IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S119 of 2014

BETWEEN

TRAVERS WILLIAM DUNCAN
Plaintiff

AND

STATE OF NEW SOUTH WALES
Defendant

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ANNOTATED

PLAINTIFF'S SUBMISSIONS

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Date of Document: 22 October 2014

Filed on behalf of Plaintiff by
Yeldham Price O'Brien Lusk
Level 2, 39 Martin Place
Sydney NSW 2000

DX 162 SYDNEY
Tel: 02 9231 7000
Fax: 02 9231 7005
Reference: Timothy Price

I INTERNET PUBLICATION

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

II ISSUES

2. The issues that arise are as follows:

   (a) Does Chapter III of the *Constitution* preclude the exercise of judicial power by State legislatures?

   (b) Does Schedule 6A to the *Mining Act 1992* (NSW) (**the Act**), in whole or in part, constitute an exercise of judicial power, with the result that it is invalid?

   (c) Is Schedule 6A to the Act invalid by reason of failing to answer the description of a "law" within the meaning of s 5 of the *Constitution Act 1902* (NSW)?

III NOTICE OF CONSTITUTIONAL MATTER

3. The Plaintiff has served notices under s 78B of the *Judiciary Act 1903* (Cth).

IV REASONS FOR JUDGMENT IN COURT BELOW

4. This proceeding is brought in the original jurisdiction of the High Court conferred by s 30(a) of the *Judiciary Act 1903* (Cth).

V MATERIAL FACTS

5. The material facts are contained in the Special Case ("**SC**"), though it is convenient to highlight the following matters.

6. On 12 November 2012, the Independent Commission Against Corruption commenced a public inquiry in respect of an investigation styled "Operation Jasper" (SC [20]). That inquiry concerned, amongst other things, the circumstances in which a mining exploration licence in respect of the area known as Mount Penny had been granted, in mid-2009, in favour of Cascade Coal Pty Ltd ("**Cascade Coal**"), of which, at the time of that grant, the Plaintiff had been a director and in which he remains a substantial shareholder.

7. The Mount Penny exploration licence was held through a wholly-owned subsidiary of Cascade Coal, namely, Mt Penny Coal Pty Ltd ("**Mt Penny Coal**") (SC [12]). That company had, on 20 December 2010, lodged an application, under what was then Pt 3A of the *Environmental Planning and Assessment Act 1979* (NSW) ("**the Planning Act**"), for project approval in respect of a proposed open cut coal mine at Mount Penny ("**the**

Part 3A Application") (SC [13]). As at the date of enactment of the legislation impugned in these proceedings, that application remained pending.

8. Another wholly-owned subsidiary of Cascade Coal, Glendon Brook Coal Pty Ltd ("**Glendon Brook Coal**"), had been granted an exploration licence in respect of the area known as Glendon Brook on 21 October 2009.

9. On 31 July 2013, following the conclusion of the public inquiry in respect of Operation Jasper, ICAC provided copies of a report entitled "Investigation into the Conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and Others", which recorded its findings in relation to that investigation, to the Presiding Officers of the Legislative Assembly and the Legislative Council. The Report was made public shortly thereafter (SC [22]).

10. ICAC found that various directors and shareholders of Cascade Coal had engaged in corrupt conduct within the meaning of the *Independent Commission Against Corruption Act* 1988 (NSW). This finding did not extend to participation in what was found to be a corrupt agreement between the former Minister for Mineral Resources, Mr Ian Macdonald, and members of the Obeid family, and it pertained to matters *after* the granting of the exploration licences to Mt Penny Coal and Glendon Brook Coal.

11. On 18 December 2013, a further report by ICAC, entitled "Operations Jasper and Acacia – Addressing Outstanding Questions", was made public (SC [26]). This further report contained recommendations favouring the cancellation, by various means, of certain authorities granted under the Act, including the exploration licences in respect of Mount Penny and Glendon Brook (SC [28]).

12. On 19 December 2013, the Director-General of the New South Wales Department of Trade and Investment invited Mt Penny Coal and Glendon Brook Coal to make submissions as to why the New South Wales Government should not act on ICAC's recommendation to cancel the Mount Penny and Glendon Brook exploration licences (SC [29]). Submissions were provided in response to this invitation both by Mt Penny Coal and Glendon Brook Coal and by the Plaintiff on or before 15 January 2014 (SC [30]), though these were not laid before the New South Wales Parliament before the enactment of the impugned legislation.

VI ARGUMENT

Legislative scheme

13. The Act makes provision for the creation and cancellation of authorities that are defined as meaning "an exploration licence, an assessment lease or a mining lease". Division 3 of Pt 7 of the Act specified grounds for cancellation of such authorities (s 125); prescribed a procedure to be followed prior to cancellation, including the giving of notice and an opportunity to make representations, and imposed a requirement on the decision-maker to take such representations into account (s 126); and provided for appeals against decisions concerning cancellations to the Land and Environment Court of New South Wales (s 128).

14. Schedule 6A was inserted into the Act by the *Mining Amendment (ICAC Operations Jasper and Acacia) Act 2014* (NSW) ("**the Amending Act**") on 31 January 2014.

15. Schedule 6A was passed upon "[t]he Parliament, being satisfied because of information that has come to light as a result of investigations and proceedings of the Independent Commission Against Corruption known as Operation Jasper and Operation Acacia, 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 (the ***tainted processes***)": cl 3(1).

16. That satisfaction as to a factual state of affairs amounts to a "finding" of fact by the New South Wales Parliament.

17. Consequent upon the "finding", and wholly bypassing the procedure prescribed in Div 3 of Pt 7 of the Act, Parliament, by cl 4(1), purported to cancel three specific exploration licences and, by cl 5(1), a "Part 3A project or concept plan application (within the meaning of Schedule 6A to the Planning Act) made by Mount Penny Coal Pty Ltd (reference number MP 10_0234)" was declared to be "void and of no effect".

18. The cancellation of the three exploration licences was thus by direct legislative action rather than by the procedure prescribed by Div 3 of Pt 7 of the Act, which involved an exercise of executive power subject to judicial review.

19. Clause 6 of Sched 6A, akin to a condition of a judicial order for rescission of a contract, provided for the refund of fees payable in relation to the making of an application for an exploration licence and the Part 3A project or concept plan application.

20. Clause 7 provided that no compensation was payable for cancellation of the exploration licences or for the voiding of the Part 3A Application.

21. Clauses 9 to 11 of Schedule 6A erect a regime pursuant to which Cascade Coal or Mt Penny Coal is obliged to provide reports and, more importantly, exploration information – that is, the results of any tests or studies conducted in the course of their prospecting activities at Mount Penny – to the New South Wales Government without any compensation and without the protections otherwise afforded to intellectual property rights.

