DUNCAN ..... PLAINTIFF;

AND

STATE OF NEW SOUTH WALES ..... DEFENDANT.

NUCOAL RESOURCES LIMITED ..... PLAINTIFF;

AND

STATE OF NEW SOUTH WALES ..... DEFENDANT.

CASCADE COAL PTY LTD AND OTHERS ... PLAINTIFFS;

AND

STATE OF NEW SOUTH WALES ..... DEFENDANT.

[2015] HCA 13

HC of A 2015

Feb 10, 11; *April* 15 2015

French CJ, Hayne, Kiefel, Bell, Gageler, Keane and Nettle JJ

Constitutional Law — State Parliament — Powers — Cancellation by statute of certain mining exploration licences — Reference in statute to information obtained by investigative body — Recitation of Parliament's satisfaction that issue of licences tainted by serious corruption — Whether statute a law within competence of Parliament — Whether legislative exercise of judicial power akin to bill of pains and penalties — Constitution Act 1902 (NSW), s 5 — Mining Act 1992 (NSW), Sch 6A, cll 1-13.

Section 5 of the *Constitution Act 1902* (NSW) provided that the New South Wales legislature should, subject to the provisions of the *Commonwealth Constitution*, have power to make laws for the peace, welfare, and good government of New South Wales in all cases whatsoever. Following certain investigations and reports by the Independent Commission Against Corruption (ICAC), the *Mining Act 1992* (NSW) was amended by the insertion of Sch 6A. Clause 4(1) of Sch 6A provided that three specified mining exploration licences were cancelled by the schedule. Clauses 6 and 7 provided that no compensation was payable to the former licensees other than the refund of fees paid in respect of the licences. Clause 3 recited that the Parliament, being satisfied because of information that had come to light as a result of

specified investigations and proceedings of ICAC that the grant of the three licences, and the decisions and processes that culminated in the grant of those licences, were tainted by serious corruption, and recognising the exceptional nature of the circumstances, had enacted the amending Act for the purposes of restoring public confidence in the allocation of the State's valuable mineral resources, promoting integrity in public administration above all other considerations (including financial considerations) and deterring future corruption, and placing the State as nearly as possible in the same position as it would have been had the three licences not been granted.

Held, (1) that the amending Act was a law within the meaning of s 5 of the *Constitution Act*. The word "laws" in that section implied no relevant limitation of the content of an enactment of the New South Wales Parliament.

Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51 at 64, 76-77, 109, applied.

(2) That the Parliament, not having limited its consideration or linked its conclusions to any specific findings in the ICAC reports, had not, by the amending Act, legislatively determined a breach of some antecedent standard of conduct. Nor was the legislative detriment occasioned by the cancellation of licences in the nature of legislative punishment. The amending Act could not be characterised as being akin to a bill of pains and penalties, and therefore did not constitute a legislative exercise of judicial power.

Kariapper v Wijesinha [1968] AC 717 at 736, applied.

SPECIAL CASES stated pursuant to *High Court Rules 2004* (Cth), r 27.08 and referred under the *Judiciary Act 1903* (Cth), s 18.

On 15 December 2008, the New South Wales Minister for Mineral Resources issued an exploration licence to Doyles Creek Mining Pty Ltd in respect of land situated in the Hunter Coalfield. Early in 2010, NuCoal Resources Ltd acquired Doyles Creek Mining by the exercise of an option.

On 24 August 2009, Cascade Coal Pty Ltd applied for exploration licences for the areas known as Mt Penny and Glendon Brook, nominating Mt Penny Coal Pty Ltd and Glendon Brook Coal Pty Ltd (both companies which Cascade Coal had caused to be incorporated and which were wholly owned subsidiaries of Cascade Coal) as the respective licensees. On 21 October 2009, the Minister issued those licences to Mt Penny Coal and Glendon Brook Coal. Travers William Duncan was a director of Cascade Coal between 19 February 2009 and 31 July 2009. At all material times Mr Duncan was also a director of a company which held shares in Cascade Coal as trustee of the Duncan Family Trust, under which Mr Duncan was also a beneficiary.

