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

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.

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 its 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, John Maitland and Others* on 30 August 2013 (the **Acacia Report**). The Report recorded the ICAC's findings of the investigation styled "Operation Acacia". The scope of that investigation, as set out in Parliament's resolution of

Filed on behalf of the defendant by:
IV Knight, Crown Solicitor for New South Wales
Level 5, 60-70 Elizabeth Street
Sydney NSW 2000
DX 19 Sydney

Date of this document: 26 November 2014
Contact: Paolo Buchberger
File ref: 201401397 T5
Telephone: 02 9224 5247
Fax: 02 9224 5255
Email: Paolo_Buchberger@cso.nsw.gov.au

23 November 2011, included the circumstances surrounding the application for and allocation to Doyles Creek Mining Pty Ltd (**DCM**) of exploration licence 7270 (the **Doyles Creek licence**) under the *Mining Act 1992* (NSW) (***Mining Act***) and the circumstances surrounding the making of profits, if any, by shareholders of NuCoal Resources NL as proprietor of DCM (SCB 369). The scope of the investigation was later expanded to include whether the then Minister for Mineral Resources, Mr Ian Macdonald, acted improperly in granting the Doyles Creek licence to DCM including by intending to confer a favour or benefit on Mr John Maitland and his associates (SCB 377). It was also expanded to include the conduct of those involved with DCM – namely Messrs Maitland, Ransley, Poole and Chester (the **DCM associates**) – in applying for the Doyles Creek licence (SCB 377).

6. The ICAC found that Mr Macdonald had granted DCM consent to apply for the Doyles Creek licence, and later granted DCM the licence, substantially for the purpose of benefiting Mr Maitland (SCB 497). Mr Macdonald did so despite advice from the Department of Primary Industries that it might raise "probity issues" (SCB 400) and further advice from the Department that DCM's submission was deficient, that a number of other companies had expressed interest in the area, and that Mr Macdonald should consider allocating the licence using a competitive tender process (SCB 418-419).

7. The ICAC concluded that (SCB 387):

> ...by allocating the Doyles Creek tenement directly to DCM, Mr Macdonald, first, deprived the state of the chance of receiving far more for the tenement (by way of additional financial contribution) than it might have received under a competitive process. Secondly, he deprived the state of the opportunity of receiving the payments to be made by the successful tenderer, in a competitive process, immediately upon the granting of the EL. Thirdly, he deprived the state of the opportunity of receiving bids, on a competitive basis, to construct and operate a training mine. Fourthly, by allocating the tenement directly to DCM, Mr Macdonald conferred a substantial benefit on DCM's shareholders – a benefit involving many millions of dollars.

8. The ICAC made findings pursuant to ss. 13(3) and 13(3A) of the *ICAC Act* that Mr Macdonald had engaged in "corrupt conduct" within the meaning of s. 7 of the *ICAC Act* (SCB 497-498). The ICAC found that Mr Macdonald's conduct constituted or involved a partial exercise of his official functions within the meaning of s. 8(1)(b) and a breach of public trust within the meaning of s. 8(1)(c) (SCB 497). The ICAC also found that his conduct constituted or involved a criminal offence under s. 9(1)(a), namely the common law offence of misconduct in public office (SCB 497-498).

9. The ICAC also concluded that the DCM associates had made or agreed to Mr Maitland publishing numerous false statements in or in relation to the application for the Doyles Creek licence (SCB 498-500). The ICAC made findings pursuant to ss. 13(3) and 13(3A) that, in doing so, they had engaged in corrupt conduct within the meaning of s.7 (SCB 501-503).

10. The ICAC published a further report, entitled *Operations Jasper and Acacia – Addressing Outstanding Questions*, on 18 December 2013 (the **Further Report**). In the Further Report the ICAC concluded that the grant of the Doyles Creek licence, like the grant of the Mount Penny and Glendon Brook licences, was so "tainted by corruption that those authorities should be expunged or cancelled and any pending applications regarding them should be refused" (SCB 540). It recommended that the NSW Government consider enacting legislation to expunge the licences or, as the less preferable alternative, cancel the licences and refuse pending applications for mining leases under s. 380A of the *Mining Act* (SCB 540). In relation to the Doyles Creek licence, the ICAC also suggested, as a further alternative, that the licence be cancelled under s. 125(1)(b2) of the *Mining Act* (SCB 540) on the ground that DCM provided false information in connection with its application.