Invalidity

22. The Plaintiff advances three central propositions as follows:

(a) **Proposition 1:** it is beyond the competence of the Parliament of New South Wales to exercise judicial power because that is precluded by the exhaustive prescription, by Chapter III of the Commonwealth *Constitution*, of an integrated system for the exercise of judicial power under the ultimate superintendence of the High Court;

(b) **Proposition 2:** the impugned legislation, properly characterised, constitutes an exercise of judicial power because it purports to determine pre-existing rights and duties. In substance and practical effect, it metes out punishment or imposes a penalty on a particular party, namely Cascade Coal (and indirectly, but in substance, its shareholders), in light of adverse findings of "serious corruption", made by the Parliament itself in respect of past conduct. It is akin to a bill of pains and penalties, a classic example of an exercise of judicial power (although it does not need to meet that description for it to amount to an exercise of judicial power);

(c) **Proposition 3:** further or alternatively, the impugned legislation is not a "law" within the meaning of s 5 of the *Constitution Act 1902* (NSW), and is invalid for that reason. As a matter of substance and practical effect, it does not involve the creation of new rights or duties or the determination of "the content of a law as a rule of conduct or a declaration as to power, right or duty" but rather entails a determination of existing rights and duties.

Proposition 1: Chapter III precludes the exercise of judicial power by state legislatures

23. The Parliament of New South Wales cannot validly exercise judicial power. This proposition is a necessary incident of the integrated system for the exercise of judicial power that is prescribed by Chapter III of the Constitution.

24. The proposition is not that there is a constitutional separation of powers in the states. In particular, the Plaintiff does not contest that State courts may exercise non-judicial powers.[1] Nor does the Plaintiff contest that state administrative bodies, not being courts, may exercise judicial power.[2]

25. The proposition is only that the exercise of judicial power in a State, consistent with Chapter III, must be amenable to the supervision of the Supreme Court of the State and, in turn, the 'final superintendence'[3] of the High Court of Australia. State parliaments, for historical and constitutional reasons, stand wholly outside of that integrated system of supervision and superintendence. It follows that they are incompetent to exercise the judicial power of the state. This argument is elaborated in what follows.

26. Chapter III of the Constitution establishes an integrated system for the exercise of the judicial powers of the Commonwealth and of the several states. The system is integrated in the sense that, since the passage of the Australia Acts 1986, Commonwealth and state judicial powers alike are exercised exclusively under the ultimate superintendence of the High Court.

27. The judicial powers of the several states are subjected to that superintendence by the combined operation of two complementary constitutional structures. First, s 73(ii) entrenches, subject only to exceptions and regulations made by the Commonwealth Parliament, an avenue of appeal to the High Court from the Supreme Court of a State.[4] Secondly, the Constitution entrenches the supervisory jurisdiction of those same

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[1] See, eg, *Kable v DPP (NSW)* (1996) 189 CLR 51.

[2] See, eg, *Trust Company of Australia Ltd (t/as Stockland Property Management) v Skiwing Pty Ltd (t/as Café Tiffany's)* (2006) 66 NSWLR 77, 83 [26] (Spigelman CJ); *Orella-Fuentes v Standard Knitting Mills Pty Ltd* (2003) 57 NSWLR 282, 290 [39] (Ipp JA).

[3] *Kable v DPP (NSW)* (1996) 189 CLR 51, 138 (Gummow J); *K-Generation Pty Limited v Liquor Licensing Court* (2009) 237 CLR 501, 529 [87] (French CJ).

[4] See *Peterswald v Bartley* (1904) 1 CLR 497, 499; *Sue v Hill* (1999) 199 CLR 462, 485 (Gleeson CJ, Gummow and Hayne JJ).

Supreme Courts to enforce the jurisdictional limits of inferior State courts and State administrative tribunals.[5]

28. Chapter III, therefore, does not only integrate federal and State courts in the administration of the judicial power of the Commonwealth. It also integrates the several judicial powers themselves in a closed, hierarchical system of law at the apex of which the High Court of Australia exercises its final superintendence. There is not only an *integrated* system of courts, but also an *exhaustive* system of courts and tribunals for the exercise of judicial power. It is exhaustive, not in the sense that there cannot be created new bodies vested with judicial power, but in the sense that there cannot be created new bodies vested with judicial power that stand outside of the supervisory mechanisms entrenched by Chapter III. As the Court explained:

> The supervisory jurisdiction of the Supreme Courts was at federation, and remains, the mechanism for the determination and the enforcement of the limits on the exercise of State executive and judicial power by persons and bodies other than the Supreme Court.[6]

29. The integrated and exhaustive system for the exercise of judicial power is hinged upon the constitutional position of the State Supreme Courts, the continued existence of which the *Constitution* presupposes. The *Constitution* entrenches the capacity of the State Supreme Courts to supervise the exercise of state judicial power through the granting of prerogative relief to correct jurisdictional error. In turn, it equally entrenches the supervision of those same Supreme Courts by the High Court exercising its appellate jurisdiction. In this way, the exercise of state judicial power, consistent with the constitutional structure, occurs only *within* the integrated and exhaustive system of law that is ultimately superintended by the High Court.

30. It hardly needs stating that the same is true of the judicial power of the Commonwealth as exercised by federal courts. Appeals from those courts, subject to exceptions and regulations, lie to the High Court under s 73(ii), while the judges of those courts are, without the possibility for exception, amenable to constitutional writs under s 75(v).[7]

31. The capacity of the State Supreme Courts to supervise the exercise of state judicial power is entrenched not simply because it was a "characteristic" of those courts at the time of

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[5] *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 580–581 [98].

[6] (2010) 239 CLR 531, 580–581 [98].

[7] See, eg, *Edwards v Santos Ltd* (2011) 242 CLR 421.

federation.[8] It is entrenched because it was, and remains, a "*defining*" characteristic. And it was, and remains, a "*defining*" characteristic precisely because of the high constitutional function and purpose that it serves: namely, that it is a necessary incident of the structural prescription for an integrated and exhaustive system for the exercise of judicial powers that cannot countenance "islands of power immune from supervision and restraint".[9]

32. If there were a body capable of exercising the judicial power of a state outside of the supervision of the Supreme Court of that state, then the Australian judicial system would cease to be integrated or exhaustive. The High Court would cease to exercise final superintendence over the exercise of judicial power. There would cease to be "but one common law in Australia which is declared by [the High Court] as the final court of appeal".[10] If there were such a body, it would operate as an "island of power" of the kind that Chapter III of the *Constitution* proscribes.

33. *Kirk v Industrial Court (NSW)*[11] holds that the Parliament of New South Wales is incompetent to create such an island of power by the purported deprivation of the Supreme Court of jurisdiction to grant certiorari for jurisdictional error.