In August 2013, the New South Wales Independent Commission Against Corruption (ICAC) laid before the New South Wales Parliament a report which contained findings that corrupt conduct had occurred in relation to the grant of the licences to Mt Penny Coal and Glendon Brook Coal. In September 2013, ICAC laid before the Parliament a report which contained findings that corrupt conduct had occurred in relation to the grant of the licence to Doyles Creek Mining. On 31 January 2014, Royal Assent was given to the *Mining Amendment (Operations Jasper and Acacia) Act 2014* (NSW) thereby cancelling the licences held by NuCoal Resources, Mt Penny Coal, and Glendon Brook Coal. By writs of summons, Mr Duncan, NuCoal Resources, Cascade Coal, Mt Penny Coal, and Glendon Brook Coal challenged the validity of that Act in the original jurisdiction of the High Court. On 17 September 2014, Gageler J made orders for the filing of special cases and their referral to the Full Court.

W Sofronoff QC (with him *G J D del Villar*) for the plaintiff, NuCoal Resources. The New South Wales Parliament may not pass a law which intends to, and does, adjudge persons complicit in serious corruption and which imposes a punishment for such acts. The amending Act is such a law. [HAYNE J. The offence of complicity in serious corruption is not known to law.] The amending Act is bad for that reason, as no exercise of judicial power would ever involve the finding of guilt for something that has not been an offence heretofore. The judicial powers of the Westminster Parliament were limited. The trial of peers and the process of impeachment in the House of Lords were irrelevant to Australia's constitutional development, as those processes had at their heart the status of the members of that House. Acts of attainder and bills of pains and penalties were the result of historic forces in England not relevant to Australia. The colonial legislature of New South Wales was never invested with judicial power. Thus, the colonial parliaments did not have power to punish for contempt unless such a power was expressly conferred by statute (1). In any event, since Federation, the *Commonwealth Constitution*, whose interpretation is informed by the rule of law, has prohibited the exercise of judicial power by State parliaments. The legislation in this case is the obverse of that in *Kable v Director of Public Prosecutions (NSW)* (2). The courts can be undermined also by the legislature arrogating to itself judicial power and without doing constitutional

(1) *Kielley v Carson* (1842) 4 Moo PC 63 [13 ER 225]; *Speaker of the Legislative Assembly (Vic) v Glass* (1871) LR 3 PC 560 at 570; *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157; *Armstrong v Budd* [1969] 1 NSWR 649 at 653, 659, 663.

(2) (1996) 189 CLR 51.

violence directly upon the judiciary. Thus, a criminal judgment by Parliament would lack finality because of the power of repeal. It would be immune from review as it is not a judgment, decree, order or sentence against which there can be appeal to the High Court (3). Street CJ was wrong to conclude in *Building Construction Employees and Builders' Labourers Federation (NSW) v Minister for Industrial Relations* (4) that the Parliament had a power to adjudicate. Even if the Parliament possesses judicial power, it must be exercised judicially, for example, by giving affected parties an opportunity to be heard.

A S Bell SC (with him *B K Lim*) for the plaintiffs Duncan, Cascade Coal, Mt Penny Coal and Glendon Brook Coal. Schedule 6A is an exercise of judicial power by the New South Wales Parliament. The Parliament has made a finding that the licensees contravened a norm of conduct, being a norm of not being involved in "serious corruption", and imposed serious adverse consequences upon them in order to deter future corruption. Schedule 6A has a punitive character bespeaking its judicial character, whether or not it meets the description of a bill of pains and penalties (5). [HAYNE J. If the purpose of these provisions was to punish, why are the licensees given back their application fees?] To make the amending Act appear to be something it is not, as a matter of substance. The corollary of Sch 6A being an exercise of judicial power is that it is not a "law" within the meaning of s 5 of the *Constitution Act 1902* (NSW). [GAGELER J. So an act of attainder is not a law?] A "law" is not to be equated with a statute. In particular, Sch 6A does not lay down a norm of conduct and does not merely vary existing rights but destroys them by way of punishment for what the Parliament has judged to be "serious corruption". The Parliament cannot exercise judicial power. That is because (1) there is an integrated system of courts for the exercise of federal and state judicial power at the apex of which sits the High Court in ultimate superintendence (6); (2) there can be no islands of judicial power immune from supervision or restraint (7); and (3) there cannot be different grades or qualities of justice in Australia (8). The ability of the Parliament to exercise non-federal judicial power is corrosive of the *Commonwealth Constitution*: it means that the Supreme Court of New

(3) *Commonwealth Constitution*, s 73.

(4) (1986) 7 NSWLR 372 at 380.