11. The Acacia Report was laid before the Legislative Assembly and the Legislative Council on 10 September 2013 (SCB 56 [43]). The Further Report was laid before the Legislative Assembly and Legislative Council on 30 January 2014 (SCB 56 [45]). It was against this factual background that the legislature enacted Schedule 6A of the *Mining Act,* which was inserted into the *Mining Act* by the *Mining Amendment (Operations Jasper and Acacia) Act 2014* (NSW) (***Amending Act***).

V APPLICABLE PROVISIONS

12. The applicable statutory provisions are set out in the plaintiffs' submissions in the Duncan and Cascade Coal proceedings, the accuracy of which the defendant accepts. The defendant also adopts the provisions in Annexure A to its submissions in the Duncan proceedings.

VI ARGUMENT

13. Much of what the defendant would submit in response to the plaintiff's submissions has already been said in the defendant's submissions in the Duncan and Cascade Coal proceedings. The defendant adopts those submissions in this proceeding and the abbreviations used therein. In these submissions the defendant makes further submissions on the following issues:

    (a) whether Schedule 6A constitutes an exercise in judicial power; and

    (b) whether the NSW Parliament is competent to exercise judicial power.

Schedule 6A is not an exercise in judicial power

14. The plaintiff submits that Schedule 6A constitutes an exercise in judicial power because it amounts to a "criminal judgment and sentence" (PS [16]) and is "punitive" (PS [21]). Parliament is said to have "declared the complicity of the licence holders in conduct involving corruption" (PS [21]) and "*for* those acts" deprived the licence holders of "the property they are found to have gained in that manner" and disqualified them "from exercising statutory rights conferred by a law of general application enjoyed by all other licencees" (PS [21]).

15. The plaintiff lists six characteristics (PS [19]-[20]) of "punishment" which it says are displayed by Schedule 6A. Three of those characteristics have been addressed in the defendant's submissions in the Duncan and Cascade Coal proceedings, namely:

(a) in relation to the requirement that there be an "offence against legal rules" (PS [19(b)]), Schedule 6A entails no finding of fact and no application of any legal rules to any facts as found. Clause 3(1) is merely an explanation of the context in which Schedule 6A was enacted: see the defendant's submissions in the Duncan proceeding (**Duncan DS**) at [19]-[26].

(b) in relation to the requirement that the supposed punishment be imposed *for* an offence (PS [19(c)]), Schedule 6A is not directed at the conduct of the licence holders but at the "tainted processes" involved in the grant of the licences: Duncan DS [39]-[48]. In the case of the Mount Penny and Glendon Brook licences, those processes were tainted by the agreement between Mr Macdonald and the Obeids. In the case of the Doyles Creek licence, those processes were tainted by Mr Macdonald granting the licence to DCM as a favour to Mr Maitland. It may be accepted that the concept of "tainted processes" is broad enough to encompass the activities of the DCM associates in relation to the making of the licence application. However, the fact that cl. 3(1) refers to a conclusion about a state of affairs that encompasses the conduct of a range of persons – Mr Macdonald, the Obeids *and* the DCM associates – counts against a suggestion that Schedule 6A is *ad hominem* legislation aimed at punishing the licence holders *for* an offence.

(c) the plaintiff's submission that Schedule 6A was enacted for the "dominant purpose" of inflicting punishment, in the sense of deterring future offences and/or exacting retribution (PS [20]) is contradicted by the legislation. Schedule 6A is aimed at remedying the impacts of the "tainted processes" and restoring the State to the position it would have been in had the licences not been granted: Duncan DS [39]-[48], in particular at [47]-[48]. Contrary to the plaintiff's submission, in the present case the factors referred to by McHugh J in *Re Woolley; Ex p. Applicants M276/2003* (2004) 225 CLR 1 at [58]-[61] bearing on the characterisation of a particular measure as punitive or penal actually point against that conclusion.