34. It is a small step from that established constitutional principle (which is not challenged) to the proposition that neither may a State Parliament, exploiting its non-amenability to appeal or prerogative relief, act as the very same island of power itself. If it could exercise judicial power, it would do so necessarily outside of the integrated and exhaustive system for the exercise of judicial power and would do so beyond the final superintendence of the High Court. Chapter III denies to State parliaments competence to confer judicial power on any body beyond the supervision of the Supreme Court, and accordingly denies to those parliaments the competence to exercise judicial power for themselves.

35. The decision of the New South Wales Court of Appeal in *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations ("The*

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[8] *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 580–581 [97]-[98].

[9] (2010) 239 CLR 531, 581 [99].

[10] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 563.

[11] (2010) 239 CLR 531.

BLF Case"),[12] which held that it was open to the New South Wales Parliament to exercise judicial power, does not stand in the way of the Plaintiff's argument.

36. Apart from the fact that that decision is not binding on this Court, it was a case decided, consistent with the manner in which it was argued, on the basis of New South Wales constitutional law. Kirby P observed that the parties "conceded that the Australian Constitution was silent on the question" of whether the New South Wales Parliament can enact a legislative judgment.[13] Mahoney JA observed similarly that certain "considerations arising from the Australian Constitution" were "not directly relevant".[14] Priestley JA recorded that the "chief line of argument" was based on the state constitution.[15] No argument like the present plaintiff's argument, which is based on the text and structure of the Commonwealth *Constitution*, was advanced in *The BLF Case.*

37. The Court of Appeal's decision did not decide whether the Commonwealth *Constitution* denied the New South Wales legislature the ability to exercise judicial power. It appears to have been assumed that it did not. If, as the plaintiffs now contend, the *Constitution* does deny that power then, consistent with covering clause 5 of the *Constitution*, nothing in the State constitution can validly confer it.

38. Further, the reasoning of Street CJ must, with respect, be regarded as incorrect in light of *Kirk v Industrial Court (NSW).* For his Honour, the "compelling consideration" demonstrating the constitutional capacity of the New South Wales Parliament to exercise judicial power was this:

> Parliament has power to bring into existence a tribunal outside the regular court system and to authorise that tribunal to judge. It follows that Parliament must necessarily be the repository itself of that power to judge which it thus vests in another. To deny that power would strike down a major aspect of the public administration of this State.[16]

In fact, contrary to this reasoning, Parliament has no power to bring into existence such a tribunal. At the very least, in accordance with *Kirk v Industrial Court (NSW),* the Supreme Court of New South Wales must retain its supervisory jurisdiction to compel the tribunal's observance of its jurisdictional limits. And the High Court must, in turn,

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[12] (1986) 7 NSWLR 372.

[13] (1986) 7 NSWLR 372, 397.

[14] (1986) 7 NSWLR 372, 412.

[15] (1986) 7 NSWLR 372, 415.

[16] (1986) 7 NSWLR 372, 381.

retain its entrenched appellate jurisdiction to hear and determine an appeal from the Supreme Court. At least to this extent, Parliament cannot create a tribunal outside the regular court system.

Proposition 2: the impugned legislation constitutes an exercise of judicial power

39. Whether the impugned legislation involves a purported exercise of judicial power is a question of substance. A given power may have a "judicial" or "non-judicial" character in substance "[d]espite its form".[17] So also, "the practical, as well as the legal, operation of the law must be examined".[18] The mere fact that the power in question has been exercised by the Parliament, and not by a court, is not determinative of the substantive character of the power. It is true that many powers have "no *a priori* exclusive delimitation, but may be capable of assignment by Parliament in its discretion to more than one branch of government"[19] and it is true that a power may, therefore, sometimes take its constitutional character from the identity of its repository.[20] But the identity of that repository is only one aspect of the entire context to which regard must be had. The substantive character of a power falls to be identified according to an "evaluative process"[21] or "evaluative judgment".[22]

40. In carrying out that evaluative process, or in making that evaluative judgment, it is legitimate to "hav[e] regard to social values and the reasons for preserving the separateness of judicial power".[23] The social and constitutional values and reasons that sustain the quasi-separateness of *state* judicial powers may, of course, be different from the values and reasons that sustain the separateness of *Commonwealth* judicial power. That is because very different qualities of "separateness" may be involved. But attention to the *relevant* values and reasons legitimately, and necessarily, informs whether a given exercise of power should be characterised as "judicial power".

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[17] *Momcilovic v The Queen* (2011) 245 CLR 1, 65 (French CJ).

[18] *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323, 368.

[19] *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153, 178 (Isaacs J), quoted in *R v Quinn; Ex parte Consolidated Food Corporation* (1977) 138 CLR 1, 8 (Jacobs J).

[20] *Pasini v United Mexican States* (2002) 209 CLR 246, 253–254 [12]–[13] (Gleeson CJ, Gaudron, McHugh and Gummow JJ).

[21] *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 530 [90] (French CJ).

[22] *Wainohu v New South Wales* (2011) 243 CLR 181, 202 [30] (French CJ and Kiefel J).

[23] Leslie Zines, *The High Court and the Constitution* (5th ed, 2008) 221.

41. Judicial power "involves, as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation".[24] It is possible that a power may be "held to be judicial though no adjudication in a lis inter partes is involved".[25] It is necessary only that "in general the notion is there, *even if in the background*, of arbitrament upon a question as to whether a right or obligation in law exists".[26] Judicial power "brings about a conclusive determination as to ... *existing* rights and entitlements ... and ... *existing* duties and responsibilities".[27] Conversely, legislative and administrative powers do not "involve the determination of pre-existing rights and obligations" but rather involve "the creation of new rights and obligations for the future".[28]

42. The distinction between rights-determination and rights-creation does not, of course, rigidly demarcate a well-defined distinction between judicial and non-judicial power. But that is principally because it is recognised that an exercise of judicial power can sometimes be said to create rights and not merely determine them. Thus, in *Thomas v Mowbray*, Gleeson CJ said that "interfering with legal rights, and creating new legal obligations, is in truth a power that has been, and is, exercised by courts in a variety of circumstances".[29] That is distinctly *not* to say, however, that the exercise of a non-judicial power can ever finally determine existing rights.[30] At most, the exercise of a non-judicial power might involve a determination that operates as a factum for the creation of new rights.[31]

43. Significantly, in this context, the amenability to review of such an exercise of power has often been emphasised as a factor relevant to the characterisation of the power as non-

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[24] R *v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 374 (Kitto J).

[25] (1970) 123 CLR 361, 374 (Kitto J).

[26] (1970) 123 CLR 361, 374 (Kitto J) (emphasis added).

[27] *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83, 110 [41] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) (emphasis added).