(5) *Haskins v The Commonwealth* (2011) 244 CLR 22 at 57 [96]; *Polyukhovich v The Commonwealth* (1992) 172 CLR 501 at 647, 686; *United States v Brown* (1965) 381 US 437.

(6) *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 138; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 580-581 [98].

(7) *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 581 [99].

(8) *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 88-89 [123].

South Wales is not in fact supreme, and that neither that Court nor this Court, through the judicially unifying mechanism of s 73 of the *Constitution*, may supervise or review the exercise of such power, however arbitrary, biased, pernicious or fundamentally unfair it may be. The established principle that there is no separation of powers in the States is not challenged: courts may exercise non-judicial power, and tribunals may exercise judicial power.

Clause 11 of Sch 6A is inconsistent with the *Copyright Act 1968* (Cth) and, by force of s 109 of the *Constitution*, invalid. The *Copyright Act* creates a comprehensive licence scheme for the use by the State of New South Wales of works in which copyright subsists. That licence scheme mandates, as the statutory quid pro quo for the qualification upon the copyright owner's exclusive rights, the provision of terms, either negotiated or determined by the Copyright Tribunal, or, in the case of reproduction, equitable remuneration (9). Clause 11 purports to authorise the State to do acts comprised in copyright owned by Cascade Coal unimpeded by any intellectual property right, without any liability attaching to the State, and without any compensation being payable. There is thus a direct collision between the two laws.

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

M G Sexton SC. The amending Act is a later statute that affects an interest created by a prior statute. Other than certain limitations imposed by the *Australia Act 1986* (Cth) and the *Commonwealth Constitution*, the legislative powers of the Parliament are plenary. Schedule 6A would be valid even if it were an exercise of judicial power, as the form of government set up in New South Wales never effected a separation of judicial from legislative powers (10). In any event, it is not an exercise of judicial power. It operates to cancel existing licences and to create a new set of rights that apply to them. It does not recognise or attempt to determine any dispute in relation to those rights (11). Clause 3 of Sch 6A does not amount to a finding of fact. It may be compared with a preamble (12). Even if Sch 6A had some aspects of an exercise of judicial power, it would be characterised as an exercise of legislative power because it was exercised by a

(9) *Copyright Agency Ltd v New South Wales* (2008) 233 CLR 279 at 301 [68].

(10) *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth* (1986) 161 CLR 88 at 94-96; *Clyne v East* [1967] 2 NSWR 483.

(11) *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542 at 592-593 [152], [155].

(12) *H A Bacharach Pty Ltd v Queensland* (1998) 195 CLR 547 at 561 [12].

legislative body (13). Schedule 6A is not a bill of pains and penalties because the alteration of rights and obligations relating to the exploration licences was not premised on any offence being committed nor was any penalty imposed on any actual or supposed offender (14). There is a significant difference between the imposition of adverse consequences by way of legislation and the notion of punishment (15). Schedule 6A is a "law" of the Parliament because it embodies a rule of conduct in relation to the *Mining Act*, as well as declaring rights, duties and powers (16). [NETTLE J. What is the rule of conduct which the law prescribes? Is the rule that, henceforth, to grant a licence by the same process is unlawful?] In the sense that it is unlawful only in this instance.

S J Free. There is a partial overlap between cl 11 of Sch 6A and the *Copyright Act*; however, cl 11 does not remove the State's obligations to comply with the *Copyright Act*, including payment of terms or equitable remuneration.

J T Gleeson SC, Solicitor-General for the Commonwealth, (with him *J S Stellios*), for the Attorney-General for the Commonwealth, intervening. The nature of the power being exercised, cancellation of a right granted by statute, lends itself to exercise by any of legislative, executive or judicial power. Where such a power is exercised by Parliament, each member of Parliament is ordinarily entitled to bring to bear an unlimited range of considerations as to whether the public interest requires the cancellation and, if so, on what terms. Clause 3 of Sch 6A shows that that occurred here. An unconfined discretion of this character is inconsistent with judicial power. It is unclear what controversy between which persons over what existing rights has been determined by the Parliament. Merely to characterise something as "punishment" without more does not isolate an exercise of judicial power. Censure and stigmatisation through the removal of statutory rights may validly attend exercises of legislative power (17). Schedule 6A is a "law" even if it is an exercise of judicial power. If, for example, a Commonwealth law strays into adjudication and punishment of

(13) *H A Bacharach Pty Ltd v Queensland* (1998) 195 CLR 547 at 562 [15]; *R v Spicer; Ex parte Australian Builders' Labourers' Federation* (1957) 100 CLR 277 at 305.

