

HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, KIEFEL, BELL, GAGELER, KEANE AND NETTLE JJ

Matter No S119/2014

TRAVERS WILLIAM DUNCAN PLAINTIFF
AND

THE STATE OF NEW SOUTH WALES DEFENDANT

Matter No S138/2014

NUCOAL RESOURCES LIMITED PLAINTIFF
AND

STATE OF NEW SOUTH WALES DEFENDANT

Matter No S206/2014

CASCADE COAL PTY LIMITED & ORS PLAINTIFFS
AND

THE STATE OF NEW SOUTH WALES DEFENDANT

Duncan v New South Wales
NuCoal Resources Limited v New South Wales
Cascade Coal Pty Limited v New South Wales
[2015] HCA 13
15 April 2015
S119/2014, S138/2014 & S206/2014

ORDER

Matter No S119/2014

The questions asked by the parties in the special case dated 18 September 2014 and referred for consideration by the Full Court be answered as follows:

Question 1

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

This judgment has been processed by BarNet from electronic material provided by the High Court of Australia. A table of headings has been inserted. This material is clearly indicated. With the exception of minor adjustments for typesetting conventions, the text remains as received. The editors of JADE welcome your comments as to how the format might be further improved. Please send us an email at editor@jade.barnet.com.au

An electronic version of this judgment with hyperlinks to case law and legislation is available online within JADE. You may reach this judgment directly by following this URL:

<http://jade.barnet.com.au/mnc/2015/hca/13>

 BarNet



Answer

No.

Question 2

Who should pay the costs of this Special Case?

Answer

The plaintiff.

Matter No S138/2014

The questions asked by the parties in the special case dated 23 September 2014 and referred for consideration by the Full Court be answered as follows:

Question 1

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

Answer

No.

Question 2

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

Answer

This question does not arise on the facts of the special case.

Question 3

Who should pay the costs of the special case?

Answer

The plaintiff.

Matter No S206/2014

The questions asked by the parties in the special case dated 23 September 2014 and referred for consideration by the Full Court be answered as follows:

Question 1

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

Answer

No.

Question 2

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

Answer

This question does not arise on the facts of the special case.

Question 3

Who should pay the costs of this Special Case?

Answer

The plaintiffs.

Representation

A S Bell SC with B K Lim for the plaintiff in S119/2014 (instructed by Yeldham Price O'Brien Lusk Lawyers)

W Sofronoff QC with G J D Del Villar for the plaintiff in S138/2014 (instructed by Quinn Emanuel Urquhart & Sullivan)

A S Bell SC with B K Lim for the plaintiffs in S206/2014 (instructed by TressCox Lawyers)

M G Sexton SC, Solicitor-General for the State of New South Wales and S J Free with Z C Heger for the defendant in each matter (instructed by Crown Solicitor (NSW))

Interveners

J T Gleeson SC, Solicitor-General of the Commonwealth with J S Stellios for the Attorney-General of the Commonwealth, intervening (instructed by Australian Government Solicitor)

M G Hinton QC, Solicitor-General for the State of South Australia with L K Byers for the Attorney-General for the State of South Australia, intervening (instructed by Crown Solicitor (SA))

S G E McLeish SC, Solicitor-General for the State of Victoria with K L Walker SC for the Attorney-General for the State of Victoria, intervening (instructed by Victorian Government Solicitor)

G R Donaldson SC, Solicitor-General for the State of Western Australia with D E Leigh for the Attorney-General for the State of Western Australia, intervening (instructed by State Solicitor (WA))

P J Dunning QC, Solicitor-General of the State of Queensland with J A Kapeleris and W E Wild for the Attorney-General of the State of Queensland, intervening (instructed by Crown Law (Qld))

CATCHWORDS**Duncan v New South Wales****NuCoal Resources Limited v New South Wales****Cascade Coal Pty Limited v New South Wales**

Constitutional law - Judicial power - Independent Commission Against Corruption produced reports which recommended passing legislation to cancel three exploration licences granted under *Mining Act 1992 (NSW)* - *Mining Amendment (ICAC Operations Jasper and Acacia) Act 2014 (NSW)* (“**Amendment Act**”) inserted Sched 6A into *Mining Act 1992 (NSW)*, cancelling three licences without compensation - Whether Amendment Act involves exercise of judicial power in nature of, or akin to, bill of pains and penalties.

Constitutional law - *Constitution Act 1902 (NSW)* - Legislative competence of New South Wales Parliament - Whether Amendment Act is “law” within meaning of s 5 of *Constitution Act 1902 (NSW)*.

Constitutional law - Inconsistency between Commonwealth and State laws - Provision of Amendment Act authorised use or disclosure of information contained in works - Whether provision of Amendment Act inconsistent with *Copyright Act 1968 (Cth)* and invalid to extent of inconsistency.

Words and phrases - “bill of pains and penalties”, “judicial power”, “law”.

Constitution, Ch III, s 109.

Constitution Act 1902 (NSW), s 5.

Mining Act 1992 (NSW), Sched 6A.

Mining Amendment (ICAC Operations Jasper and Acacia) Act 2014 (NSW).

