected by the law, and thus a punishment when effected by Parliament. The clear answer is that it would not be. A licence is a privilege, and does not *per se* grant the licensee any common law rights that would be a bar to the cancellation of that privilege by its grantor.

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50 (1937) 58 CLR 479.
51 (1984) 156 CLR 414.
52 (2001) 208 CLR 199, 250 [110].
53 *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1, 38 [86] (Gaudron J), 51-52 [134] and 56-57 [145]-[147] (McHugh J).
54 In *Durham Holdings v New South Wales* 205 CLR 399 the applicant contended that the legislation in question was invalid because the Parliament of New South Wales lacked power to enact laws for the acquisition of property without compensation. The plurality shortly rejected that contention at 408 [7].

59. The circumstances in which one party does create legally enforceable rights in favour of a licensee are very clearly defined in the common law. They include contract and, in particular circumstances falling short of contract, estoppel.

60. If the cancellation of a licence is a breach of a contractual right then there is no question that it would be protected by the common law. It cannot, however, be reasonably asserted that the cancellation of the licence by Parliament is in any way akin to a breach of a bargain between Parliament and the plaintiff. A legislative grant is not a contract or akin to a contract between Parliament and the grantee. And it is not argued before this Court that the Parliament in any way bound itself to the plaintiff not to cancel the licence. Such an argument would have been inconsistent with NuCoal's own prospectus material.

61. Shares in NuCoal were listed on the ASX, with members of the public and institutions subscribing for shares issued pursuant to a prospectus dated 2 December 2009. The December 2009 prospectus contained the following statement:[55]

> The Company's exploration and appraisal activities are dependent upon the grant and maintenance of appropriate licenses, permits, resource consents, access arrangements and regulatory authorities (authorisations) which may not be granted or may be withdrawn or made subject to limitations.

62. Nor could there be, and nor was there put before this Court, any claim that NuCoal or its shareholders have rights of the type that would otherwise be protected by estoppel.[56] They never expended money in reliance on any representation by Parliament that the license would not be cancelled.

63. While it is true that NuCoal expended money in furtherance of its coal mining exploration venture, it did so in the full knowledge that it may not continue to enjoy its exploration licence. And the prospectus statement extracted in [61] above shows that its shareholders must also be taken as having explicitly contemplated and accepted the loss of the licence as a risk in making their decisions to invest in the company, and in valuing that decision.

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55 SCB Annexure 4.

56 *Walton Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.

64. On this analysis it becomes apparent that the substance of NuCoal's complaint is not of the cancellation of the licence itself, but that in NuCoal's own words:[57]

> It deprives NuCoal and its shareholders of the benefit of property forfeited by NuCoal's subsidiary.

65. Or, in the language of rights, that Parliament has deprived it of a right to future economic profit, that being the only possible benefit to NuCoal of the licence.[58] This is reflected in the special case, where an agreed fact on which NuCoal relies is that:[59]

> NuCoal believes that it and its shareholders would, in the ordinary course, have benefitted financially from the exploitation of those resources.

66. A right to future economic profit could only be a legal right recognised, if at all, within the economic torts.

The economic torts

67. In *Lenah*, Gummow and Hayne JJ held that:[60]

> Commercial enterprises may sustain economic harm through methods of competition which are said to be unfair, or by reason of other injurious acts or omissions of third parties. However, the common law does not respond by providing a generalised cause of action "whose main characteristic is the scope it allows, under high-sounding generalisations, for judicial indulgence of idiosyncratic notions of what is fair in the market place". Rather, the common law provides particular causes of action and a range of remedies. These rights and remedies strike varying balances between competing claims and policies.

68. The recognised categories of economic tort include interference with contractual relations, intimidation, conspiracy, deceit and injurious falsehood. The impugned enactment does not, however, fit within these categories. The question is whether there is a more general category that would capture behaviour akin to the impugned enactment.