16. The suggestion that Schedule 6A is aimed at punishing DCM is also countered by the particular circumstances of DCM when the *Amending Act* was passed. As the plaintiff itself emphasises, by the time the *Amending Act* was passed on 31 January 2014, the shareholding and directorship of DCM had changed substantially. In late 2009, Taurus Funds Management Pty Ltd acquired a 20% shareholding in DCM and two of its nominees were appointed directors (PS [6]; SCB 51 [11]). By late 2009, Mr Maitland and Mr Ransley had ceased to be directors of DCM (SCB 57 [48]). In early 2010, the plaintiff acquired the whole of the shareholding in DCM by the issuing of 470,000,000 shares to the shareholders of DCM, in exchange for and in proportion to their shares in DCM (SCB 52 [20]). Shares in the plaintiff were offered to the public and 50 million shares were purchased by investors for 20 cents each (SCB 52 [20]). Although Mr Poole and Mr Chester were initially directors of the plaintiff, by 1 May 2013

they had both ceased acting as directors of DCM and the plaintiff (SCB 57 [48]). By 31 January 2014 Messrs Poole, Chester, Maitland and Ransley were not directors of DCM or the plaintiff and had a direct or indirect interest in only 2.74% of the plaintiff's share capital (SCB 57 [48]).

17. While the plaintiff presumably relies on these facts to highlight the impact of Schedule 6A on persons who had no association with the "tainted processes", the facts significantly undermine the plaintiff's submission that Schedule 6A is aimed at punishing the conduct of the DCM associates. By the time the *Amending Act* was passed, the DCM associates were no longer involved in the management of DCM and had minimal shareholdings. In passing the *Amending Act*, Parliament was aware that it would impact shareholders who "may be innocent of any conduct involving the company".[1] This serves to underline the aim of Schedule 6A: to restore the State to the position it was in prior to the grant of the licences, even if persons – whether they be DCM associates or otherwise – suffered some harm in the process. There is no meaningful correspondence between the supposed "punishment" of the plaintiff and any offence having been "found" to have been committed by the plaintiff.

The NSW Parliament is competent to exercise judicial power

18. The plaintiff's submissions on this question involve two propositions:

    (a) first, that the legislative history of New South Wales demonstrates that the colonial legislature never had judicial power conferred on it (PS [29]-[42]); and

    (b) secondly, that the notion of the rule of law, as embodied in the *Commonwealth Constitution*, precludes the NSW Parliament from exercising judicial power (PS [43]ff).

19. Both propositions should be rejected.

The NSW Parliament has the power to make laws and in making laws may exercise judicial power

20. The establishment of various courts in New South Wales, does not (contra PS [29], [33]) prove that the Governor, and thereafter the legislature, never had judicial power. While those courts were clearly vested with judicial power, there is nothing in the statutes and instruments under which those courts were created that suggests that they were to exercise judicial power *to the exclusion* of the legislature. In *Building Constructions Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372 (the ***NSW BLF Case***), Mahoney JA (at 408, 411) reviewed the history of the establishment of those courts and concluded, with respect correctly, that the NSW Parliament was competent to exercise judicial power.

21. Indeed, in the early years of settlement, both the courts *and* the Governor exercised judicial power. For example:

---

[1] New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 30 January 2014: SCB 669.

(a) the Court of Criminal Jurisdiction was convened at the discretion of the Governor, was composed of persons appointed by and subordinate to the Governor and could not impose the death sentence without the Governor's consent;[2]

(b) the Court of Civil Jurisdiction was subject to appeal to the Governor, whose judgment was final where the matter was below £300 in value.[3] The right of appeal appears first to have been exercised in 1796;[4] and

(c) s. 15 of the *New South Wales Act 1823* required the Governor to "hold a court to be called 'The Court of Appeals of the Colony of New South Wales' which court shall have power and authority in all such cases".

22. According to Chief Justice Francis Forbes, in a letter to Under Secretary Horton dated 6 March 1827, the Governor exercising judicial power was a "very natural order of things":[5]

> ...every thing necessarily centred in the governor as the primum mobile of the machine; the police, the roads, the market, the importation of supplies, the cultivation of provisions, and even the prices of every article of daily consumption, were regulated by orders of the governor; these phirmans entered into some of the minutest matters of domestic life, and gradually became so familiar to the inhabitants, that instances are to be found of domestic quarrels being referred to the fountain head of authority, and there settled with all the form and sanction of legal supremacy. This was a very natural order of things.