Index of Headings

***BarNet**
Supplementary
material

FRENCH CJ, HAYNE, KIEFEL, BELL, GAGELER, KEANE AND NETTLE JJ.	6
Context of the Amendment Act	7
Text of the Amendment Act	11
Challenges to validity	13
The Amendment Act is a law	14
The Amendment Act is not an exercise of judicial power	15
No question of inconsistency arises on the facts	18
Disposition	18

French CJ
Hayne J
Kiefel J
Bell J
Gageler J
Keane J
Nettle J

- 1 **FRENCH CJ, HAYNE, KIEFEL, BELL, GAGELER, KEANE AND NETTLE JJ.** The *Mining Amendment (ICAC Operations Jasper and Acacia) Act 2014* (NSW) (“**the Amendment Act**”) amends the *Mining Act 1992* (NSW) (“**the Mining Act**”) to cancel, without compensation, three specified exploration licences issued under the Mining Act. The Amendment Act was enacted following consideration by the Houses of the New South Wales Parliament of reports of investigations undertaken by the Independent Commission Against Corruption (“**ICAC**”), established under the *Independent Commission Against Corruption Act 1988* (NSW) (“**the ICAC Act**”). Those reports contained findings that the Minister administering the Mining Act, and other individuals, had engaged in corrupt conduct in relation to the issue of the exploration licences.
- 2 In three separate proceedings against the State of New South Wales in the original jurisdiction of this Court, the corporate licensees of two of the cancelled exploration licences (together with their parent company and one of its former directors), and the parent company of the corporate licensee of the other cancelled exploration licence, seek declarations that the amendments introduced into the Mining Act by the Amendment Act are invalid. Between them, they challenge the validity of the Amendment Act on three grounds. Those grounds are subsumed in questions which, by special case, the parties have agreed to reserve for the consideration of the Full Court.
- 3 First, it is contended that the Amendment Act is not a “law” within the meaning of the provision of the *Constitution Act 1902* (NSW) (“**the Constitution Act**”) which provides for the legislative competence of the New South Wales Parliament. Second, it is contended that the Amendment Act is a legislative exercise of judicial power by that Parliament, contrary to what is argued to be an implied limitation, which derives either from an historical limitation on colonial legislative power unaffected by the *Australia Act 1986* (Cth) or from Ch III of the Constitution. Third, it is contended that particular consequential provisions of the Amendment Act, relating to the use and disclosure of information required to be provided by the licensees, are inconsistent with provisions of the *Copyright Act 1968* (Cth) (“**the Copyright Act**”) and are for that reason inoperative by force of s 109 of the Constitution.
- 4 None of those grounds of invalidity is established. The Amendment Act is a law within the competence of the New South Wales Parliament. The Amendment Act is not an exercise of judicial power by that Parliament. The existence and scope of any implied limitation on the ability of a State Parliament to exercise judicial power therefore does not arise for consideration and is not explored in these reasons for judgment. The question of inconsistency is not shown by the facts agreed in the special cases to be the subject of real controversy, and is for that reason inappropriate to be answered.
- 5 Before turning to explain each of those conclusions, it is appropriate to recount something more of the context of the Amendment Act, to set out the precise terms of the amendments it introduced into the Mining Act, and to note in more detail the arguments against validity.

Context of the Amendment Act

- 6 The exploration and development of coal resources in New South Wales is governed in part by the Mining Act, the objects of which include “to encourage and facilitate the discovery and development of mineral resources in New South Wales” and specifically “to ensure an appropriate return to the State from mineral resources”.¹
- 7 The Mining Act empowers the Minister to grant exploration licences, either on application² or in some circumstances after calling for tenders.³ An exploration licence is granted for a fixed term of five years or less,⁴ is renewable on application,⁵ and remains in force pending determination of an application for renewal.⁶ An exploration licence entitles its holder to prospect for specified minerals on specified land in accordance with the conditions of the licence.⁷ The holder is obliged to prepare and lodge with the Department reports of all such prospecting,⁸ including both annual reports and (within 30 days of the expiration or cancellation of the licence) a “final report” containing detailed data of all surveys and other information not provided in annual reports.⁹ Those reports are required to be kept confidential for the period during which the exploration licence (or any assessment lease or mining lease subsequently granted to the holder of the exploration licence in respect of the same land and mineral) remains in force,¹⁰ and the information contained in them cannot be disclosed other than in circumstances which include “with the consent of the person from whom the information was obtained”,¹¹ “in connection with the administration or execution of [the Mining] Act”,¹² or “with the concurrence of the Minister”.¹³
- 8 The Mining Act empowers the Minister to cancel an exploration licence only on specified grounds, which include satisfaction that the holder has contravened a provision of the Mining Act.¹⁴ It is relevant to note in this respect that, in 2008 and 2009, the Mining Act contained a provision making it an offence to furnish false or misleading information in connection with an application made under the Act.¹⁵
- 9 For much of 2008 and 2009, the Minister administering the Mining Act was Ian Macdonald MLC. The Minister oversaw the Department of Primary Industries.
- 10 On 15 December 2008, Mr Macdonald granted an exploration licence entitling its holder for a term of four years to prospect for coal on specified land at Doyles Creek (“**EL 7270**”) to Doyles Creek Mining Pty Limited (“**Doyles Creek**”). One of the directors of Doyles Creek was then John Maitland. Mr Maitland ceased to be a director in the middle of 2009. In early 2010, all of the shares in Doyles Creek were acquired by NuCoal Resources Limited (“**NuCoal**”), a publicly listed company floated for that

¹ Section 3A(d).

