IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S206 of 2014

BETWEEN:

CASCADE COAL PTY LIMITED

(ACN 119 180 620)

First Plaintiff

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MT PENNY COAL PTY LIMITED

(ACN 139 010 209)

Second Plaintiff

GLENDON BROOK COAL PTY LIMITED

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(ACN 139 009 000)

Third Plaintiff

and

THE STATE OF NEW SOUTH WALES

Defendant

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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.

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Intervener's submissions

Filed on behalf of the Attorney-General for the State of Queensland
Form 27C
Dated: 2014
Per Wendy Ussher
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PART II: ISSUES

2. The issues are reflected in the questions for the Court's opinion, which are set out on page 15 of the Special Case. They are:

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

   (b) Is clause 11 of Schedule 6A to the *Mining Act 1992* (NSW) inconsistent with the *Copyright Act 1968* (Cth) and inoperative to the extent of that inconsistency?

   (c) Who should pay the costs of this Special Case?

PART III: BASIS OF INTERVENTION

3. The Attorney-General for the State of Queensland ("**Queensland**") intervenes under s 78A of the *Judiciary Act 1903* (Cth) in support of the Defendant.

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. Queensland intervenes to address questions (a) and (b) of the Special Case.

7. The plaintiff in S119 of 2014 (the ***Duncan proceeding***) makes submissions (***Duncan PS***) which advance three central propositions.[1] The Duncan PS are addressed to propositions 1 and 2. Queensland addresses those propositions in its submissions in the Duncan proceeding (***Duncan QS***).

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[1] Duncan PS [22].

8. The submissions of the Plaintiffs in this proceeding (***Cascade PS***) adopt the Duncan PS.[2] Similarly, Queensland in this proceeding adopts the Duncan QS.

9. The Cascade PS address proposition 3 and an argument that the impugned legislation is invalid for inconsistency with the *Copyright Act 1968* (Cth). The present submissions address those matters.

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Plaintiff proposition 3: The impugned provisions are not a law

10. The Plaintiffs submit that that Schedule 6A to the *Mining Act 1992* (NSW) is not a 'law'.[3] This is really the obverse of the Plaintiffs' proposition 2 which is addressed in the Duncan PS.[4]

11. Queensland submits that Schedule 6A is a law, for reasons given in answering proposition 2 in the Duncan QS[5] and developed further below.

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A statute made by the Parliament is a law

12. The plaintiffs refer to the power of the New South Wales Parliament under s 5 of the *Constitution Act 1902* (NSW) to make laws for the peace, welfare and good government of the State in all cases whatsoever.[6]

30 13. The Parliament's powers even before the *Constitution Act* were as large and of the same nature as those of the Imperial Parliament itself.[7]

14. Subsection 2(2) of the *Australia Act 1986* (Cth) does not affect that understanding. It provides in part that:

> ... 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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2 Cascade PS [7].
3 Cascade PS [8](a).
4 Duncan PS [39]-[68].
5 Duncan QS [34]-[83].
6 Cascade PS [9].
7 *Powell v Apollo Candle Co Ltd* (1885) 10 App Cas 282.

15. That provision refers to the legislative powers of the State and Imperial Parliaments. It does not affect non-legislative powers.

16. In *Kable v Director of Public Prosecutions (NSW)* (***Kable***),[8] Dawson J traces a long and consistent line of authority relating to the supremacy of Parliament.[9] It suffices for present purposes to note that the plenary law-making power of the Parliament was recognised as such 'even in an era when emphasis was given to the character of colonial legislatures as subordinate law-making bodies'.[10]

17. Queensland submits that the orthodox understanding that this lawmaking power is plenary in nature and unlimited as to subject-matter should not be disturbed.

18. The plaintiffs cite Dawson J's reasons in *Kable* to the effect that for the purposes of s 5 of the *Constitution Act*, 'law' means 'statute'. The plaintiffs seek to dilute that statement on the basis that his Honour was in dissent in *Kable*.[11] While Dawson J was in dissent in the result, his Honour's view of s 5 of the *Constitution Act* was explicitly supported by Brennan CJ and McHugh J, and implicitly by Toohey J.[12] While Gaudron and Gummow JJ did not expressly consider the point, their reasons can only be understood on the basis that the impugned law was indeed a law.