69. That question was considered by this Court in *Sanders v Snell*.[61]

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57 PS [16].
58 The directors of NuCoal are not parties to this action.
59 Special Case [33].
60 (2001) 208 CLR 199, 238 [80] (references omitted).
61 (1998) 196 CLR 329, 341-342 [30]-[31] (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

> We do not think it is necessary to decide in this case whether a tort of interference with trade or business interests by an unlawful act should be recognised in Australia. For present purposes, it is enough to consider one element of that tort: the element of unlawful act.
>
> The tort that is emerging, or has emerged in the United Kingdom, is a tort of interference with trade or business interests by an unlawful act directed at the persons injured. The element of unlawfulness is essential to the definition of the tort. Otherwise, conduct of the most unremarkable kind would be tortious. Any person engaged in trade or commerce will daily act deliberately to further that trader's economic interests by obtaining business that otherwise would go to a trade rival. The whole focus of the business of many, if not all, traders is to compete with trade rivals and by advancing their own economic interests, inevitably harm the economic interests of their rivals. In many cases the trader's conduct will be directed specifically at a particular rival. But, if the means of competition employed are lawful, and those means cause no breach of obligation, there is no warrant for holding the trader liable to the rival for the economic consequences of that competitive conduct. The fact that the conduct is engaged in deliberately or is directed specifically at the person who suffers economic detriment is not enough to make the conduct tortious.

70. There is some dispute in the English cases as to the bounds of an unlawful act for the purposes of this tort. It is not, however, necessary to consider those bounds in relation to the case put by the plaintiff. NuCoal does not appear to suggest that there is anything unlawful about the act by which Parliament purportedly deprived it of its future economic profit, other than to say that it is a punishment.[62] That does not assist NuCoal, of course, because the question of whether it is a punishment is the very question to be answered.

71. It is sufficient to observe that an act that deliberately interferes with the trade or business interests of another is not a civil wrong *per se*, even if it can be established that it deprived that other of future economic profit. It follows that the right asserted by NuCoal is not a right recognised by the law.

72. As the court observed in *Sanders*, there are excellent policy reasons the law does not recognise such purely economic rights. If the New South Wales Parliament is prohibited from enacting legislation akin to bills of pain and penalties (which Queensland denies), similar policy reasons should dictate that the deprivation of future economic profit should not be recognised as a punishment falling within that prohibition. If it were otherwise then, to adopt the language of their Honours in *Sanders*, legislative conduct of

62 PS [16], [17].

the most unremarkable kind would be unlawful. The result would be to invalidate any legislation that even incidentally affects someone's economic interests.

73. For these reasons, Queensland submits that the impugned enactment is not akin to a bill of pains and penalties.

No deprivation of future economic profit

74. Even if it were found that deprivation of future economic profit is a legal wrong, Queensland submits that it has not been admitted or proved, and must not be merely assumed, that the licence cancellation did deprive NuCoal of future economic profit.

75. There is nothing in the special case to establish that NuCoal would have realised future economic profit had the licences not been cancelled.

76. To repeat, the agreed facts in the special case go only as high as to say that:[63]

> NuCoal believes that it and its shareholders would, in the ordinary course, have benefitted financially from the exploitation of those resources

77. It is circular reasoning, but a common commercial conceit, that any venture a company wishes to pursue has a positive future financial benefit because otherwise the company would not wish to pursue it.

78. On NuCoal's own public representations it admits the likelihood that future economic profit may not be realised. In addition to the statement recognising that NuCoal's licenses may be withdrawn (see [60] above), the 2009 Prospectus contained the following further statements.

> 8.17 **Investment Risk.** The Shares issued pursuant to this Prospectus should be considered speculative.[64]
>
> 8.18 **No Profit to Date.** The Company and Doyles have both incurred losses since their inception and it is not therefore possible to evaluate the Company's prospects based on past performance. The Directors anticipate making further losses in the foreseeable future. While the Directors have confidence in the future earning potential of the Company, there can be no

63 Special Case [33].
64 SCB at [253].

certainty that the Company will achieve or sustain profitability or sustain positive cash flow from its activities.[65]

8.9 **Exploration and Evaluation Risk.** Potential investors should understand that mineral exploration and development are high risk undertakings. While the Company has attempted to reduce this risk by identifying projects that have identified prospective mineral targets, there is still no guarantee of success. Even if an apparently viable deposit is identified, there is no guarantee that it can be economically exploited.[66]