² Sections 13 and 22.

³ Sections 14, 15 and 23.

⁴ Section 27.

⁵ Sections 113–114.

⁶ Section 117.

⁷ Section 29.

⁸ Section 163C.

⁹ Clause 57 of the Mining Regulation 2010 (NSW).

¹⁰ Clause 58 of the Mining Regulation 2010 (NSW).

¹¹ Section 365(1)(a).

¹² Section 365(1)(b).

¹³ Section 365(1)(e).

¹⁴ Section 125(1)(b).

¹⁵ Section 374.

purpose. Doyles Creek applied for renewal of EL 7270 in November 2012. By that time, Doyles Creek had carried out exploration and development work, at a cost of more than \$25 million, as a result of which it had ascertained the area of EL 7270 to contain more than 500 million tonnes of coal.

- 11 On 21 October 2009, an exploration licence entitling its holder for a term of five years to prospect for coal on specified land (“**EL 7405**”) was granted to Glendon Brook Coal Pty Ltd (“**Glendon Brook**”), and another (“**EL 7406**”) was granted to Mt Penny Coal Pty Ltd (“**Mt Penny**”). The Mt Penny exploration licence related to specified land in the Bylong Valley, a substantial part of which was beneficially owned by Edward Obeid Snr MLC, members of the Obeid family and their friends. Glendon Brook and Mt Penny were then, and remain, wholly owned subsidiaries of Cascade Coal Pty Limited (“**Cascade**”). One of the directors of Cascade between February and July 2009 was Travers Duncan. Under the authority of EL 7405, Glendon Brook subsequently carried out exploration and development work, at a cost of approximately \$84,000. Under the authority of EL 7406, Mt Penny subsequently carried out exploration and development work, at a cost of more than \$9.5 million, as a result of which it ascertained the area of EL 7406 to contain more than 170 million tonnes of coal. An independent valuation undertaken in February 2011 placed Cascade’s then value at between \$459 million and \$587 million, with the “Mt Penny Open Cut” being the most significant component of that value.
- 12 On 23 November 2011, both Houses of the New South Wales Parliament, by resolution, referred a number of matters to ICAC for investigation, including the circumstances surrounding the application for and allocation to Doyles Creek of EL 7270. The subsequent investigation by ICAC, styled “Operation Acacia”, became the subject of a report by ICAC which was laid before the Houses of Parliament in September 2013 (“**the Operation Acacia report**”).
- 13 On 12 November 2012, in the course of another investigation, which it had commenced after receiving an allegation from a private individual, ICAC commenced a public inquiry, styled “Operation Jasper”, into, amongst other things, the circumstances surrounding the grant and use of EL 7405 and EL 7406. The public inquiry resulted in a report by ICAC which was laid before the Houses of Parliament in August 2013 (“**the Operation Jasper report**”).
- 14 It is unnecessary to examine in any detail the provisions of the ICAC Act which governed the conduct of those investigations and the production of those reports. Two features only need to be noted. One is that it is an element of corrupt conduct, as defined for the purposes of the ICAC Act, that the conduct could constitute or involve a criminal offence.¹⁶ The other is that ICAC is nevertheless not authorised to include in a report any finding or opinion that a specified person is guilty of, or has committed, a criminal offence.¹⁷
- 15 In the Operation Acacia report, ICAC made findings that corrupt conduct had occurred in events which led to the grant of EL 7270. In the Operation Jasper report, ICAC made findings that corrupt conduct had occurred in events which led to the grants of EL 7405 and EL 7406.

¹⁶ Sections 7(1) and 9(1)(a) of the ICAC Act.

¹⁷ Section 74B(1)(a) of the ICAC Act.