[28] *Luton v Lessels* (2002) 210 CLR 333, 345 [22](Gleeson CJ)

[29] (2007) 233 CLR 307, 328 [15]. See also at 356–357 [116]–[121] (Gummow and Crennan JJ), 526 [651] (Heydon J).

[30] See *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 258 (Mason CJ, Brennan and Toohey JJ), 268 (Deane, Dawson, Gaudron and McHugh JJ), citing *Re Cram; Ex parte Newcastle Wallsend Coal Co Pty Ltd* (1987) 163 CLR 140, 149.

[31] See, eg, *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542, 597–598 (Crennan and Kiefel JJ); R *v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361.

judicial.[32] Consistent with this emphasis, the values and reasons that sustain the quasi-separateness of state judicial power include the necessity for certain kinds of decision to be made within institutions that are amenable to legal supervision and restraint, ultimately by the High Court. Decisions to create new rights and liabilities are not necessarily decisions of that character. But decisions to determine existing rights and liabilities *are* of that character. That is to say, there are powerful constitutional reasons to insist that the final determination of existing rights and liabilities take place within institutions that are limited by law, and that are amenable to having their legal limits enforced. Those reasons militate in favour of characterising any decision to determine existing rights and liabilities as having the character of "judicial" power.

44. The central vice of this kind within Schedule 6A is this: the impugned provisions purport to cancel exploration licences, and to achieve consequential ends, all predicated upon the existence of the *fact* 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": cl 3(1). "Serious corruption" is not defined in the impugned legislation, but it appears in the context of express reference to "proceedings of the Independent Commission Against Corruption": see cl 3(1) of Schedule 6A, and ss 8 and 12A of the *Independent Commission Against Corruption Act 1988* (NSW). It is apparent that the impugned legislation sets out to achieve its ends by reference to an *existing* fact or classification, and one that is at least cognate with, if not identical to, a concept employed within a well-established institutional context.

45. The plaintiffs do not complain about the capacity for governments and legislatures to respond, in appropriate circumstances, to findings of corruption. The constitutional vice in the impugned legislation is that the legislature has taken the extraordinary, and *ad hominem*, step of finding *for itself* the fact of "serious corruption" — and has done so outside of the constitutional system for the supervision and restraint of such findings. It has done so to an extent beyond the findings made by ICAC, in that ICAC found no wrongdoing by the Plaintiff in relation to the creation of the exploration licences. It may be that the legislation would have been valid if it provided for the cancellation of any exploration licences that were determined by ICAC, or by any other tribunal or by a Court, to be tainted by serious corrupt conduct. For in those circumstances, the

[32] *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542, 579 [100] (Hayne J). See also *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350, 363 [32] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ).

determination of serious corrupt conduct (as with an administrative decision to cancel a licence by the mechanism for cancellation contained in Div 3 of Pt 7 of the Act) would be amenable to the kind of supervision and restraint that characterises the integrated system for the exercise of judicial power referred to by this Court in *Kirk*. Instead, the legislature has purported to find the fact directly, and to impose penalties and declare certain applications "void". That finding and those consequences are not amenable to supervision, restraint, review or appeal. And yet, the finding operates in substance to determine in a conclusive and binding manner the rights of the holders of the exploration licences, and to impose a severe punishment in consequence.

46. Apart from the infirmity in the factual fulcrum upon which the entirety of Sched 6A depends for its efficacy, certain other features of the impugned legislation highlight that the legislature has purported to determine *existing* rights and liabilities, rather than to create new rights or liabilities.

47. Clause 3(1) of Schedule 6A includes among its purposes the placing of "the State, as nearly as possible, in the same position as it would have been had those relevant licences not been granted". Schedule 6A thus proceeds upon an assumption that the plaintiffs were never entitled to the benefit of the exploration licences granted in their favour. In other words, that schedule records, and gives effect to, the views of the New South Wales Parliament, not merely in relation to what the future entitlements of various parties should be, but also in relation to what their present entitlements are. This is indicative of the extent to which Schedule 6A trespasses upon what is properly the province of the judicature.

48. Clause 5 of Schedule 6A to the *Mining Act*, as already noted, deals with:

(a) any associated application, including the application for project approval lodged by the second plaintiff for the purposes of what was previously Part 3A of the *Environmental Planning and Assessment Act* 1974 (NSW) (**the EPA Act**); and

(b) any environmental assessment requirements notified by the Director-General of the Planning Department in respect of any project the subject of an associated application.

It deals with those matters by declaring, in unmistakably judicial language, that they are, "on the cancellation date, void and of no effect". Clause 5 is thus framed as a pronouncement upon the legal effect of steps taken pursuant to a statute, as distinct from an attempt at defining the rights and liabilities of parties such as the second plaintiff

by reference to whatever situation would have prevailed if, say, the associated applications had been void.

49. In this respect, cl 5 may be distinguished from provisions such as those considered by this Court in *R v Humby; Ex parte Rooney*[33] and *Re Macks; Ex parte Saint*,[34] in the sense that it does not merely alter the rights and liabilities of persons on the basis of a deemed or fictitious state of affairs relating to the validity of various steps. Nor does it alter the substantive law governing projects of the sort to which the associated applications related. Instead, it contains a declaration as to the juridical consequence, in the context of existing law, of an application that would, if valid, require consideration in the manner prescribed by what is now Schedule 6A to the EPA Act. In the plaintiffs' submission, that is quintessentially a pronouncement of a judicial character.

50. That the New South Wales Parliament has trespassed upon the province of the State judicature is made all the more apparent by cl 5(2) of Schedule 6A. That provision states, on the basis that the associated applications have been rendered void by cl 5(1), that "any such associated application is not to be dealt with any further under this Act or the Planning Act". Crucially, the direction issued in that subclause is not, in terms, addressed merely to those public officials or public authorities charged with administering the statutes to which it refers; it is also capable of being read – and should as a matter of ordinary English, be understood – as extending to any Court in which questions concerning the associated applications may come to be litigated. In other words, while cl 5(2) does not deny the Courts of New South Wales jurisdiction with respect to the associated applications, it does direct the manner and outcome of the exercise of that jurisdiction. It follows then that if such a law had been enacted by the Commonwealth Parliament, it would quite plainly constitute "an impermissible intrusion into the judicial power which Ch III vests exclusively in the courts which it designates".[35] The circumstance that cl 5(2) appears in a New South Wales statute does not make it any less an interference with, or a usurpation of, judicial power.

51. The matter may also be approached by asking whether or not Schedule 6A has the character of a bill of pains and penalties, noting that the enactment of such bills is

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[33] (1973) 129 CLR 231.

[34] (2000) 204 CLR 158.