Legislative power may be exercised in relation to specific subject-matter

19. In *Randwick City Council v Minister for the Environment*[13] the Full Court of the Federal Court of Australia approved the following statements of the learned authors de Smith, Woolf and Jowell:[14]

> Other criteria for distinguishing legislative from administrative acts appear in ordinary linguistic usage. In the first place, every measure duly enacted by Parliament is regarded as legislation. If land is compulsorily acquired by means of a Private Act of Parliament or a Provisional Order Confirmation Act, the acquisition is deemed to be a legislative act; though if the acquisition is effected by means of a

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8 (1996) 189 CLR 51 at
9 189 CLR at 71-76.
10 *Union Steamship Co of Australia v King* (1988) 166 CLR 1 at 9, cited in *Kable* 189 CLR at 71.
11 Cascade PS [10].
12 189 CLR at 64 (Brennan CJ), 91 (Toohey J) and 109 (McHugh J).
13 (1999) 167 ALR 115; 106 LGERA 47.
14 167 ALR 115, 134 [65]; 106 LGERA 47, 68-69 [65].

> compulsory purchase order made under enabling legislation, it will usually be classified as an administrative act ...[15]

20. The Plaintiffs submit that the recent trend of authority suggests a more restrictive reading of the term 'law' than that of Dawson J in *Kable*.[16] But the authorities cited do not amount to a trend, or are of limited persuasive value.

21. The plaintiffs refer[17] to *Grunseit v Commonwealth* (***Grunseit***).[18] That case concerned a distinction between legislative and executive powers, not legislative and judicial. In that context, Latham CJ said:[19]

> The general distinction between legislation and the execution of legislation is that legislation determines the content of a law as a rule of conduct or a declaration as to power, right or duty, whereas executive authority applies the law in particular cases.

22. Of that proposition, Gummow J (as a judge of the Federal Court of Australia) in *Queensland Medical Laboratory v Blewett* said:[20]

> However, to accept that proposition is not necessarily to accept the further proposition that to qualify as a law, a norm must formulate a rule of general application. The concept of law as a general command was a feature of Austinian positivism. But, as Professor Raz has pointed out, 'individual norms' which apply only to the action of a single person on a single occasion may still be classed as laws, and this is so although the operation of such laws must necessarily be upon particular cases.

23. See also examples of 'special legislation' cited in *Building Construction Employees and Builders' Labourers Federation (NSW) v Minister for Industrial Relations*.[21]

Legislative power may be exercised to extinguish specific rights

24. In *Newcrest Mining (WA) Ltd v The Commonwealth*,[22] this Court considered the effect of proclamations made under s 7(8) of the *National Parks and Wildlife Conservation Act 1975* (Cth), extending the area of Kakadu National Park. Section 10(1A) of the Act prohibited the 'the recovery of minerals' from Kakadu National Park. This Court found

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15 De Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (5th Edition, 1995).
16 Cascade PS [10].
17 Cascade PS [12].
18 (1943) 67 CLR 58.
19 (1943) 67 CLR 58 at 82.
20 (1988) 84 ALR 615, 635.
21 (1986) 7 NSWLR 372, 390 (Kirby P).
22 (1997) 190 CLR 513.

that the proclamations were invalid to the extent that they effected an acquisition of property other than on just terms. There was no suggestion in the case that s 7(8) or 10(1A) was not a law.

25. In *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (***BLF Case***),[23] this Court considered a Commonwealth Act that empowered a Minister to order that a particular union be deregistered. At the time, the union was engaged in litigation challenging a declaration by the Conciliation and Arbitration Commission that union employees had contravened certain undertakings and agreements. The effect of the declaration was to empower the Minister under the Act to order that the union be deregistered, and the Minister had so ordered.

26. The union's principal submission was that the Act was invalid because it amounted to an exercise of judicial power. The Court held that the legislation was valid and not an exercise of judicial power. The Court said:[24]

> ... [there is no support] for the contention that the provisions in Ch III governing the judicial power prevent the Parliament from exercising its legislative power so as to abrogate or alter rights and liabilities which would otherwise be subject to a judicial determination.
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> ...
>
> It matters not that the motive or purpose of the Minister, the Government and the Parliament in enacting the statute was to circumvent the [legal] proceedings [brought by BLF against the Minister] and forestall any decision which might be given in those proceedings.

27. As demonstrated in Queensland's submissions in the Duncan proceeding[25], a statute may deal with the subject-matter of a pending judicial proceeding,[26] even if to do so amounts to the exercise of judicial power.[27] In keeping with the nature of the law-making power, the motive of the government or the legislature in enacting such a law is

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23 (1986) 161 CLR 88.

24 161 CLR at 96-97.