- 16 Common to each report were findings that ICAC was satisfied that Mr Macdonald had acted contrary to his public duty as a Minister in circumstances which, if proved on admissible evidence to the criminal standard, would have established that Mr Macdonald had committed one or other of the common law offences of misconduct in public office or of conspiracy to defraud. In the Operation Acacia report, ICAC found Mr Macdonald to have so acted in granting the exploration licence to Doyle's Creek substantially for the purpose of benefiting Mr Maitland. In the Operation Jasper report, it found Mr Macdonald to have so acted in: entering into agreements with Mr Edward Obeid Snr (and one of his sons, Moses Obeid) under which he arranged for the creation of the Mt Penny mining tenement, for the purpose of benefiting Mr Edward Obeid Snr, Mr Moses Obeid and members of the Obeid family; providing confidential information to members of the Obeid family, again for the purpose of benefiting Mr Edward Obeid Snr, Mr Moses Obeid and members of the Obeid family; deciding to reopen an expression-of-interest process for exploration licences so that companies associated with Mr Duncan would be able to participate; and providing Mr Duncan with confidential information in the knowledge that Mr Duncan could use the information for his financial benefit. ICAC found that Mr Macdonald had acted because of what was variously described as a "close" or "strong" relationship between himself and each of Mr Maitland, Mr Edward Obeid Snr, Mr Moses Obeid and Mr Duncan.
- 17 ICAC's findings in the Operation Acacia report also included that Mr Maitland had made false statements to the Department in connection with the application by Doyle's Creek for EL 7270 (conduct which ICAC was satisfied, if proved on admissible evidence to the criminal standard, would constitute an offence under the Mining Act,¹⁸ as well as under other State and Commonwealth laws¹⁹) and that other former directors of Doyle's Creek had agreed to Mr Maitland doing so (conduct which ICAC was satisfied, if proved on admissible evidence to the criminal standard, would constitute substantially the same offences). Its findings in the Operation Jasper report also included that Mr Duncan, together with other former directors of Cascade, had deliberately misled the Department and other New South Wales Government agencies, including by failing to disclose the Obeid family involvement (conduct which ICAC was satisfied, if proved on admissible evidence to the criminal standard, would constitute offences against State and Commonwealth laws²⁰).
- 18 After the Operation Acacia report and the Operation Jasper report, ICAC went on to produce a further report in relation to both Operation Acacia and Operation Jasper, which was made public on 18 December 2013 and laid before the Houses of Parliament on 30 January 2014 ("**the December report**"). On the basis of the findings it had made in the Operation Acacia report and the Operation Jasper report, ICAC expressed the view in the December report that the granting of the Doyle's Creek, Glendon Brook and Mt Penny exploration licences "was so tainted by corruption that [they] should be expunged or cancelled and any pending applications regarding them should be refused". ICAC recommended that the New South Wales Government consider enacting legislation to achieve that expunging, noting that "[s]uch legislation would have the benefit of reducing risks arising from challenges in the

¹⁸ Section 374.

¹⁹ Identified in the Operation Acacia report to be s 178BB of the *Crimes Act* 1900 (NSW) and s 184(1) of the *Corporations Act* 2001 (Cth).

²⁰ Identified in the Operation Jasper report to be s 192E(1)(b) of the *Crimes Act* 1900 (NSW) and s 184(1) of the *Corporations Act* 2001 (Cth).

courts to any ministerial decision to cancel or not renew current [licences].”

19 On 19 December 2013, NuCoal, Glendon Brook and Mt Penny were informed that the New South Wales Government was considering ICAC’s recommendations and were invited to make submissions as to why those recommendations should not be implemented. In response, NuCoal and Cascade each made submissions objecting to the implementation of the recommendations.

20 On 20 January 2014, the Premier announced the intention of the New South Wales Government to introduce legislation to cancel the three exploration licences without compensation.

21 On 30 January 2014, the Bill for the Amendment Act was introduced into, read three times in, and passed without amendment by, both Houses of the New South Wales Parliament. Second reading speeches for the Bill were made in substantially identical terms, in the Legislative Council by the Minister for Roads and Ports,²¹ and in the Legislative Assembly by the Premier.²² Both speeches explained that the Bill would cancel the Doyles Creek, Glendon Brook and Mt Penny exploration licences, as “was, of course, recommended” by ICAC.²³ Both recorded that some of ICAC’s findings were “the subject of current or threatened legal challenge” and that ICAC’s jurisdiction “to recommend cancellation of the licences [was also] being challenged”.²⁴ Both continued:²⁵

“However, the action proposed in this bill does not stand or fall based on the findings or recommendations of [ICAC]. Having 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.”

Both noted that some submissions to the Government had suggested that cancellation of the licences without compensation “may raise concerns about sovereign risk”.²⁶ The Minister then stated:²⁷

“In response to that I say that 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 that corrupt public officials and their private sector mates will distort public processes, will manipulate markets and will act for their own private benefit in secret deals, all at the expense of the public interest. This bill puts an end to that.”

The Premier made a statement in substantially the same terms.²⁸

22 Having been passed by both Houses, the Bill received Royal Assent on 31 January 2014.

²¹ New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 30 January 2014 at 26558.

²² New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 30 January 2014 at 26649.

²³ New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 30 January 2014 at 26558;

New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 30 January 2014 at 26649.

²⁴ New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 30 January 2014 at 26558;

New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 30 January 2014 at 26649.

²⁵ New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 30 January 2014 at 26558;

New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 30 January 2014 at 26649.

²⁶ New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 30 January 2014 at 26559;

New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 30 January 2014 at 26650.

²⁷ New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 30 January 2014 at 26559–26560.

²⁸ New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 30 January 2014 at 26650.