[35] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 37 (Brennan, Dawson and Deane JJ).

equated to the exercise of judicial rather than legislative power. In the plaintiff's submission, what Schedule 6A relevantly does is to usurp any proper judicial inquiry[36] as to whether or not persons associated with Cascade Coal have been guilty of or associated with "serious corruption" so as to warrant the cancellation of their exploration licences, the declaring void of their Part 3A application, and the confiscation of their intellectual property.

52. The Parliament's finding, in cl 3(1) of Schedule 6A, of "serious corruption" is rendered in the passive voice, and therefore does not identify the persons whose conduct is said to have contributed to the "serious corruption" so resoundingly condemned in that provision. That being so, the expression "tainted by serious corruption" is sufficiently oblique or obscure to permit recourse, pursuant to s 34(1)(b)(ii) of the *Interpretation Act 1987* (NSW), to extrinsic materials in order to give it meaningful content. Those materials necessarily include the second reading speech made by the then Premier to the Legislative Assembly on introducing the Bill for the impugned legislation.

53. Caution requires that due recognition be given to the statement in the Premier's speech that "the action proposed in this bill does not stand or fall based on the finding or recommendations of [ICAC]".[37] The same might be said of the Premier's exhortation that "[h]aving regard to the information that has been exposed to public scrutiny, the Parliament itself can and should form its own view as to whether these licences should be cancelled".[38]

54. However, the Premier was not suggesting that Parliament ignore the findings of ICAC and examine afresh the evidence that was adduced during the course of Operation Jasper for the purpose of determining whether or not the Mount Penny Licence should be cancelled. Given that the Bill for the impugned legislation was first introduced in the Legislative Council on 30 January 2014 and passed by the New South Wales Parliament on 31 January 2014, it is simply not credible to say that Parliament undertook its own review of the evidence against those against whom ICAC had made adverse findings before sending the Bill to the Governor for her assent.

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[36] *Polyukhovich v The Commonwealth* (1991) 172 CLR 501, 647 (Dawson J). See also at 685–686 per Toohey J.

[37] Hansard, Legislative Assembly, 30 January 2014 at 31.

[38] Hansard, Legislative Assembly, 30 January 2014 at 31.

55. It is against that background that the following points should be noted in relation to the Premier's speech. First, in addressing the plight of "innocent" shareholders in companies such as Cascade Coal, the Premier said:[39]

> Whilst the Government believes that as a matter of principle the shareholders have no legitimate claim to compensation from the taxpayer, this is not to say that some shareholders should not feel aggrieved by what has happened. Their grievances should be properly directed to those individuals who were involved in, or at the very least had knowledge of, the wrongdoing that took place. The appropriate course of action is against the directors of the company if they can be shown to have breached their duties as directors.

Implicit in the above is an assertion that wrongdoing did take place and that the directors of the Plaintiffs were either involved in or had knowledge of it.

56. Secondly, the Premier sought to rebut any suggestion that the enactment of the impugned legislation would activate concerns about sovereign risk in investing in New South Wales as follows:[40]

> The greatest form of sovereign risk, the greatest threat to the stability and certainty needed by business in dealing with governments is the risk of corruption. It is the risk of corrupt public officials *and their private sector mates that will distort processes*, manipulate markets and will act for their own private benefit in secret deals at the expense of the public interest".
>
> (emphasis added)

57. The italicised words are of particular significance because ICAC found, in its report on Operation Jasper, that as at 2008 and 2009, the Plaintiff had a close friendship with the then Minister for Mineral Resources, Mr Ian Macdonald, and that Mr Macdonald had re-opened the expressions of interest process for the award of the exploration licence in respect of the Mount Penny area ("**the Mount Penny Licence**") at the request of, and in order to benefit, the Plaintiff. But ICAC also found that there was "insufficient evidence to establish that [the Plaintiff] put any pressure, inappropriate or otherwise, on Mr Macdonald to reopen the EOI process" and that this "preclude[d] a finding of corrupt conduct against [the Plaintiff] in connection with the reopening of the EOI process" (SCB 245).

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[39] Hansard, Legislative Assembly, 30 January 2014 at 32.

[40] Hansard, Legislative Assembly, 30 January 2014 at 32.

58. One then turns to consider what flowed from this finding. Most immediately was the cancellation of three exploration licences and the rendering void of the Part 3A application.

59. It is true that cl 3(2) of Schedule 6A has been drafted so as to attribute to the provisions following it the character of prophylactic measures taken to protect against the future consequences of the taint of "serious corruption" attaching to the grant of, say, the Mount Penny Licence. Thus, the cancellation of that licence is said to "ensure that the tainted processes have no continuing impact and cannot affect any future processes (such as for the grant of further authorities) in respect of the relevant land". Nonetheless, for the reasons developed below, the words of that provision cannot be determinative.

60. Article 1, s 9, cl 3 of the United States Constitution provides, in relation to Congress, that "[n]o Bill of Attainder or ex post facto Law shall be passed", and in a similar vein, Article 1, s 10, cl 1 prohibits the States from passing "any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts". The second of these provisions (together "**the Bill of Attainder Clause**") was considered at some length by the Supreme Court of the United States in *Cummings v Missouri*.[41] At issue in that case was the validity of a provision that had been inserted into the Constitution of Missouri in the aftermath of the Civil War which required persons to take an oath of loyalty, failing which they would be prohibited from teaching, preaching or officiating over marriages "as a bishop, priest, deacon, minister, or other clergyman". The oath in question included an affirmation that the person taking it had never given aid or comfort to persons engaged in hostility to the United States, and had never "been a member of, or connected with, any order, society, or organization, inimical to the government of the United States".

61. In his opinion for the Court, Field J posited a hypothetical law declaring that all priests and clergyman in the State of Missouri should be held guilty of having engaged in armed conflict with the United States, and thus deprived of any entitlement to preach or officiate over marriages, unless they performed certain acts by a prescribed date. There was no doubt in his Honour's mind that such a law would engage the Bill of Attainder Clause. His Honour then proceeded to observe that the only distinction between such a law and the amendment to the Missouri Constitution before the Court was "one of form

[41] 71 US 277 (1867).

only, and not of substance".[42] In particular, the impugned amendment was said to "presume the guilt of the priests and clergymen, and adjudge the deprivation of their right to preach or teach unless the presumption be first removed by their expurgatory oath – in other words, [it assumed] the guilt and adjudge[d] the punishment conditionally".[43] It was on this basis that the impugned amendment was held to be invalid.

62. *Cummings* has since been described as authority for the proposition that "legislative acts, *no matter what their form*, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution" (emphasis added).[44] Notwithstanding the absence of any analogue to the Bill of Attainder Clause in Australia's constitutional arrangements, there is no reason why a similar emphasis on substance should not also form part of the doctrine of this Court in so far as bills of pains and penalties are concerned.