23. In his "Introduction" to the *Australian Historical Record*, Dr Watson said:[6]

> The governor was the sole executive power; as judge in the court of appeal and convener of the courts, he was the supreme judicial power; and he soon assumed uncontrolled legislative power and powers of taxation. In fact, he was a king and parliament combined.

24. There is nothing in the *NSW Constitution*, or previous legislation which vested law making power in the Governor, indicating that the NSW Parliament was vested with legislative power *except to the extent that* the passage of legislation involved an exercise of judicial power. Section 5, like its predecessor provisions,[7]

---

[2] The Act of 27 Geo III c 56, s II; see also Letters Patent dated 2 April 1787, *Historical Records of New South Wales* (1892) vol I, Part 2 at 74-75.

[3] Dr Watson said that it was "evidently intended to make the governor the fountain head": F. Watson, "Introduction" in *Historical Records of Australia* (Series IV, 1922), section A volume 1 at xii.

[4] H.V. Evatt, "The Legal Foundations of New South Wales" (1938) 11 *Australian Law Journal* 409 at 414-415; V. Windeyer, "A Birthright and Inheritance: The Establishment of the Rule of Law in Australia" (1963) 1 *Tasmania University Law Review* 635 at 664-665.

[5] *Historical Records of Australia* (Series IV, 1922), section A volume 1 at 688.

[6] F. Watson, "Introduction" in *Historical Records of Australia* (Series IV, 1922), section A volume 1 at xiv.

[7] Section 24 *New South Wales Act 1823* conferred on the Governor, with the advice of the legislative council, the power to make "laws and ordinances for the peace, welfare and good government of the said

provides that Parliament has the power "to make laws for the peace, welfare, and good government of New South Wales". The scope of the NSW Parliament's power today must be determined by reference to those words, read in the context of the *NSW Constitution* and the *Commonwealth Constitution*.

25. Two decisions of the NSW Court of Appeal – *Clyne v East* (1967) 68 SR (NSW) 385 and the *NSW BLF Case* – have held that those words encompass the ability to exercise judicial power. The latter case is addressed in the defendant's submissions in the Duncan proceedings at [55]-[58].[8] Both cases were cited with approval in *Kable v DPP (NSW)* (1996) 189 CLR 51,[9] where, even following submissions on the constitutional history of the NSW Parliament (see 53-54), the Court concluded that there was nothing in the *NSW Constitution* that established a separation of powers and, implicitly, that there was nothing in the *NSW Constitution* that prevented the legislature from exercising judicial power. McHugh J observed at 109:

> I can see nothing in the New South Wales Constitution nor the constitutional history of the State that would preclude the State legislature from vesting legislative or executive power in the New South Wales judiciary or judicial power in the legislature or the executive.

26. This led McHugh J to conclude at 121:

> 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 imprisonment be the legislation itself or the order of a Minister, public servant or tribunal.

27. Even putting to one side *Clyne v East* and the *NSW BLF Case*, and their subsequent approval in *Kable* (as the plaintiff would prefer to do: PS [57]-[64]), other courts have consistently held that the form of words used in s. 5 confers a power as large as the power of the Parliament of Westminster.[10] If there was ever any doubt about that, it is confirmed by s. 2(2) of the *Australia Act 1986* (Cth).[11] The UK Parliament has historically exercised judicial power, including the power

---

colony". The *Australian Courts Act 1828* (9 Geo IV, c 83) likewise provided that the Governor, with the advice of the legislative council, "shall have power and authority to make laws and ordinances for the peace, welfare and good governance of the said colon[y]".

[8] See, in particular, at 381 (Street CJ); at 407, 413 (Mahoney JA); at 420 (Priestley JA, Glass JA agreeing).

[9] At 78-79 (Dawson J); at 92 (Toohey J); at 109 (McHugh J).