10 8.5 **Commercialisation Risks.** Even if the Company discovers commercial quantities of coal, there is a risk the Company will not achieve a commercial return. ... Obtaining approvals may be a lengthy and costly process, and there is a risk those approvals may not be obtained at all.[67]

8.7 **Future Capital Needs.** Further funding of projects will be required by the Company to support it ongoing activities and operations and to meet the Company's business plan ... There can be no assurance that such funding will be available on satisfactory terms or at all.[68]

79. In summary, NuCoal at the time of cancellation of the licenses had incurred losses since its inception and with further losses anticipated in the future. Even reaching commercial operation was contingent on a series of risks, any of which would have terminated the venture and resulted in a realisation of those losses. These risks included an inability to raise the significant further funds required, unsuccessful exploration and evaluation, inability to secure necessary licensing and approvals, and failure to complete a capital investment programme.

30 80. The prospectus also identified a range of other risks to NuCoal's future economic prospects, any of which might again cause the venture to fail to generate economic profit to NuCoal. These included: Native Title Risk, Key Personnel Risk, Acquisition and Title to Tenements, Competition Risk, Resources and Reserves, Operational Risk, Environmental Risk, Commodity Prices, Carbon Pollution Reduction Scheme, and Transport and Port Capacity.[69]

40 ***2C There was no censure or stigmatisation***

81. NuCoal charges that

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65 SCB at [253]
66 SCB at [251].
67 SCB at [250].
68 SCB at [251].
69 SCB [250-3] paras 8.2, 8.3, 8.4, 8.6, 8.8, 8.10, 8.11, 8.12, 8.13, 8.14.

> The Act was intended to and does express an authoritative censure upon the three license holders at which it is directed. It was also intended to and does stigmatise the holders of the licenses, as well as former directors[70].

82. It is worthwhile to recall the exact language of clause 3.

> The 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. ...

10

83. It is difficult to see how clause 3 actually censures or stigmatises NuCoal. It does not say that NuCoal engaged in corrupt practice. It does not even mention directors or former directors, and they are not parties to this action in any case. In fact NuCoal was not even the grantee of the license:[71]

> A public company, NuCoal Resources Ltd, was acquired to take the whole of the shareholding in Doyles Creek. A prospectus was published (in December 2009). The existing shareholders in Doyles Creek accepted shares in NuCoal
20 in return for their shares in Doyles Creek. Members of the public and institutions subscribed for further shares and the company's shares were listed on the ASX.

84. If the impugned enactment is not a censure or stigmatisation, then Queensland submits that as a mere statement it cannot be a legal punishment in any other respect.

85. The judicial remedy closest to a mere statement is a declaration, and it is true that a judicial declaration 'does not create rights capable of enforcement without a further
30 order of the Court'.[72]

86. Nevertheless, French J of the Federal Court (as his Honour then was) observed extra-judicially that a judicial declaration is not without legal effect. His Honour there cited with approval the statement that a judicial declaration:[73]

> ... operates in law either as a res judicata or an issue estoppel and such an order is a final order for the purposes of appeal.

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87. In its Duncan submission,[74] Queensland cited authority for the proposition that:

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70 PS [16].
71 PS [6].
72 Hon Justice R S French, "Declarations - Homer Simpson's remedy - is there anything they cannot do?" [2007] FedJSchol 24.
73 P W Young, *Declaratory Orders* (2nd ed, 1984) 214 cited by French ibid 3.
74 Queensland Duncan submissions [54].

> A prior legislative declaration of fact, such as that found in clause 3 of Schedule 6A, would not be binding on a court determining those [other] justiciable controversies.[75]

88. For these reasons, question (a) in the special case should be answered 'No'.

Dated 26 November 2014.

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75 *Dawson v Commonwealth* (1946) 73 CLR 157, 175 and *Deputy Commissioner of Taxation (NSW) v W R Moran Pty Ltd* (1939) 61 CLR 735.