63. Indeed, that appears to be the position favoured by authority. Something should be said at this point concerning the decision in *United States v Brown*.[45] The law impugned in that case was an Act which prohibited, subject to criminal sanction, a person who was, or who had been within the preceding five years, a member of the Communist Party from serving as an officer or as an employee of a labour union, except in a clerical or custodial position. This was said to be directed towards protecting the United States economy by minimising the danger of political strikes, and thus to be supported by the power of Congress to make laws "[t]o regulate Commerce with foreign Nations, and among the several States".

64. Nonetheless, the law was held to fall foul of the Bill of Attainder Clause. It is apparent from the opinion delivered by Warren CJ that Congress was regarded, first, as having determined that members of the Communist Party either had committed various acts or possessed certain traits which increased the likelihood of their initiating, or being involved in, political strikes, and secondly, as having imposed upon such persons the penalty of being precluded from meaningful participation in the affairs and management

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[42] 71 US 277, 324–325 (1867).

[43] 71 US 277, 325 (1867).

[44] *United States v Lovett*, 328 US 303, 315 (1946).

[45] 381 US 437 (1965).

of labour unions. This analysis indicates the extent to which, in circumstances where a law is said to amount to a bill of attainder, the character of that law does not depend upon legislative statements of protective intent.

65. Crucially, what was said in *Brown* informed the reasons of Dawson J and Toohey J in *Polyukhovich v The Commonwealth*;[46] hence, for example, Dawson J's remark that "a bill of attainder may designate the persons it seeks to penalize by means of some characteristic (such as membership of an organization) that is independent of and not equivalent to the criminal activity which it is the purpose of the law to prohibit or prevent".[47] This view found reflection in Toohey J's observation, in relation to bills of attainder directed at classes of persons, that "membership of a group would be a legislative assessment as to the certainty, or at least likelihood to the criminal standard of proof, of an accused doing certain acts or having certain intentions".[48] Again, the echoes of Warren CJ's analysis in *Brown* are plainly evident.

66. It follows then that the stated purposes in cl 3(1) of Schedule 6A to the *Mining Act* do not represent the final word in relation to the character, for present purposes, of that schedule. Significantly, the denial of any compensation for the cancellation of the exploration licences identified in cl 4 of Schedule 6A goes further than is necessary for achieving the avowed objective of ensuring that future governmental processes would not be affected by the taint of serious corruption in the past. The legislative fiat that there was to be no compensation was thus, on any view, punitive.

67. Further, and tellingly, cll 9 to 11 of Schedule 6A erect a regime pursuant to which Cascade Coal and its subsidiaries are obliged to provide reports and, more importantly, exploration information – that is, the results of any tests or studies conducted in the course of their prospecting activities at Mount Penny – to the New South Wales Government without any compensation and without the protections otherwise afforded to intellectual property rights. How can this be characterised other than as punishment or a penalty for perceived involvement in the "serious corruption" that tainted the grant of the exploration licences and to which the Premier referred in his second reading speech?

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[46] (1991) 172 CLR 501.

[47] (1991) 172 CLR 501, 647.

[48] (1991) 172 CLR 501, 686.

68. Here there has been a final determination of pre-existing rights, following the making of a "finding", the characterisation of that finding in terms of guilt and taint, and the visiting of dramatic penalties, the cancellation of valuable licences, the declaring void of a Part 3A application and a requirement to deliver up valuable intellectual property without compensation. Such an exercise of judicial power, wholly unreviewable, was not for the New South Wales legislature.

Proposition 3: clauses 3-11 of schedule 6A do not amount to a "law" within the meaning of s 5 of the *Constitution Act 1902* (NSW)

69. The Plaintiff adopts the written submissions of the plaintiffs in S206 of 2014 (**the Cascade proceeding**) in relation to this proposition.

VII APPLICABLE PROVISIONS

70. The applicable constitutional provisions and statutes as in force at the date of these submissions are set out in Annexure A.

VIII ORDERS SOUGHT

71. The questions stated for the opinion of the Full Court should be answered as follows:

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

   Answer: Clauses 1 to 13 of Schedule 6A to the *Mining Act 1992* (NSW) are invalid.

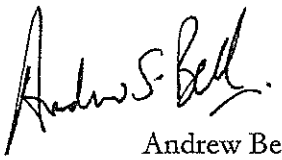
2. Who should pay the costs of this Special Case?

   Answer: The Defendant.

IX ESTIMATE OF TIME

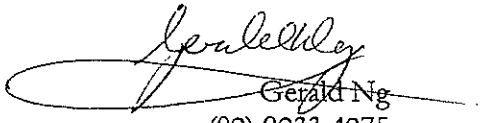
72. The Plaintiff will require, together with the plaintiffs in the Cascade proceeding, 3 hours for the presentation of their oral argument.

Date: 22 October 2014



Andrew Bell

Phone (02) 9233 1370
Fax (02) 9232 7626
Email asbell@wentworthchambers.com.au



Gerald Ng

Phone (02) 9233 4275
Fax (02) 9221 5386
Email gng@selbornechambers.com.au

Brendan Lim

Phone (02) 8228 7112
Fax (02) 9232 7626
Email blim@wentworthchambers.com.au

ANNEXURE A

Mining Act 1992 (NSW) as at 22 October 2014

Schedule 6A Cancellation of certain authorities

Part 1 Preliminary

1 Application

This Schedule has effect despite any other provision of this Act or the Planning Act.

2 Definitions

In this Schedule:

cancellation date means the date of assent to the *Mining Amendment (ICAC Operations Jasper and Acacia) Act 2014*.

conduct includes any statement, or any act or omission:

(a) whether unconscionable, negligent, false, misleading, deceptive or otherwise, and

(b) whether constituting an offence, tort, breach of contract, breach of statute or otherwise.

EL 7270 means the exploration licence referred to in clause 4 (1) (a).

EL 7405 means the exploration licence referred to in clause 4 (1) (b).

EL 7406 means the exploration licence referred to in clause 4 (1) (c).

Planning Act means the *Environmental Planning and Assessment Act 1979*.

relevant land means the exploration area of a relevant licence or any part of the exploration area of a relevant licence.

relevant licence means an exploration licence referred to in clause 4 (1) (a), (b) or (c).

statement includes a representation of any kind, whether made orally or in writing.

3 Purposes and objects

(1) The Parliament, being satisfied because of information that has come to light as a result of investigations and proceedings of the Independent Commission Against Corruption known as Operation Jasper and Operation Acacia, 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 (the *tainted processes*), and recognising the exceptional nature of the circumstances, enacts the *Mining Amendment (ICAC Operations Jasper and Acacia) Act 2014* for the following purposes:

(a) restoring public confidence in the allocation of the State's valuable mineral resources,

(b) promoting integrity in public administration above all other considerations, including financial considerations, and deterring future corruption,

(c) placing the State, as nearly as possible, in the same position as it would have been had those relevant licences not been granted, recognising that it is not practicable in the circumstances to achieve, through financial adjustments or otherwise, an alternative outcome in relation to the relevant licences based on what would have happened had the relevant licences been granted pursuant to processes other than the tainted processes.