- 23 Three months later, the New South Wales Parliament enacted the *Mining and Petroleum Legislation Amendment Act 2014* (NSW) (“**the Further Amendment Act**”). The Further Amendment Act amended the Mining Act, relevantly, to ensure power on the part of the Minister to refuse to grant or renew an exploration licence on the ground that, in the opinion of the Minister, the applicant is not a fit and proper person,²⁹ and to allow the Minister, for the purpose of considering whether or not an applicant is a fit and proper person, to take into consideration whether the applicant has “compliance or criminal conduct issues”.³⁰ Amongst categories of persons or bodies corporate specified as meeting that description are those who previously held exploration licences that were then cancelled.³¹

Text of the Amendment Act

- 24 The Amendment Act, which was expressed to commence on the date of its assent,³² inserted into the Mining Act a new Sched 6A.³³ For the purpose of Sched 6A, the date of assent to the Amendment Act is defined as the “cancellation date”.³⁴
- 25 Clause 3 of Sched 6A to the Mining Act, headed “[p]urposes and objects”, is in the following terms:
- “(1) The Parliament, being satisfied because of information that has come to light as a result of investigations and proceedings of [ICAC] 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 [Amendment Act] 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 [Amendment Act] are as follows:

²⁹ Section 38oA(1)(a). See Sched 1 [24] to the Further Amendment Act.

³⁰ Section 38oA(2)(a).

³¹ Section 38oA(3)(c).

³² Section 2 of the Amendment Act.

³³ Schedule 1 to the Amendment Act.

³⁴ Clause 2 of Sched 6A to the Mining Act.

- (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 [licences]) 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.”

26 Clause 4 of Sched 6A states:

- “(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.
- (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.”

27 Clause 5 of Sched 6A states that any “associated application” (including an application for renewal³⁵) lodged or made but not finally disposed of under the Mining Act before the cancellation date “is, on the cancellation date, void and of no effect”³⁶ and “[a]ccordingly ... is not to be dealt with any further”.³⁷ Clause 6 provides for the refund of fees paid in connection with each of the three exploration licences cancelled by cl 4(1). Clause 7 states that compensation is not payable by or on behalf of the State because of the enactment or operation of the Amendment Act, because of any direct or indirect consequence of that enactment or operation, or because of any conduct relating to that enactment or operation.³⁸ However, the clause is expressed not to exclude or limit any personal liability of a person for conduct occurring before the grant of any of the exploration licences cancelled by cl 4(1).³⁹ Clause 8

³⁵ Clause 5(3)(a).

³⁶ Clause 5(1).

³⁷ Clause 5(2).

³⁸ Clause 7(1).

³⁹ Clause 7(3).

protects and immunises the State from all civil liability in relation to those exploration licences,⁴⁰ and extends that protection and immunity to 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”.⁴¹

- 28 Clause 9 of Sched 6A declares the continuing obligation of the holder to prepare and lodge with the Department annual and final reports of all prospecting undertaken in accordance with an exploration licence⁴² notwithstanding cancellation of the licence by cl 4(1). Clause 10 ensures that “exploration information”, obtained from or in other ways relating to the licences, and corresponding records, remain subject to general powers of compulsion under the Mining Act.⁴³
- 29 Clause 11 permits use or disclosure of any information obtained in connection with the administration or execution of the Mining Act in respect of a licence cancelled under cl 4(1) or in respect of the area of such a licence “if the use or disclosure is in connection with any application or tender” under the Mining Act “or is for any other purpose approved by the Minister”.⁴⁴ The clause specifically provides that “[n]o intellectual property right or duty of confidentiality ... prevents the use or disclosure” so authorised,⁴⁵ and that “[n]o liability attaches to the State or any other person in connection with the use or disclosure” so authorised.⁴⁶

Challenges to validity

- 30 The validity of the Amendment Act is in issue in separate proceedings brought against the State of New South Wales by each of Mr Duncan, NuCoal, and Cascade, Mt Penny and Glendon Brook. By special case in each proceeding, the parties have reserved questions for the consideration of the Full Court in each of those proceedings. The special cases have been heard together.
- 31 The principal ground of challenge to the validity of the Amendment Act is the same in each case. The argument, as refined in the course of oral submissions, is that the Amendment Act involves an exercise of judicial power in the nature of, or akin to, a bill of pains and penalties. Such an exercise of judicial power, it is argued, is denied to the Parliament of New South Wales by an implied limitation on State legislative power. That limitation, it is variously contended, derives either from Ch III of the Constitution or from an historical limitation on colonial, and subsequently State, legislative power which, it is argued, was not overtaken by the *Australia Act*.
- 32 In support of the contention that the Amendment Act is an exercise of judicial power, Mr Duncan, NuCoal and the Cascade parties highlight the expression by the New South Wales Parliament in cl 3(1) of Sched 6A of satisfaction that the grant of the exploration licences was “tainted by serious corruption”. NuCoal argues that that reference is to be understood as the Parliament being satisfied at least of the existence of facts which, if proved on admissible evidence to the criminal standard, would amount to one or more of the pre-existing criminal offences identified

⁴⁰ Clause 8(1)-(4).

⁴¹ Clause 8(5).

⁴² Section 163C.

⁴³ Part 12, and in particular s 248B.

⁴⁴ Clause 11(1).

⁴⁵ Clause 11(3).