[10] *Durham Holdings v New South Wales* (2001) 205 CLR 399 at 409 (Gaudron, McHugh, Gummow and Hayne JJ); *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 10 (the Court); *Kable v DPP (NSW)* (1996) 189 CLR 51 at 71 (Dawson J). See also *R v Burah* (1878) 3 App Cas 889 at 904 (Lord Selbourne); *Hodge v The Queen* (1883) 9 App Cas 117 at 132 (Sir Barnes Peacock); *Powell v Apollo Candle Company* (1885) 10 App Cas 282 at 290 (Sir Robert Collier); *Riel v The Queen* (1885) 10 App Cas 675 at 678-679 (Lord Halsbury).

[11] Contra PS [38], the reference in s. 2(2) to "legislative powers" is broad enough to encompass the passage of legislation that amounts to the exercise of judicial power.

to pass bills of pains and penalties. The power has never been abolished[12] and was exercised as recently as 1821.[13]

28. In Tudor and pre-Tudor times, the Parliament was "still in reality 'the High Court of Parliament.'"[14] It is wrong to suggest (PS [39]) that by the fourteenth century "the judicial power of Parliament" had come to be exercised exclusively by the House of Lords. Coke's *Fourth Institute*, published in 1644, contradicts that submission.[15] In 1796, Francis Hargrave summarised the various kinds of "*judicature exercisable in parliament*" as including: the "*judicature*" of each house concerning privileges, the "*judicature*" for impeachment (which involved both houses), the "*judicature*" for the trials of peers by the lords, and the "*appellate jurisdiction by the lords in causes of equity*".[16]

29. It is true that, with the rise of subordinate judicial tribunals in the sixteenth century such as the Star Chamber and the court of Chancery,[17] the remedial jurisdiction of Parliament was correspondingly diminished.[18] But it does not follow that the power to pass laws that involved the exercise of "judicial power" was taken from the Parliament. In 1834, Sir Francis Palgrave felt able to declare that: "The character of the English parliament as a supreme court of remedial jurisdiction has never altered, though many changes have taken place in its form."[19]

30. Professor McIlwain, in a detailed study on the topic published in 1910, thought that sufficient proof existed to warrant Palgrave's declaration.[20] For example, ordinances made in 1811 expressly stated that Parliament must be held once a year, or twice if necessary, for hearing pleas, including those "whereon the Justices are of divers Opinions."[21] Thus McIlwain argued that the subordinate

---

[12] *Halsbury's Laws of England*, 5th ed, vol 24 at [643]; *Erskine May's Parliamentary Practice* (23rd ed, 2004) at 73.

[13] While the failed attempt in 1821 to pass a bill punishing Queen Caroline, wife of King George IV, is often cited as the last example of a bill of pains and penalties, Lehmann observes that a bill of pains and penalties was successfully passed a year later (1 & 2 Geo. 4 c 47): see M.P. Lehmann, "The Bill of Attainder Doctrine: a Survey of the Decisional Law" (1978) 5 *Hastings Constitutional Law Quarterly* 767 at 774 fn 30.

[14] C.H. McIlwain, *The High Court of Parliament and its Supremacy* (Yale UP, 1910) at 109.

[15] Coke, *Fourth Institute*, c 1 at 23: "*it is to be known, that the lords in their house have power of judicature, and the commons in their house have power of judicature, and both houses together have power of judicature*".

[16] Hargrave, "preface" to Sir Matthew Hale's *The Jurisdiction of the Lords House, or Parliament* (1796), at iv-v.

[17] Holdsworth, *A History of English Law*, 3rd ed (1966 reprint), vol 1 at 187.

[18] C.H. McIlwain, *The High Court of Parliament and its Supremacy* (Yale UP, 1910) at 132-133.

[19] F. Palgrave, *An Essay upon the Original Authority of the King's Council*, (1834) at 125.

[20] C.H. McIlwain, *The High Court of Parliament and its Supremacy* (Yale UP, 1910) at 121.