(2) To those ends, the specific objects of the *Mining Amendment (ICAC Operations Jasper and Acacia) Act 2014* are as follows:

(a) to cancel the relevant licences and ensure that the tainted processes have no continuing impact and cannot affect any future processes (such as for the grant of further authorities) in respect of the relevant land,

(b) to ensure that the State has the opportunity, if considered appropriate in the future, to allocate mining and prospecting rights in respect of the relevant land according to proper processes in the public interest,

(c) to ensure that no person (whether or not personally implicated in any wrongdoing) may derive any further direct or indirect financial benefit from the tainted processes,

(d) to protect the State against the potential for further loss or damage and claims for compensation, without precluding actions for personal liability against individuals, including public officials, who have been implicated in the tainted processes and have not acted honestly and in good faith.

Note. The *Mining Amendment (ICAC Operations Jasper and Acacia) Act 2014* inserted this Schedule into this Act.

Part 2 Cancellation of exploration licences and related matters

4 Cancellation of certain exploration licences

(1) The following exploration licences are cancelled by this Schedule:

(a) exploration licence number 7270 dated 15 December 2008,

(b) exploration licence number 7405 dated 21 October 2009,

(c) exploration licence number 7406 dated 21 October 2009.

Note. EL 7270 was granted over certain land at Doyles Creek. EL 7405 was granted over certain land at Glendon Brook. EL 7406 was granted over certain land at Mount Penny.

(2) The cancellation takes effect on the cancellation date.

(3) The cancellation of an exploration licence by this Schedule does not affect any liability incurred before the cancellation date by or on behalf of a holder of a relevant licence or by or on behalf of a director or person involved in the management of a holder of a relevant licence.

5 Associated applications and actions expunged

(1) Any associated application lodged or made under this Act or the Planning Act before the cancellation date that was not finally disposed of before the cancellation date is, on the cancellation date, void and of no effect.

(2) Accordingly, any such associated application is not to be dealt with any further under this Act or the Planning Act.

(3) In this clause, *associated application* means:

(a) any application under this Act for the grant of an authorisation, or for the renewal or transfer of an authorisation, made:

(i) in connection with a relevant licence, or

(ii) in respect of relevant land by any person other than an excluded person, or

(b) a Part 3A project or concept plan application (within the meaning of Schedule 6A to the Planning Act) made by Mount Penny Coal Pty Ltd (reference number MP 10_0234), or

(c) any application under the Planning Act for consent or approval to carry out development on relevant land for any of the following purposes made by any person other than an excluded person:

(i) mining,

(ii) prospecting.

(4) An application for environmental assessment requirements made by NuCoal Resources Ltd under Part 2 of Schedule 2 to the *Environmental Planning and Assessment Regulation 2000* before the cancellation date (reference number SSD 5177) is, on the cancellation date, void and of no effect.

(5) Any environmental assessment requirements that have been notified by the Director-General (within the meaning of the Planning Act) as a consequence of an application made void by this clause are, on the cancellation date, void and of no effect.

(6) On the cancellation date, the Mount Penny Coal Project, being the project of that name that was, before the cancellation date, a transitional Part 3A project, ceases to be a transitional Part 3A project.

(7) To avoid doubt, *mining* and *prospecting* have the meanings given by this Act.

(8) In this clause:

environmental assessment requirements has the meaning given by Schedule 2 to the *Environmental Planning and Assessment Regulation 2000*.

excluded person means a person who is the holder of an authorisation in relation to relevant land that is in force (other than a relevant licence).

transitional Part 3A project has the same meaning as in Schedule 6A to the Planning Act.

6 Refund of fees paid in connection with relevant licences and associated applications

(1) The following fees are refundable:

(a) any application fee under section 13 (4) (c) paid for an application for a relevant licence,

(b) any application fee under section 33 (4) (c) for an application for an assessment lease, being an application fee paid for an application made void by this Schedule,

(c) any application fee paid under this Act for an application for a permit under section 252, being an application fee paid for an application made void by this Schedule,

(d) any fee paid in accordance with condition 56 (a) of EL 7270,

(e) any annual rental fee or administrative levy payable under Part 14A of this Act for the privilege of being the holder of a relevant licence, being a fee that has been paid or, but for this clause, would be payable,

(f) any amount the Minister required an applicant for a relevant licence to pay under section 67, where that requirement was made in connection with an application for a relevant licence,

(g) any fee an applicant for EL 7405 or EL 7406 was required to pay to the Department in the expression of interest process for that exploration licence, being a fee described as an assessment fee or a contribution to the Department's coal development fund,

(h) any other fee paid or payable to a public authority that is declared by the regulations to be refundable under this clause.

(2) A fee that is refundable under this clause:

(a) ceases to be payable, and

(b) if already paid, is to be refunded to the former holder of the relevant licence in connection with which it was paid, subject to subclause (3).

(3) A refund is to be paid from money to be appropriated by Parliament or otherwise legally available for that purpose.

(4) In this clause:

fee includes a charge or other amount.

7 Compensation not payable

(1) Compensation is not payable by or on behalf of the State:

(a) because of the enactment or operation of this Schedule, the *Mining Amendment (ICAC Operations Jasper and Acacia) Act 2014* or any Act that amends this Schedule, or

(b) because of any direct or indirect consequence of any such enactment or operation (including any conduct under the authority of any such enactment), or

(c) because of any conduct relating to any such enactment or operation.

(2) This clause extends to conduct and any other matter occurring before the commencement of this clause.

(3) This clause does not exclude or limit any personal liability of a person for conduct occurring before the grant of a relevant licence.

Note. However, clause 8 absolves the State and certain employees of the State from liability for such conduct.

(4) In this clause:

compensation includes damages or any other form of compensation.

the State means the Crown within the meaning of the *Crown Proceedings Act 1988* or an officer, employee or agent of the Crown.

8 State not liable for certain conduct

(1) The State is not liable, and is taken never to have been liable, whether vicariously or otherwise, for any conduct (*relevant conduct*) before the cancellation date in relation to a relevant licence or mining on relevant land (whether occurring before or after the grant of a relevant licence).

(2) In addition, the State is not liable, and is taken never to have been liable, whether under any contract, policy or other arrangement for self-insurance or otherwise, to indemnify any person against any personal liability of the person for relevant conduct.

(3) To remove doubt, this clause extends to the following conduct as relevant conduct:

(a) conduct that facilitated the grant of an authority in respect of relevant land or that facilitated mining on relevant land,

(b) conduct relating to the provision of assistance, advice or information (including mining information) in relation to relevant land or an authority for relevant land,

(c) conduct relating to the licensing process in connection with relevant land,

(d) any conduct occurring in the course of events that culminated in the grant of a relevant licence.

