

**DUNCAN v THE STATE OF NEW SOUTH WALES (S119/2014)**  
**CASCADE COAL PTY LIMITED & ORS v THE STATE OF NEW SOUTH WALES (S206/2014)**

Dates writs of summons filed: 30 May 2014 (S119/2014)  
24 July 2014 (S206/2014)

Dates special cases referred to Full Court: 25 September 2014 (S119/2014)  
23 September 2014 (S206/2014)

Mr Travers Duncan is a director of a company which, as trustee of a trust of which Mr Duncan is a beneficiary, holds shares in Cascade Coal Pty Limited ("Cascade"). He was a director of Cascade from February to July 2009.

In June 2009, following a process of expressions of interest to the New South Wales Department of Primary Industries ("the DPI"), Cascade was selected by the Director-General of the DPI as the successful applicant for proposed coal exploration licences for areas known as Mount Penny and Glendon Brook. In October 2009 a licence was issued under the *Mining Act* 1992 (NSW) ("Mining Act") to each of two newly incorporated subsidiaries of Cascade, Mt Penny Coal Pty Limited ("MPC") and Glendon Brook Coal Pty Limited ("GBC").

MPC subsequently carried out extensive exploration and development work. In December 2010 the company lodged an application under the *Environmental Planning and Assessment Act* 1979 (NSW) for approval of a proposed open-cut coal mine at Mount Penny ("the Project Application").

In July 2013 the Independent Commission Against Corruption ("ICAC") published a report entitled "Investigation into the Conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and Others". Findings made by ICAC in its report included that Mr Duncan and the other directors of Cascade had engaged in corrupt conduct by taking steps to deceive public authorities as to the involvement of the Obeid family in the Mount Penny tenement. A further ICAC report, "Operations Jasper and Acacia – addressing outstanding questions", was published in December 2013. That report contained findings by ICAC that the Mount Penny tenement was created as a result of corrupt conduct and that Cascade had acquired the benefit of the Glendon Brook tenement as the result of a corrupt agreement it had made in relation to Mount Penny. That report also recommended that the New South Wales Government ("the Government") cancel the licences held by MPC and GBC.

On 31 January 2014 the *Mining Amendment (ICAC Operations Jasper and Acacia) Act* 2014 (NSW) added Schedule 6A to the Mining Act. Provisions of Schedule 6A declare the Project Application void, cancel the exploration licences of MPC and GBC (and a similar licence held by NuCoal Resources Limited) and oblige the companies to continue to provide reports and other information obtained from their mining exploration activities to the Government. Schedule 6A also provides that the Government is not liable to pay compensation for any consequence of the operation of the Schedule.

Mr Duncan then commenced proceedings in this Court, challenging the validity of Schedule 6A to the Mining Act. Similar proceedings were later commenced by Cascade, MPC and GBC (“the Cascade parties”).

Mr Duncan and the Cascade parties submit that Schedule 6A determines rights and imposes punishment, thereby amounting to an exercise of judicial power. They contend that the exercise of such power is beyond the law-making power given to the New South Wales Parliament by s 5 of the *Constitution Act* 1902 (NSW), with the result that Schedule 6A is not a valid law. All plaintiffs also contend that, being an exercise of judicial power, Schedule 6A is invalid because it falls outside the integrated system prescribed by Chapter III of the Commonwealth Constitution. This is because that system involves the supervision by the relevant Supreme Court, and ultimately by this Court, of any exercise of judicial power in a State.

The Cascade parties additionally contend that clause 11 of Schedule 6A, which authorises certain officials to use information obtained under the Mining Act is, pursuant to s 109 of the Commonwealth Constitution, invalid to the extent of its inconsistency with the *Copyright Act* 1968 (Cth).

Notices of a Constitutional Matter were filed by Mr Duncan and the Cascade parties. The Attorneys-General of the Commonwealth and the States of Victoria, Queensland, Western Australia and South Australia are intervening in both proceedings.

In each of the proceedings the parties filed a Special Case, which Justice Gageler referred for consideration by the Full Court.

The Special Case in proceedings number S119/2014 states the following questions for the opinion of the Full Court:

1. Are clauses 1 to 13 of Schedule 6A to the Mining Act, or any of them, invalid?
2. Who should pay the costs of this Special Case?

In proceedings number S206/2014 the following questions are stated:

1. Are clauses 1 to 13 of Schedule 6A to the Mining Act, or any of them, invalid?
2. Is clause 11 of Schedule 6A of the Mining Act inconsistent with the *Copyright Act* 1968 (Cth) and inoperative to the extent of that inconsistency?
3. Who should pay the costs of this Special Case?