[21] Ibid 112-113.

judicial tribunals "only shared with the Parliament in the 'judicial' business; they did not supersede it".[22]

31. In the *NSW BLF Case*, Street CJ observed (at 380):

> Whilst the pretensions of the Executive government to the right and capacity to adjudicate were...forever laid to rest, the authority of Parliament to adjudicate has not been correspondingly denied at common law. In the Middle Ages the line separating the judicial and the legislative powers of Parliament was far from clear and Parliament, not infrequently, directly exercised judicial power. The practice of impeachment is a well-known example of Parliament exercising the powers of a court. It provided a means whereby Parliament might adjudicate and determine whether conduct ought to be adjudged treason. The use of impeachments was suspended in the fifteenth century. Their place for the time being was taken by Acts of Attainder which were, equally, legislative adjudications. Impeachments were revived in the seventeenth century and finally ended with the impeachment of Lord Melville in 1805: Holdsworth (at 377-384). Whilst both impeachments and attainders were regarded as judgments of the "High Court of Parliament", they were looked upon askance by the judges. The judges, however, were bound to recognise their validity.

32. Street CJ also observed that, in addition to impeachments and bills of attainder, the Parliament "conventionally exercised judicial power" by Private Acts, including Private Acts of divorce which were passed in response to petitions for such enactments (at 380-381). His Honour cited the following words of Holdsworth:[23]

> That Parliament, without ceasing to possess some of the characteristics of a court, could be so used ... that it became a true legislative assembly, is due ... especially to the substitution of the practice of legislating by bill for the practice of legislating by petition. So long as legislation took the form of a petition to the king, those petitions which resulted in legislation did not differ materially from petitions which resulted in a judicial decree; and a petition to Parliament for a private Act still retains the judicial characteristics which marked the early stages in the history of every variety of Parliamentary legislation.

33. The NSW Parliament was vested with all the power of the Parliament of Westminster, which undoubtedly included judicial power and in particular the power to pass bills of pains and penalties. For the reasons developed further below, the plaintiff has not established any relevant limitation on the power of the NSW Parliament arising from the *Commonwealth Constitution*. It follows that the NSW Parliament is competent to pass a bill of pains and penalties and/or any other law that involves an exercise of judicial power.

---

[22] Ibid 119.

[23] Holdsworth, *A History of English Law*, vol IV, at 184.

The "rule of law" does not prevent the NSW Parliament from exercising judicial power

34. The plaintiff submits that, even if NSW Parliament were vested with judicial power, the rule of law, as embodied in the *Commonwealth Constitution*, precludes it from exercising that power. Specifically, the plaintiff submits that the rule of law requires that State courts are independent and impartial bodies and that legislation which constitutes an exercise in judicial power necessarily undermines that independence and impartiality (PS [49]).

35. The plaintiff cites *Kable* in support of this proposition, submitting that it was decided upon the footing that the *Commonwealth Constitution* "requires there be no such intrusion into the State judiciary as would threaten the continued existence of State courts as bodies capable of exercising judicial power, that is to say, as independent and impartial courts" (PS [48]). That submission, as with much of the plaintiff's argument, pays insufficient regard to the reasons for judgment in *Kable* and to the constitutional principle for which it stands as authority. The Court did not suggest that any State legislation which threatens State courts' independence and impartiality is invalid. The members of the Court stressed that the focus of the inquiry is on the nature of the powers conferred on the Court and whether those powers are incompatible with their status as repositories of federal judicial power.[24] Moreover, neither *Kable* nor any decision applying *Kable* has suggested that the exercise of judicial power *by a body other than a State court*, including a State Parliament, would have any affect on the status of State courts as repositories of federal judicial power.

36. The most recent articulation of the *Kable* principle is found in *Kuczborksi v Queensland* [2014] HCA 46. The plurality observed:[25]

> [139] The *Kable* principle was most recently summarised in *Attorney-General (NT) v Emmerson*, where French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ said:
>
> > "The principle for which *Kable* stands is that because the Constitution establishes an integrated court system, and contemplates the exercise of federal jurisdiction by State Supreme Courts, State legislation which purports to confer upon such a court a power or function which substantially impairs the court's institutional integrity, and which is therefore incompatible with that court's role as a repository of federal jurisdiction, is constitutionally invalid." (footnotes omitted)

---

[24] At 95-96, 98 (Toohey J); at 103, 106, 108 (Gaudron J); at 114-115, 118 (McHugh J). Subsequent authorities have established that it is not only the task which is given to a State court, "but also the manner in which that Court is required to perform the task", which may require the conclusion that the legislation is invalid: *Kuczborksi v Queensland* [2014] HCA 46 at [104] (Hayne J), citing *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319; *South Australia v Totani* (2010) 242 CLR 1; and *Wainohu v New South Wales* (2011) 243 CLR 181.