(4) This clause extends to all types of civil liability, whether at law or in equity, and whether arising in tort or contract, or under an enactment or otherwise.

(5) An employee (or former employee) of the State acting honestly and in good faith in the performance or purported performance of his or her functions as an employee of the State has the same protections and immunities as the State under this clause.

(6) This clause does not apply in respect of any liability arising solely in respect of an authority granted before the cancellation date that is not a relevant licence.

(7) This clause applies despite the *Law Reform (Vicarious Liability) Act 1983* and the *Civil Liability Act 2002*.

(8) In this clause:

employee of the State means a person employed under the *Public Sector Employment and Management Act 2002*.

licensing process means any practice, process or procedure relating to the obtaining of or grant of an authority, including in relation to expressions of interest, tenders, applications, investigations, inquiries or consents, and whether or not provided for by this Act.

mining includes prospecting.

mining information includes information about:

(a) the mineral bearing capacity of land, or

(b) the licensing process.

the State means the Crown in right of New South Wales and includes a statutory body representing the Crown.

Part 3 Information gathering, disclosure and use

9 Continuing obligation to provide reports

(1) The obligation of the holder of a relevant licence to provide a report under section 163C continues despite the cancellation of the licence under this Schedule.

(2) A reference in section 163C:

(a) to an authorisation includes a reference to a relevant licence cancelled by this Schedule, or

(b) to the holder of an authorisation includes a reference to a former holder of such a relevant licence.

10 Obtaining exploration information

(1) For the purposes of Part 12 (Powers of entry and inspection) of this Act, the obtaining of exploration information or any record of exploration information is considered to be for purposes connected with the administration of this Act.

(2) Accordingly, section 248B (Requirement to provide information and records) extends to authorise an inspector to require a person to furnish exploration information or any record of exploration information.

(3) Any core or sample that is exploration information furnished under section 248B becomes the property of the State.

(4) In this clause, *exploration information* means information obtained from, used for the purposes of or in connection with, or comprising the results of, any test, study, survey, analysis or research conducted by or on behalf of the holder of a relevant licence in respect of relevant land or a relevant licence and includes any core or sample taken on or from relevant land under a relevant licence.

11 Disclosure and use of information for future mining purposes

(1) The appropriate official may use or disclose any information obtained in connection with the administration or execution of this Act or the Planning Act in respect of a relevant licence or relevant land if the use or disclosure is in connection with any application or tender (or proposed application or tender) under this Act or any application under the Planning Act (whether or not in respect of relevant land) or is for any other purpose approved by the Minister.

(2) The *appropriate official* is:

(a) the Director-General under this Act in the case of information obtained in connection with the administration or execution of this Act, or

(b) the Director-General under the Planning Act in the case of information obtained in connection with the administration or execution of the Planning Act.

(3) No intellectual property right or duty of confidentiality (whether arising by agreement, under a relevant licence or otherwise) prevents the use or disclosure of information by the appropriate official as authorised by this clause or the use or disclosure of that information by or on behalf of a person to whom it has been disclosed as authorised by this clause.

(4) No liability attaches to the State or any other person in connection with the use or disclosure of information as authorised by this clause.

(5) Clause 58 (Confidentiality of reports) of the *Mining Regulation 2010* does not prevent the disclosure of information under this clause even if the information is contained in a report lodged with the Director-General before the commencement of this clause.

(6) The disclosure of information under this clause is taken to be in connection with the administration or execution of this Act and the Planning Act.

(7) In this clause:

disclose includes publish or communicate.

use includes reproduce.

Part 4 Miscellaneous

12 Clearing away of mining plant

To avoid doubt, a reference in section 245 to the holder of an authority includes a reference to a former holder of relevant licence.

13 Continuation of certain conditions of relevant licences

(1) The preserved conditions of a relevant licence continue to have effect despite the cancellation of the licence by this Schedule. Accordingly, any obligation imposed on the holder of a relevant licence under the preserved conditions continues to have effect.

(2) The *preserved conditions* are conditions 16 (f)–(h), 18 (c), 19 (d), 20 (g), 23 (b) (vii), 27, 28, 29, 32 and 44 of each relevant licence, and condition 54 of EL 7270, as in force immediately before the cancellation date.

(3) A reference in a provision of this Act or the regulations to the conditions of an authority includes a reference to a preserved condition of a relevant licence.

(4) For the purposes of the application of a provision of this Act to and in respect of a preserved condition of a relevant licence, a reference in the provision:

(a) to an authorisation includes a reference to a relevant licence cancelled by this Schedule, or

(b) to the holder of an authorisation includes a reference to a former holder of such a relevant licence.

14 Security requirements

(1) The requirement to give and maintain security under condition 29 of a relevant licence lapses when the Minister determines that the requirements of any directions under section 240 or obligations under the relevant licence (non-compliance with which would authorise a claim on or realisation of the deposit) have been fulfilled to a satisfactory extent and in a satisfactory manner.

(2) The Minister is not required to make a determination under subclause (1) until the Minister is satisfied that no directions or further directions under section 240 are required.

(3) The Minister must, if practicable, give written notice of a determination under subclause (1) to the former holder of the relevant licence.

(4) For the purposes of section 378D, and sections 378H and 378I and Schedule 7 to this Act (as they apply to contraventions of section 378D), condition 29 of a relevant licence is taken to be a condition of a kind referred to in Part 1 of Schedule 7 to this Act.

(5) Subclause (4) applies only to a contravention of section 378D that occurs on or after the cancellation date.

15 Access arrangements

(1) The cancellation of a relevant licence by this Schedule does not affect any liabilities of a holder or former holder of the relevant licence under an access arrangement.

(2) The cancellation of a relevant licence by this Schedule operates, for the purposes of any access arrangement relating to the relevant licence:

(a) as an occasion of the holder of the relevant licence ceasing to hold an authority over the exploration area, and

(b) as a cancellation of the relevant licence for the purpose of any provision of the access arrangement that deals with the cancellation of an authority (including any provision that refers to cancellation under Division 3 of Part 7 of this Act).

(3) The regulations may make provision for the termination of any access arrangements relating to a relevant licence.

16 Further Planning Act applications prohibited

(1) An application under the Planning Act for consent or approval to carry out development on relevant land for any of the following purposes cannot be made except by a person who is the holder of an authority that is in force in relation to that land:

(a) mining,

(b) prospecting.

(2) To avoid doubt, *mining* and *prospecting* have the meanings given by this Act.

5 General legislative powers

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

Provided that all Bills for appropriating any part of the public revenue, or for imposing any new rate, tax or impost, shall originate in the Legislative Assembly.