⁴⁶ Clause 11(4).

by ICAC in the Operation Acacia report and the Operation Jasper report. Mr Duncan and the Cascade parties argue that it is to be understood instead as the Parliament finding that the holders of the three identified exploration licences (Doyles Creek, Mt Penny and Glendon Brook) had contravened a novel norm of conduct which the Parliament retrospectively imposed by enacting the Amendment Act, being the “norm of not being involved in ‘serious corruption’”.

- 33 In further support of the contention that the Amendment Act is an exercise of judicial power, Mr Duncan, NuCoal and the Cascade parties emphasise the express identification by cl 3(1)(b) of Sched 6A of “detering future corruption” as one of the “purposes” of the Amendment Act. They argue that an important, if not predominant, purpose of the legislative cancellation of the three exploration licences without compensation was to punish transgression and to instil fear of similar punishment in those who might similarly transgress in the future. Mr Duncan and the Cascade parties go on to submit that the punitive purpose of the Amendment Act is carried further by cl 5 (avoiding their renewal applications) and by cl 11 (which they argue attempts to confiscate their intellectual property). They argue that the specific purpose of punishing past breaches of a general norm of conduct explains the references in the second reading speeches directed to allaying concerns about sovereign risk. They also call in aid the Further Amendment Act, which they argue forms part of the same legislative scheme as the Amendment Act and furthers its punitive purposes by stigmatising Doyles Creek, Mt Penny and Glendon Brook as having “compliance or criminal conduct issues” and by inhibiting their ability to apply for further licences.
- 34 Mr Duncan and the Cascade parties rely in the alternative on the logically anterior ground that the Amendment Act is not a “law” within the competence of the New South Wales Parliament to enact under s 5 of the Constitution Act. That is because, they argue, Sched 6A “does not merely vary existing rights but destroys them by way of punishment for what the Parliament has judged to be ‘serious corruption’”.
- 35 NuCoal and the Cascade parties argue in addition that cl 11 of Sched 6A is inconsistent with rights conferred on them as owners of copyright by provisions of the Copyright Act, with the consequence that cl 11 is inoperative to the extent of that inconsistency by force of s 109 of the Constitution.

The Amendment Act is a law

- 36 Having defined “The Legislature” to mean “His Majesty the King with the advice and consent of the Legislative Council and Legislative Assembly”,⁴⁷ the Constitution Act provides, in s 5:
- “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”.
- 37 In *Union Steamship Co of Australia Pty Ltd v King*⁴⁸ this Court referred to longstanding authority⁴⁹ for the proposition that, within the limits of the grant, the legislative

⁴⁷ Section 3.

⁴⁸ (1988) 166 CLR 1; [1988] HCA 55.

⁴⁹ See in particular *Powell v Apollo Candle Company* (1885) 10 App Cas 282 at 290.

power so conferred “is as ample and plenary as the power possessed by the Imperial Parliament itself”.⁵⁰

- 38 Subsequently, in *Kable v Director of Public Prosecutions (NSW)*,⁵¹ three members of the Court expressly rejected an argument that an enactment of the New South Wales Parliament which purported to authorise the continued detention of a specified individual was not a “law” within the meaning of s 5 of the Constitution Act. Recalling that private Acts were not uncommon in nineteenth century England and have been enacted at times in Australia, Brennan CJ said that “[s]pecificity does not deny the character of law to an enactment that is otherwise within power”.⁵² The same view was articulated by Dawson J when he said that, in the context of s 5, “the word ‘laws’ is synonymous with the word ‘statutes’”, added that “[i]f any limitation is to be found upon the power of the Parliament, it is to be found elsewhere in the [Constitution Act] or in the words ‘peace, welfare, and good government’”,⁵³ and continued:⁵⁴

“Section 5 is not seeking to impose a distinction between statutes which embody a law and those which do not, according to a definition of law imported from elsewhere. In an appropriate context (and s 5 is one), a statute may be synonymous with a law because of the manner of its creation. It may be so even if the law lacks validity for it is quite permissible to speak of an invalid law in such a context.”

That view of Brennan CJ and of Dawson J was expressly adopted by McHugh J,⁵⁵ and is consistent with the holding of other members of the majority in *Kable* that the enactment in issue was rendered invalid by operation of Ch III of the Constitution. There is no warrant for departing from it.

- 39 The word “laws” in s 5 of the Constitution Act implies no relevant limitation as to the content of an enactment of the New South Wales Parliament. In particular, the word carries no implication limiting the specificity of such rights, duties, liabilities or immunities as might be the subject of enactment or the purpose of their enactment.
- 40 Mr Duncan’s and the Cascade parties’ contention that the Amendment Act is not a law within the competence of the New South Wales Parliament to enact under s 5 of the Constitution Act necessarily fails. The Amendment Act is a law.

The Amendment Act is not an exercise of judicial power

- 41 Some functions of their nature pertain exclusively to judicial power. The determination and punishment of criminal guilt is one of them.⁵⁶ The non-consensual ascertainment and enforcement of rights in issue between private parties is another.⁵⁷ The termination of a right conferred by statute is not of that nature. That is so even where the basis for termination is satisfaction of the occurrence of conduct which, if

⁵⁰ (1988) 166 CLR 1 at 10.