[25] See also at [38] (French CJ).

> [140] Decisions of this Court establish that the institutional integrity of a court is taken to be impaired by legislation which enlists the court in the implementation of the legislative or executive policies of the relevant State or Territory, or which requires the court to depart, to a significant degree, from the processes which characterise the exercise of judicial power.

37. Likewise, Hayne J observed:

> [102] The central *Kable* principle is that the Parliaments of the States may not legislate to confer powers on State courts which are repugnant to or incompatible with their exercise of the judicial power of the Commonwealth. It is now accepted that, as Gummow J said in *Fardon v Attorney-General (Qld)*, "the essential notion is that of repugnancy to or incompatibility with that institutional integrity of the State courts which bespeaks their constitutionally mandated position in the Australian legal system"....
>
> [104] As was also said in *Pompano*, independence and impartiality are defining characteristics of all of the courts of the Australian judicial system. These are notions which connote separation from the other branches of government, at least in the sense that the courts must be and remain free from external influence. But, because the repugnancy doctrine does not imply into the constitutions of the States the separation of judicial power required for the Commonwealth by Ch III, there can be no direct application to the States of all aspects of the doctrines that have been developed in relation to Ch III. The repugnancy doctrine cannot be treated as simply reflecting what Ch III requires in relation to the exercise of the judicial power of the Commonwealth. Hence, there can be no direct and immediate application of what has been said[26] in the context of Ch III about the "usurpation" of judicial power.

38. The plaintiff in the present case commits the very error and elision of concepts alluded to by Hayne J. The plaintiff submits that an exercise of judicial power by the legislature *necessarily* undermines the independence and impartiality of State courts (PS [50], [53]). But that submission seems to emerge from the premise, expressly stated by the plaintiff, that the doctrine of separation of powers in Australia requires "a substantial and real separation of the judiciary from the executive and the legislature both in the State and Commonwealth spheres" (PS [47]). The plaintiff again invokes the "separation of powers" at [72]. The plaintiff's submission is, in substance, a submission that the *Commonwealth Constitution* mandates a separation of powers at the State level. There is no basis for such an implication being drawn from the *Commonwealth Constitution* and it should be rejected.

39. The plaintiff's submissions also suggest that an exercise of judicial power by the Parliament in the form of a particular law threatens the *existence* of State courts' jurisdiction. Why this is so is not articulated. None of the authorities cited by the

---

[26] Citing *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 26-29 (Brennan, Deane and Dawson JJ).

plaintiff are to the point. The plaintiff invokes a dictum of McHugh J to the effect that State Parliaments could not defeat the grant of power under s. 77 of the *Commonwealth Constitution* by legislating to abolish State courts (PS [72]). It does not logically follow, as the plaintiff submits (PS [73]) that s. 77 would equally be undermined by an exercise of judicial power by State Parliament itself. Even accepting McHugh J's dictum, it would, at most, prevent State Parliaments from arrogating *all* judicial power unto themselves. It does not prevent State Parliaments from exercising judicial power from time to time by passing particular laws. The exercise of judicial power by State Parliaments in no way undermines the existence of State courts. Contrary to the plaintiff's submission at PS [67], the *NSW BLF Case* would not be decided differently today. The legislation at issue in that case, although found to involve an exercise of judicial power, did not require the State court to exercise any function or otherwise compromise its institutional integrity.