25 Duncan QS [65]-[69].

26 *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88; *Building and Construction Employees and Builders Labourers' Federation (NSW) v Minister for Industrial Relations* (1986) 7 NSWLR 372; *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547.

27 *Building and Construction Employees and Builders Labourers' Federation (NSW) v Minister for Industrial Relations* (1986) 7 NSWLR 372 at 381 (Street CJ), 410 and 413 (Mahoney JA); *Lay v Employers Mutual Ltd* (2005) 66 NSWLR 270, at 287 [50], 290 [59].

irrelevant.[28] If the Parliament may deal with the subject-matter of pending judicial proceedings, *a fortiori* it may deal, as here, with rights that are not the subject of pending judicial proceedings.

Contrast with judicial and executive power

28. In contrast to judicial power, it is often said that the defining characteristic of legislative power is that by legislative enactment, it creates or determines (but not by way of inquiry, but by exercise of discretion and power) what the content of the law will be, and includes the power to change the law. In the *Boilermakers' Case*, the majority said:[29]

> Legislative power is very different in character to judicial power: the general authority of the Parliament of the Commonwealth to make laws upon specific subjects at discretion bears no resemblance to the judicial power.

29. Justice Holmes said in *Prentis v Atlantic Coast Lin Co*:[30]

> A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power ... And it does not matter what inquiries may have been made as a preliminary to the legislative act. Most legislation is preceded by hearings and investigations. But the effect of the inquiry, and of the decision upon it is determined by the nature of the act to which the inquiry and decision lead up ... The nature of the final act determines the nature of the previous inquiry. As the judge is bound to declare the law he must know or discover the facts that establish the law. So when the final act is legislative the decision which induces it cannot be judicial in the practical sense, although the question considered might be the same that would rise in the trial of a case.

30. Legislative power is often also defined by contrast with executive power:[31]

> The general distinction between legislation and the execution of legislation is that legislation determines the *content of a law* as a rule of conduct or a declaration as to power, right or duty, whereas executive authority applies the law in particular cases'.

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28 *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88, 96-97; *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547, 561 [12].

29 *R v Kirby; Ex Parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 279-80 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

30 211 US 210, 226-7 (1908); [53 Law. Ed. 150, 158-9], cited referred to in *R v Davison* (1954) 90 CLR 353, 370 (Dixon CJ and McTiernan J).

31 *Commonwealth v Grunseit* (1943) 67 CLR 58, 82. See also *Minister for Industry and Commerce v Tooheys Ltd* (1982) 60 FLR 325, 331.

31. In cases where there is doubt about the nature of the power exercised, assistance in determining its nature can be derived by giving consideration to the 'character of the body on which the power is conferred'.[32]

Limitations on law-making power

32. The only recognised limitations on the law-making power of the State Parliaments are:

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(a) the entrenchment of 'manner-and-form' provisions;[33]

(b) express and implied limitations arising from the Commonwealth Constitution.[34]

33. The Plaintiffs do not suggest that the former is engaged in this case.

34. The Plaintiffs' attempt to extrapolate the *Kable* and *Kirk* principles into a rule that the State Parliaments cannot exercise judicial power should be rejected for the reasons

20 given in Queensland's submissions in the Duncan proceeding.[35]

Characteristics of a law

35. The following characteristics of a law may be drawn from these authorities:

(a) generally, every measure duly enacted by Parliament can be regarded as legislation;

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(b) legislation which abrogates or alters rights and liabilities (including proprietary rights, mining interests or a right for an entity to exist, conferred by statute) may be legitimately passed in respect of individual corporate or other legal entities or organisations;

(c) the motive of the legislature for passing such a law is irrelevant, even if it is to forestall potential legal proceedings which might be brought against the State.

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32 *R v Ludeke; Ex parte Australian Building Construction Employees' and Builders Labourers' Federation* (1985) 159 CLR 636, 655. See also *McWilliam v Civil Aviation Safety Authority* (2004) 142 FCR 74, 83-84 and authorities cited there.

33 *Australia Act 1986* (Cth), s 2(2).