⁵¹ (1996) 189 CLR 51; [1996] HCA 24.

⁵² (1996) 189 CLR 51 at 64.

⁵³ (1996) 189 CLR 51 at 76.

⁵⁴ (1996) 189 CLR 51 at 77.

⁵⁵ (1996) 189 CLR 51 at 109.

⁵⁶ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27; [1992] HCA 64.

⁵⁷ *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 258; [1995] HCA 10.

proved on admissible evidence to the criminal standard, would constitute a criminal offence.⁵⁸

- 42 In terminating exploration licences issued under the Mining Act and in making consequential provision, the Amendment Act exhibits none of the typical features of an exercise of judicial power. It quells no controversy between parties. It precludes no future determination by a court of past criminal or civil liability. It does not determine the existence of any right that has accrued or any liability that has been incurred. Save for the limited immunity it confers on the State and its current or former employees, it does not otherwise affect any accrued right or existing liability.
- 43 The contention that the Amendment Act is a legislative exercise of judicial power relies on characterisation of the Amendment Act as nevertheless being in the nature of, or akin to, a bill of pains and penalties. Two features are commonly identified as underlying the characterisation of a law as a bill of pains and penalties, and as thereby “a legislative intrusion upon judicial power”.⁵⁹ One is legislative determination of breach by some person of some antecedent standard of conduct. The other is legislative imposition on that person (alone or in company with other persons) of punishment consequent on that determination of breach. Neither in form nor in substance does the Amendment Act exhibit either of those characteristics.
- 44 The Amendment Act does not adopt, and does not fasten upon, any of the numerous specific findings made by ICAC in the Operation Acacia report and in the Operation Jasper report as to the corrupt conduct of individuals. Nor does it impose any legal burden on any of those individuals. They remain subject to the ordinary processes of the criminal law.
- 45 What the New South Wales Parliament has done in the Amendment Act is of a different nature. Having informed itself by reference to the Operation Acacia report, the Operation Jasper report and the December report, but without having limited its consideration or linked its conclusions to any one or more specific findings in those reports, the Parliament has formed and expressed its own satisfaction that the administrative processes by which the three specified exploration licences were issued were tainted by corruption. The Parliament has gone on to express, and to give effect to, its own determination that it was in the public interest that the products of those tainted processes - the licences themselves - be cancelled, that the State be restored so far as possible to the position the State would have been in had those licences not been issued, and that those who had held the licences not obtain any advantage from having done so. The operative provisions of the Amendment Act, including those of cl 11 of Sched 6A concerning the use and disclosure of exploration information, can all be seen to be directed to those ends.
- 46 That NuCoal, Mt Penny and Glendon Brook were deprived by those provisions of valuable assets, for which they were not compensated by the State, does not mean

⁵⁸ *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 89 ALJR 382; 317 ALR 279; [2015] HCA 7.

⁵⁹ *Haskins v The Commonwealth* (2011) 244 CLR 22 at 37 [25]; [2011] HCA 28, quoting *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 649-650; [1991] HCA 32. See generally *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 536, 685-686; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 69-71; *United States v Lovett* 328 US 303 at 322-324 (1946); *Kariapper v Wijesinha* [1968] AC 717 at 736.

that they were thereby punished in the sense in which that term is used when describing an exercise of judicial power consequent on a finding of criminal guilt. Legislative detriment cannot be equated with legislative punishment.

47 The specific reference in cl 3(1)(b) of Sched 6A to the purposes of the Amendment Act including “detering future corruption” does not point in any different direction. It does not bear the weight which the parties challenging validity seek to place on it. It is to be read, in the context of the clause as a whole, as a reference to an aspect of promoting integrity in public administration. It is not indicative of an additional purpose of retribution.

48 Nor does the Further Amendment Act shed any different light on the Amendment Act. Assuming, without deciding, that the Further Amendment Act can be treated as part of the same legislative scheme, the further amendments it introduced into the Mining Act are not indicative of stigmatisation or penalisation. The effect of their designation of a former holder of a cancelled exploration licence as a person having “compliance or criminal conduct issues” is no more than to raise a consideration relevant to be taken into account in an overall assessment of whether or not that person is a fit and proper person to hold another licence under the Mining Act. It is not determinative of that inquiry.

49 The case for characterising the Amendment Act as an exercise of judicial power in the nature of, or akin to, a bill of pains and penalties is weaker than that rejected by the Privy Council in *Kariapper v Wijesinha*⁶⁰ in upholding the validity of a statute enacted by the Parliament of Ceylon which imposed civic disabilities in the form of disqualification from office, with consequent loss of emoluments, on specified persons who had been members of that Parliament in respect of whom allegations of bribery had been found by a commission of inquiry to be proved. In the judgment of the Board, to which reference has been made in a number of decisions of this Court, Sir Douglas Menzies held that the statute contained neither of the two elements which might justify its characterisation as a bill of pains and penalties in that:⁶¹ “[f]irst, it contain[ed] no declaration of guilt of bribery or of any other act”; and “[s]econdly, the disabilities imposed by the [statute] are not, in all the circumstances, punishment”. As to the second, Sir Douglas went on to say:⁶²

“It is, of course, important that the disabilities are not linked with conduct for which they might be regarded as punishment, but more importantly the principal purpose which they serve is clearly enough not to punish but to keep public life clean for the public good.”