(14) *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 535.

(15) *Kariapper v Wijesinha* [1968] AC 717 at 736; *Haskins v The Commonwealth* (2011) 244 CLR 22 at 37 [26].

(16) *H A Bacharach Pty Ltd v Queensland* (1998) 195 CLR 547 at 564 [22]; *The Commonwealth v Grunseit* (1943) 67 CLR 58 at 82.

(17) *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth* (1986) 161 CLR 88; *Kariapper v Wijesinha* [1968] AC 717.

criminal guilt, it is still a "law" within the meaning of Ch I of the *Constitution*; but, because s 51 is "subject to this Constitution", the law is invalid as infringing Ch III.

M G Hinton QC, Solicitor-General for the State of South Australia, (with him *L K Byers*), for the Attorney-General for that State, intervening, adopted the defendant's and the Commonwealth's submissions and made the following further submissions. There being no declaration of guilt in Sch 6A, any harm resulting from the alteration in rights and obligations attaching to the relevant licences cannot be for any articulated wrongdoing (18). The alteration of rights and obligations attaching to exploration licences is not uniquely susceptible of judicial determination. It is appropriate for Parliament to revisit the grant of such rights and obligations and no judicial process is thereby interfered with (19). As a declaration of rights and obligations attaching to the relevant licences as at the cancellation date, Sch 6A is a "law" within the meaning of s 5 of the *Constitution Act* (20).

S G E McLeish SC, Solicitor-General for the State of Victoria, (with him *K L Walker* SC), for the Attorney-General for that State, intervening. Schedule 6A effects no exercise of judicial power. [He referred to *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (21) and *Attorney-General (Cth) v Alinta Ltd* (22).] The rights attaching to the exploration licences were, being creatures of statute, inherently susceptible of variation or extinguishment by statute (23). The legal operation of Sch 6A does not turn on the suggested "finding" in cl 3; the effect of the "finding" is determined by the operative provisions which follow (24). The New South Wales Parliament is not precluded by the *Commonwealth Constitution* from exercising judicial power. The exercise of powers of the legislature is subject to constitutional review by the courts and democratic review by the electorate. State Parliaments have the recognised ability to exercise

(18) *Al-Kateb v Godwin* (2004) 219 CLR 562 at 650 [265].

(19) *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth* (1986) 161 CLR 88 at 95-96; *H A Bacharach Pty Ltd v Queensland* (1998) 195 CLR 547 at 562 [15]-[16].

(20) *R v Davison* (1954) 90 CLR 353 at 370; *The Commonwealth v Grunseit* (1943) 67 CLR 58 at 82; *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 10.

(21) (1970) 123 CLR 361 at 374.

(22) (2008) 233 CLR 542 at 592-593 [152]-[155].

(23) *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 237; *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 35 [78], 56 [145]; *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140 at 200 [144].

(24) *Prentis v Atlantic Coast Line Co* (1908) 211 US 210 at 227.

powers which, if exercised by courts, would be regarded as judicial (25). Nor are State Parliaments, by separation of powers considerations, precluded from imposing punishment (26). There is no requirement that legislation in respect of property rights must be general in character and not aimed at a particular right (27).

G R Donaldson SC, Solicitor-General for the State of Western Australia, (with him *D E Leigh*), for the Attorney-General for that State, intervening. The power to enact bills of pains and penalties has not been abandoned nor fallen into desuetude. The last medieval impeachment on a bill of attainder was in 1459 and was not again exercised until 1620-1621 (28). A similar gap exists between the present day and the last such enactment. There is no right to compensation for compulsorily acquired property which restrains State legislative power (29). Legislation which the Parliament lacks power to make is still a "law" (30).

P J Dunning QC, Solicitor-General for the State of Queensland, (with him *J A Kapeleris* and *W E Wild*), for the Attorney-General for that State, intervening, adopted the defendant's and the interveners' submissions and made the following further submissions. Chapter III of the *Commonwealth Constitution* establishes an integrated courts system, not an integrated system of judicial power (31). Parliaments are not, and need not be, subject to supervision by the Supreme Courts. Enactments are ultimately sanctioned, or not, by the people. In any event, the recital of facts in cl 3 is not essential to the operation of Sch 6A as a whole and is therefore severable.