34 E.g. Commonwealth Constitution, s 109; the *Kable* principle; and the implied freedom of political communication recognised in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

35 Duncan QS [24]-[33].

Characteristics of the impugned provisions

36. The impugned provisions here fit comfortably within that understanding. As Queensland has noted in relation to proposition 2,[36] the *Mining Act* establishes a general scheme for the grant of statutory licences to explore for and recover minerals. There is no dispute that the general scheme is a law. Schedule 6A is not different in kind from the general scheme. It declares the legal effect of certain previously granted licences. It 10 'determines the content of a law as … a declaration as to power, right or duty'.[37]

37. The key features of Schedule 6A, relevant for present purposes, which demonstrate that it represents a conventional exercise of legislative power are as follows:

(a) it is a duly enacted law of the NSW Parliament, not a decision of a court;

(b) it does not address itself to resolving a controversy or deciding any question of 20 law which had arisen between any parties, including between the State and another party;

(c) the purpose of the Parliament in enacting it was not to conduct an inquiry into the current state of the law or attempt to make any findings of fact relevant to a controversy between parties;

(d) the NSW Parliament did not apply existing law to facts as found by it, and 30 issue any judgment, instead, it created new law;[38]

(e) the NSW Parliament had already satisfied itself of certain facts (that relevant exploratory licences had been issued through tainted processes) which appear to have motivated the legislature to enact Schedule 6A, the motive for legislation being irrelevant to its validity;

(f) the purposes of the Parliament in enacting Schedule 6A were, *inter alia*, to 40 restore public confidence in the allocation of the State's valuable mineral resources, to promote integrity in public administration, and to place the State, as nearly as possible, in the same position as it would have been had the relevant licences not been granted (these are broad policy objectives, usually

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36 Duncan QS [34]-[54].

37 *Grunseit v Commonwealth* (1943) 67 CLR 58 at 82.

38 Schedule 6A, clause 3(d) provides that it does not preclude actions for personal liability against individuals, including public officials, which might arise from the tainted processes.

characteristic of the exercise of legislative or executive power, not judicial power);

(g) those purposes were to be achieved by the specific provisions of Schedule 6A, which were to:

(i) cancel the relevant licences;

(ii) ensure the State had the opportunity of issuing new licences in respect of the relevant mining interests;

(iii) ensure that no person, whether or not personally implicated in any wrongdoing, could benefit from the tainted processes;

(iv) to protect the State against potential for further loss or damage and claims for compensation without precluding actions for personal liability against individuals, including public officials who had been implicated in the tainted processes (making it clear Parliament had no intention of making any findings in respect of guilt or innocence).

The Plaintiffs' submissions

38. The Commonwealth's submission in *Plaintiff S157/2002 v Commonwealth*[39] of a hypothetical law conferring an open-ended administrative discretion with respect to the entry of aliens was not 'rejected' as the Plaintiffs here submit[40] but doubted.[41] In any event, of course, the submission concerned a hypothetical law.

39. The *Work Choices Case* is equally unhelpful to the Plaintiffs.[42] The cited passage from the reasons of the plurality merely describes a union's submissions.[43] That submission was rejected because it was erroneous in four respects arising from the construction of the statute.[44] In any event, the impugned provision there was a regulation-making power, which is not at all comparable with the impugned provisions here, which could hardly be more clear or definite in their scope and effect.

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39 (2003) 211 CLR 476 at 512 [100]-[101].
40 Cascade PS [10].
41 (2003) 211 CLR 476 at 513 [102].
42 Cascade PS [13].
43 *Australian Workers' Union v Commonwealth* (2006) 229 CLR 1 at 176 [400] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).
44 229 CLR at 178-181 [407]-[417].

40. It does not follow that because similar words are used in the chapeau of s 51 of the Commonwealth Constitution and in s 5 of the *Constitution Act 1902* they must bear the same meaning.[45] The history of the New South Wales and Commonwealth legislatures are quite different, as Dawson J's reasons in *Kable* demonstrate. The nature of the two legislatures is also quite different. The New South Wales legislature's powers are plenary and those of the Commonwealth are limited.

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41. As to the Plaintiffs' three reasons why the word 'laws' should bear the same meanings in the two constitutions:[46]

(1) The circumstance that the *Constitution Act 1902* was enacted after the Commonwealth Constitution can have little if any weight. The form of words used owes more to previous versions of the New South Wales constitution than to the Commonwealth Constitution. Many former British colonies established constitutions before 1902, but idiosyncratic interpretations of them cannot affect the meaning of s 5. In any event, Latham CJ's interpretation of the chapeau to s 51 lay decades into the future.