50 The Amendment Act, like the legislation considered in that case, serves the legislative purpose of promoting integrity in public administration. The case for characterising the Amendment Act as an exercise of judicial power is weaker than in that case because of the absence of any necessary connection between ICAC’s administrative findings of individual misconduct and the New South Wales Parliament’s cancellation of the three specified exploration licences on the basis of them being the products of compromised processes.

51 The Amendment Act cannot be characterised as an exercise of judicial power. The argument that the Amendment Act contravenes an implied limitation on State leg-

⁶⁰ [1968] AC 717.

⁶¹ [1968] AC 717 at 736.

⁶² [1968] AC 717 at 736.

islative power therefore fails on its minor premise without the need to examine its major premise.

No question of inconsistency arises on the facts

52 This Court does not decide a constitutional question unless satisfied that there exists a state of facts which makes it necessary to decide that question in order to determine rights of the parties in actual controversy.⁶³ The parties to the NuCoal and the Cascade proceedings have agreed by their special cases to reserve for the consideration of the Full Court a question as to whether cl 11 of Sched 6A to the Mining Act is inconsistent with the Copyright Act, so as to be inoperative by force of s 109 of the Constitution to the extent of the inconsistency. But they have failed to show by those special cases that there exists a state of facts which makes it necessary for that question to be decided.

53 The NuCoal special case records no agreement as to the existence or ownership of copyright, merely that “NuCoal asserts ownership of copyright” in reports submitted in accordance with Doyles Creek’s obligations under the Mining Act as holder of EL 7270, and in “core samples and related information” provided in response to a notice issued under a general power of compulsion.

54 The Cascade special case records agreement that Mt Penny owns copyright in a final report submitted in accordance with its obligation under the Mining Act as holder of EL 7406, and that Glendon Brook owns copyright in a final report submitted in accordance with its corresponding obligation as holder of EL 7405. However, that special case provides no basis to infer that the State of New South Wales has engaged or threatens to engage in any act which might amount to an infringement of that copyright. To the contrary, in correspondence annexed to the special case, the State has noted that it will rely on its statutory licence under s 183(1) of the Copyright Act to do acts comprised in the copyright in the reports and that it will discharge its obligation to pay equitable remuneration under s 183A of the Copyright Act.

Disposition

55 Each special case asks whether cll 1 to 13 of Sched 6A to the Mining Act, or any of them, are invalid. The answer is “No”. The NuCoal and Cascade special cases ask in addition whether cl 11 of Sched 6A to the Mining Act is inconsistent with the Copyright Act and inoperative to the extent of the inconsistency. The response is “This question does not arise on the facts of the special case”. To the final question in each special case, as to who should pay the costs of that special case, the answer is “The plaintiff” or “The plaintiffs”, as the case may be.

⁶³ *Lambert v Weichelt* (1954) 28 ALJ 282 at 283.

Index of cases, legislation and authorities

This keyword index is experimental, was automatically generated and will be refined
referenced by paragraph

Australia Act	[3], [31]
Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd (2015) 89 ALJR 382; 317 ALR 279; [2015] HCA 7	[41]
Brandy v Human Rights and Equal Opportunity Commission (1995) 183 CLR 245 ; [1995] HCA 10	[41]
Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1 ; [1992] HCA 64	[41], [43]
Constitution Act	[3], [43]
Copyright Act	[3]
Crimes Act 1900 (NSW) and s 184(1) of the Corporations Act 2001 (Cth)	[17]
Haskins v The Commonwealth (2011) 244 CLR 22 ; [2011] HCA 28	[43]
Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51; [1996] HCA 24	[38]
Kariapper v Wijesinha [1968] AC 717 at 736	[43], [49]
Lambert v Weichelt (1954) 28 ALJ 282	[52]
Mining and Petroleum Legislation Amendment Act	[23]
Parliamentary Debates (Hansard), 30 January 2014	[21]
Parliamentary Debates (Hansard), 30 January 2014 ; New South Wales, Legislative Assembly, Parliamentary Debates (Hansard), 30 January 2014 at 26649	[21]
Parliamentary Debates (Hansard), 30 January 2014 ; New South Wales, Legislative Assembly, Parliamentary Debates (Hansard), 30 January 2014 at 26650	[21]
Polyukhovich v The Commonwealth (1991) 172 CLR 501 at 536, 685-686	[43]
Polyukhovich v The Commonwealth (1991) 172 CLR 501 at 649-650; [1991] HCA 32 ...	[43]
Powell v Apollo Candle Company (1885) 10 App Cas 282	[37]
Union Steamship Co of Australia Pty Ltd v King (1988) 166 CLR 1; [1988] HCA 55	[37]
United States v Lovett 328 US 303 at 322-324 (1946)	[43]