W Sofronoff QC, in reply.

A S Bell SC, in reply.

Cur adv vult

(25) *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 167; *R v Humby; Ex parte Rooney* (1973) 129 CLR 231 at 248; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 64.

(26) *R v Humby; Ex parte Rooney* (1973) 129 CLR 231 at 249-250; *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 536, 647-648, 685-686, 721; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27, 70; *Leeth v The Commonwealth* (1992) 174 CLR 455 at 469-470; *Haskins v The Commonwealth* (2011) 244 CLR 22 at 36-37 [24]-[25], 57-58 [96]; *Kuczborski v Queensland* (2014) 254 CLR 51 at 89 [104].

(27) *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 261.

(28) Holdsworth, *A History of English Law*, vol 1 (1956), pp 381-382.

(29) *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at 410 [14].

(30) *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 64, 76-77, 108, 109, 144.

(31) *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 424 [40].

15 April 2015

THE COURT delivered the following written judgment: —

1 The *Mining Amendment (ICAC Operations Jasper and Acacia) Act 2014* (NSW) (the Amendment Act) amends the *Mining Act 1992* (NSW) 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) which provides for the legislative competence of the New South Wales Parliament. Secondly, 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*. Thirdly, 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) 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" (s 3A(d)).

7 The *Mining Act* empowers the Minister to grant exploration licences, either on application (ss 13 and 22) or in some circumstances after calling for tenders (ss 14, 15 and 23). An exploration licence is granted for a fixed term of five years or less (s 27), is renewable on application (ss 113-114), and remains in force pending determination of an application for renewal (s 117). An exploration licence entitles its holder to prospect for specified minerals on specified land in accordance with the conditions of the licence (s 29). The holder is obliged to prepare and lodge with the Department reports of all such prospecting (s 163C), including both annual reports and (within thirty 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 (32). 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 (33), 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" (s 365(1)(a)), "in connection with the administration or execution of [the *Mining] Act*" (s 365(1)(b)), or "with the concurrence of the Minister" (s 365(1)(e)).

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* (s 125(1)(b)). It is relevant to note in this respect that, in 2008 and 2009, the *Mining*

(32) Clause 57 of the *Mining Regulation 2010* (NSW).
(33) Clause 58 of the *Mining Regulation 2010* (NSW).

Act contained a provision making it an offence to furnish false or misleading information in connection with an application made under the Act (s 374).

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 Ltd (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 Ltd (NuCoal), a publicly listed company floated for that 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 Ltd (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 (34). 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 (35).

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 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 Doyles 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

(34) Sections 7(1) and 9(1)(a) of the ICAC Act.
(35) Section 74B(1)(a) of the ICAC Act.

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 Doyles 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* (s 374), as well as under other State and Commonwealth laws (36)) and that other former directors of Doyles 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 laws (37)).

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 Doyles 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 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,

(36) 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).

(37) 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).

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 (38), and in the Legislative Assembly by the Premier (39). 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 (40). 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" (41). Both continued (42):

> "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" (43). The Minister then stated (44):

> "In response to that I say that the greatest form of sovereign risk, the greatest threat to the stability and certainty needed by business

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

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

(40) New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 30 January 2014, p 26558; New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 30 January 2014, p 26649.

(41) New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 30 January 2014, p 26558; New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 30 January 2014, p 26649.

(42) New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 30 January 2014, p 26558; New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 30 January 2014, p 26649.

(43) New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 30 January 2014, p 26559; New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 30 January 2014, p 26650.

(44) New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 30 January 2014, pp 26559-26560.

> 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 (45).

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

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 (46), 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" (s 380A(2)(a)). Amongst categories of persons or bodies corporate specified as meeting that description are those who previously held exploration licences that were then cancelled (s 380A(3)(c)).

Text of the Amendment Act

24 The Amendment Act, which was expressed to commence on the date of its assent (47), inserted into the *Mining Act* a new Sch 6A (48). For the purpose of Sch 6A, the date of assent to the Amendment Act is defined as the "cancellation date" (49).

25 Clause 3 of Sch 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:

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

(46) s 380A(1)(a). See Sch 1 [24] to the Further Amendment Act.

(47) Section 2 of the Amendment Act.