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(2) Section 5 of the *Constitution Act* is subject to the *Commonwealth of Australia Constitution Act*. The State constitutions were continued, subject to the Commonwealth Constitution, as at the establishment of the Commonwealth, until altered in accordance with the State constitutions: s 106. It is not expressly provided that a State constitution that is altered after the establishment of the Commonwealth is subject to the Commonwealth Constitution. Moreover, every power (not just every law-making power) of a colonial parliament, unless it is exclusively vested in the Commonwealth Parliament, continues as at the establishment of the Commonwealth: s 107. But in any event, any subjection of State constitutions to the Commonwealth Constitution does not have the result that words in a State constitution that had an established meaning are now taken to have a narrower meaning.

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45 Cascade PS [14].

46 Cascade PS [9]-[26].

(3) Section 109 relates to inconsistency of Commonwealth and State laws, not the validity of State laws by reference to State constitutions. The statements in *Ex parte McLean*[47] and *Momcilovic v The Queen*[48] are of limited assistance because they are made in the context of s 109 inconsistency, not of consideration of what is and is not a State law. Indeed, in *Momcilovic* Gummow J expressly confined his remarks to the context of s 109.[49]

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42. The Plaintiffs' reliance on the full faith and credit provisions of the Commonwealth Constitution is misplaced.[50] Their submissions claim that ss 51(xxv) and s 118 distinguish between laws and judicial proceedings of the States. But neither provision makes a distinction. Rather, they conflate those proceedings with other public acts and records. That is not surprising in the context of the provisions, whose purpose is to ensure the recognition throughout the Commonwealth of the public acts and records of
20 the States. Both provisions treat legislative and judicial acts in the same way.

43. The Plaintiffs' reliance on *The Thrasher*[51] may be dismissed at once for several reasons, of which it suffices to mention two. First, the constitutional history of British Columbia is far removed from that of New South Wales. Second, the Supreme Court's judgment turned on the power of the provincial legislature to regulate the procedure of the Court. In that regard, the Court was more concerned with construing the words 'administration
30 of justice' as the subject-matter of the law-making power, rather than with what is and is not a 'law'. The Court's conclusion that s 92 of the *British North America Act 1867* (Imp) did not include power to make laws with respect to executive and judicial functions was simply the result of its construction of s 92, and involved no constitutional considerations that are relevant here.

44. The Plaintiffs' submission that the absence of an inherent power to punish for
40 contempt[52] confuses the powers of the separate houses to punish for contempt with the

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47 (1930) 43 CLR 472, 483 (Dixon J) cited at Cascade PS [15].

48 (2011) 245 CLR 1, 136 [326] (Hayne J) cited at Cascade PS [16]; 245 CLR at 106-107 [226, 229, 232, 233] (Gummow J) cited at Cascade PS [17]-[18].

49 245 CLR at 106 [226, 229], cited at Cascade PS [17].

50 Cascade PS [20].

51 *Sewell v British Columbia Towing and Transportation Co Ltd (The 'Thrasher')* (1882) 1 BCR (Pt 1) 153 cited at Cascade PS [22-23].

52 Cascade PS [24-25].

law-making power of the Parliament under s 5 of the *Constitution Act*. The inherent powers of the houses is irrelevant; the present issue is about the extent of the law-making power of the Parliament as a whole.[53] That power clearly extends to conferring a statutory power to punish for contempt: *Constitution Act*, s 7.

Conclusion – Plaintiffs' proposition 3

10 45. Ultimately, Queensland submits that the enactment of the impugned provisions was not a judicial act but a legislative act. The reasons for this Court's unanimous judgment in the *BLF case* in relation to the registration and deregistration of industrial organisations are directly applicable to the issue and cancellation of exploration licences:[54]

> Just as it is entirely appropriate for Parliament to select the organizations which shall be entitled to participate in the system of conciliation and arbitration, so it is appropriate for Parliament to decide whether an organization so selected should be subsequently excluded and, if need be, to exclude that organization by an exercise of legislative power.

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46. In the same way, it is entirely appropriate for the New South Wales Parliament to prescribe a process for the issue of exploration licences to applicants under the statutory procedure, and it is equally appropriate for the Parliament to decide for whatever reasons it thinks fit to cancel any such licences.

Section 109 inconsistency

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47. Queensland adopts the Defendant's submissions as to whether clause 11 of schedule 6A is inconsistent with the *Copyright Act*.

PART II: ESTIMATE OF TIME REQUIRED FOR ORAL ARGUMENT

48. The Attorney-General estimates that 15 minutes should be sufficient to present his oral argument.

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Dated: 12 November 2014.

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53 The ***Legislature*** means the Queen with the advice and consent of both Houses: *Constitution Act*, s 3.

54 *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88, 95 (Gibbs CJ, Mason, Brennan, Deane and Dawson JJ).

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