40. There is a further conceptual difficulty with the plaintiff's argument. The plaintiff does not explain why an exercise of judicial power by the legislature itself through the passage of a law impermissibly undermines the independence and impartiality of State courts but the exercise of judicial power by *other non-judicial bodies* does not. The plaintiff, at PS [28], accepts as it must that the conferral of State judicial power on non-judicial bodies does not offend any constitutional restriction. The plaintiff at PS [50]-[52] suggests that real vice lies in the fact that Parliament is not required to afford procedural fairness nor is it subject to appellate review. The plaintiff, like the plaintiffs in the Duncan and Cascade Coal proceedings, seems to suggest that all exercises of judicial power must be subject to a particular kind of review which the Parliament is not subject to. This submission should be rejected for the reasons given by the defendant in those proceedings: Duncan DS [60]-[65]. There is no indication in the *Commonwealth Constitution* that all judicial power – both State and federal – must be subject to appellate review or review for jurisdictional error. In any event, to say that the exercise of judicial power by Parliament is not subject to such review is not to say it is *immune* from review. All legislation passed by the NSW Parliament – whether amounting to an exercise of judicial power or otherwise – is subject to review for compatibility with the *NSW Constitution* and the limitations imposed by the *Commonwealth Constitution*. Nor is there anything to be drawn from the fact that an exercise of judicial power by the NSW Parliament is subject to repeal (PS [51]). Even a judgment of a court is vulnerable to having its effect modified by legislation.

41. The reasoning of Street CJ in the *NSW BLF Case* at 381 concerning the power of the State legislature to confer judicial functions on tribunals which are not courts is sound and provides a powerful indication that the legislature, as the source of this power, may itself exercise judicial power. The plaintiff's comparison with the Commonwealth Parliament, at PS [63], is inapt. It is beside the point that the Commonwealth Parliament may create federal courts, but lacks the capacity to itself exercise judicial power. That is a consequence of the separation of powers for which the *Commonwealth Constitution* provides. The *Commonwealth Constitution* itself confers judicial power on Ch III courts and it does so to the exclusion of the Parliament. Parliament's role is limited to the creation of federal courts and to other laws of the kind for which Ch III makes express provision.

There are no equivalent restrictions applying in respect of State judicial power from the *Commonwealth Constitution.*

42. Finally, the plaintiff also relies on the NSW Parliament's lack of inherent power to punish for contempt (PS [62]). For the reasons given in the defendant's submissions in the Cascade Coal proceeding at [14], that example does not advance the plaintiff's case. Further, as Gleeson CJ observed in *Egan v Willis & Cahill* (1996) 40 NSWLR 650 at 666, it has always been open to legislatures to assume the power to punish for contempt by the enactment of valid legislation. That has been done in most of the Australian States.[27]

Schedule 6A is not inconsistent with the *Copyright Act*

43. The plaintiff has provided the Department of Trade and Investment with various reports that it was required to submit under s. 163C of the *Mining Act* and various core samples and related information in response to a notice issued by the Department under s. 248B of the *Mining Act* (collectively, the **Works**) (SCB 59 [57]). The plaintiff asserts ownership of the copyright in the Works (SCB 59 [59]). The parties have agreed in the special case that parts of the Works are literary or artistic works in which copyright subsists under s. 32 of the *Copyright Act* (SCB 59 [58]).

44. The defendant accepts, as it has done in the Cascade Coal proceeding, that the Works constitute information obtained in connection with the administration or execution of the *Mining Act* within the meaning of cl. 11(1) of Schedule 6A. Clause 11(1) is therefore enlivened, so that the Directors-General are authorised to use or disclose the Works or any information contained therein for the purposes specified in cl. 11(1). However, for the reasons given in the Cascade Coal proceeding, there is no inconsistency between cl. 11 and the *Copyright Act* and no part of cl. 11 is rendered inoperative by s. 109 of the *Commonwealth Constitution.*

VII ESTIMATE OF TIME

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

[27] Enid Campbell, *Parliamentary Privilege in Australia* (1966) at 23-27; *Constitution Act 1975* (Vic), s 19; *Parliamentary Privileges Act 1891* (WA) (54 Vict No 4); *Constitution Act 1934* (SA), s 9; *Constitution Act 1867* (Qld) (31 Vict No 38), s 40A; *Parliamentary Privilege Act 1858* (Tas) (22 Vict No 17).

Dated: 26 November 2014

M G Sexton SC SG
Telephone: 02 9231 9440
Fax: 02 9231 9444
Email: Michael_Sexton@agd.nsw.gov.au

Stephen Free
Telephone: 02 9233 7880
Fax: 02 9232 7626
Email: stephenfree@wentworthchambers.com.au

Zelie Heger
Telephone: 02 9101 2307
Fax: 02 9232 7626
Email: zheger@wentworthchambers.com.au