(48) Schedule 1 to the Amendment Act.

(49) Clause 2 of Sch 6A to the *Mining Act*.

(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:

(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 Sch 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 Sch 6A states that any "associated application" (including an application for renewal (cl 5(3)(a))) 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" (cl 5(1)) and "[a]ccordingly ... is not to be dealt with any further" (cl 5(2)). 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 (cl 7(1)). 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) (cl 7(3)). Clause 8 protects and immunises the State from all civil liability in relation to those exploration licences (cl 8(1)-(4)), 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" (cl 8(5)).

28 Clause 9 of Sch 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 licence (s 163C) 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* (50).

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" (cl 11(1)). The clause specifically provides that "[n]o intellectual property right or duty of confidentiality ... prevents the use or disclosure" so authorised (cl 11(3)), and that "[n]o liability attaches to the State or any other person in connection with the use or disclosure" so authorised (cl 11(4)).

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

(50) Part 12, and in particular s 248B.

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 Sch 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 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 Sch 6A of "deterring 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, Sch 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 Sch 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" (s 3), 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* (51) this Court referred to longstanding authority (52) for the proposition that, within the limits of the grant, the legislative power so conferred "is as ample and plenary as the power possessed by the Imperial Parliament itself" (53).

38 Subsequently, in *Kable v Director of Public Prosecutions (NSW)* (54), 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

(51) (1988) 166 CLR 1.
(52) See in particular *Powell v Apollo Candle Co* (1885) 10 App Cas 282 at 290.
(53) (1988) 166 CLR 1 at 10.
(54) (1996) 189 CLR 51.

that is otherwise within power" (55). 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'" (56), and continued (57):

> "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 (58), 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 (59). The non-consensual ascertainment and enforcement of rights in issue between private parties is another (60). 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

(55) (1996) 189 CLR 51 at 64.
(56) (1996) 189 CLR 51 at 76.
(57) (1996) 189 CLR 51 at 77.
(58) (1996) 189 CLR 51 at 109.
(59) *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27.
(60) *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 258.

conduct which, if proved on admissible evidence to the criminal standard, would constitute a criminal offence (61).

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" (62). 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

(61) *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352.

(62) *Haskins v The Commonwealth* (2011) 244 CLR 22 at 37 [25], quoting *Polyukhovich v The Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501 at 649-650. See generally *Polyukhovich v The Commonwealth (War Crimes Act Case)* (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* (1946) 328 US 303 at 322-324; *Kariapper v Wijesinha* [1968] AC 717 at 736.

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 Sch 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 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 Sch 6A to the purposes of the Amendment Act including "deterring 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* (63) 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

(63) [1968] AC 717.

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 (64): "[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 (65):

> "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 legislative 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 (66). 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 Sch 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.

(64) [1968] AC 717 at 736.
(65) [1968] AC 717 at 736.
(66) *Lambert v Weichelt* (1954) 28 ALJ 282 at 283.

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 1-13 of Sch 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 Sch 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.

DUNCAN v NEW SOUTH WALES

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 cll 1-13 of Sch 6A to the Mining Act 1992 (NSW), or any of them, invalid?

Answer No.

Question 2 Who should pay the costs of this special case?

Answer The plaintiff.

NuCoal Resources Ltd v New South Wales

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 cll 1-13 of Sch 6A to the Mining Act 1992 (NSW), or any of them, invalid?

Answer No.

Question 2 Is cl 11 of Sch 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 plaintiff.

Cascade Coal Pty Ltd v New South Wales

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 cll 1-13 of Sch 6A to the Mining Act 1992 (NSW), or any of them, invalid?

Answer No.

Question 2 Is cl 11 of Sch 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.

Solicitors for Duncan, *Yeldham Price O'Brien Lusk*.

Solicitors for NuCoal Resources, *Quinn Emanuel Urquhart & Sullivan*.

Solicitors for Cascade Coal, Mt Penny Coal and Glendon Brook Coal, *TressCox*.

Solicitor for the State of New South Wales, *I V Knight*, Crown Solicitor (NSW).

Solicitors for the interveners, *Australian Government Solicitor*; *M G Evans*, Crown Solicitor for the State of South Australia; *Peter Stewart*, Victorian Government Solicitor; *P D Evans*, State Solicitor for Western Australia; *G R Cooper*, Crown Solicitor for the State of Queensland.

AFSB