IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **NO S 119 OF 2014**

BETWEEN: **TRAVERS WILLIAM DUNCAN**
Plaintiff

AND: **THE STATE OF NEW SOUTH WALES**
Defendant

ANNOTATED SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

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PART I FORM OF SUBMISSIONS

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

PART II BASIS OF INTERVENTION

2. The Attorney-General of the Commonwealth (**Commonwealth**) intervenes under s 78A of the *Judiciary Act 1903* (Cth). The Commonwealth intervenes in support of the defendant.

PART III LEGISLATIVE PROVISIONS

3. The applicable constitutional provisions and statutes are those identified in the plaintiff's submissions together with the provisions set out in Annexure A.

Summary of Argument

4. In summary, the Commonwealth contends:

   4.1. Chapter III of the Constitution establishes an integrated system for the exercise of *Commonwealth* judicial power and further provides (subject to Parliament's decision otherwise) for appeals to the High Court from federal courts, State Supreme Courts and State courts exercising federal jurisdiction. It does not establish an integrated system for the exercise of *State* judicial power. State judicial power is affected by Chapter III of the Constitution only to the extent necessary for the effective operation of the judicial system established by its provisions.

   4.2. The provisions of Sch 6A to the *Mining Act 1992* (NSW) (**the impugned provisions**) operate to excise the cancelled licences from the provisions of the Mining Act, and create a new set of rights that apply to those licences. They involve an exercise of legislative power to alter existing rights. The impugned provisions are not properly characterised as a bill of attainder or otherwise involving an exercise of judicial power.

   4.3. A plaintiff will only have standing to challenge the constitutional validity of an Act if they can establish a sufficient interest in that question. Being a director of a corporation, or a beneficiary of a trust that holds shares in a corporation, will generally not be sufficient to establish standing to challenge the validity of legislation that affects the rights of that corporation. In the present case, however, no issue is raised on the pleadings as to the standing of the plaintiff to bring this proceeding. Furthermore, whatever the present plaintiff's standing, the plaintiffs in S206 of 2014 (**Cascade proceeding**) advance the same arguments as this plaintiff (by adopting them). Accordingly these submissions proceed on the assumption that the question of the plaintiff's standing to bring this proceeding does not fall for decision by the Court.

5. The Commonwealth also adopts its submissions in the Cascade proceeding.

Plaintiff's Proposition 1: Chapter III precludes the exercise of judicial power by State legislatures

6. The plaintiff's first proposition is that '[t]he Parliament of New South Wales cannot validly exercise judicial power'.[1] The plaintiff does not, and cannot, rely on a 'constitutional separation of powers in the states'.[2] Such a proposition has been rejected by the Court.[3] Nor could the plaintiff rely on a proposition that the separation of powers principles, derived from the Commonwealth Constitution, apply to the State Parliaments.[4]

7. Instead, the plaintiff's Proposition 1 is that 'the exercise of judicial power in a State ... must be amenable to the supervision of the Supreme Court of the State and, in turn, the "final superintendence" of the High Court of Australia'.[5] The proposition is further elaborated by contending that:

   7.1. 'Chapter III of the Constitution establishes an integrated system for the exercise of the judicial powers of the Commonwealth and of the several States'; and

   7.2. 'The system is integrated in the sense that, since the passage of the Australia Acts 1986,[6] Commonwealth and state judicial powers alike are exercised exclusively under the ultimate superintendence of the High Court'.[7]

8. The plaintiff accepts that its contentions are unsupported by existing authority and requires a development of established principles.

9. The Commonwealth submits that the premise for the plaintiff's first proposition is misconceived. While Chapter III of the Constitution largely establishes an integrated judicial system, the extent to which *State judicial power* is integrated is necessarily limited. The constitutional arrangement at the State level for the exercise of power is affected by Chapter III of the Constitution only to the extent necessary for the effective operation of the *federal* judicial system established by its provisions. There is thus no basis for an implication supporting Proposition 1.

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1 Plaintiff's submissions at [23].

2 Plaintiff's submissions at [24].

3 *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51 (***Kable***) at 67 (Brennan J), 78 (Dawson J), 92-94 (Toohey J), 103-104 (Gaudron J), 109 (McHugh J), 132 (Gummow J); *Assistant Commissioner Condon v Pompano* (2013) 87 ALJR 458 (***Pompano***) at 488 [125].

4 The rejection of that proposition has been recently affirmed by the Court: see *Pollentine v Bleijie* (2014) 88 ALJR 796 at [42]; *Pompano* at 488 [125].

5 Plaintiff's submissions at [25].

6 It cannot be suggested that the *Australia Acts 1986* (Cth and UK) provide support for Proposition 1. Relevantly, s 11(1) of the *Australia Acts* terminated appeals from State courts to the Privy Council. It did not expand the Court's *constitutional* jurisdiction to hear appeals from State courts exercising judicial power.

7 Plaintiff's submissions at [26].

'Integrated' judicial system

10. The judicial system established by Chapter III is described by the plaintiff as 'integrated'.[8] However, the integration of State judicial systems, which is effected by Chapter III, is necessarily limited.

11. Chapter III creates the institutional structure through which Commonwealth judicial power and federal jurisdiction can be exercised. In this respect, the extent of *integration* is that State courts can be used by the Commonwealth Parliament to exercise Commonwealth judicial power, and must be maintained for that purpose by State Parliaments.

10 12. Section 73 identifies the High Court as the ultimate court of appeal from specified courts, subject to exceptions and regulations enacted by Parliament. In relation to State courts, the appellate jurisdiction of the High Court is expressly limited to appeals from the 'judgments, decrees, orders and sentences' of State Supreme Courts and State courts exercising federal jurisdiction. It has been accepted that a judgment, decree, order or sentence must be one involving an exercise of judicial power.[9] Consequently, *State judicial power* is integrated into Chapter III only in the sense that appeals from State Supreme Courts to the High Court are guaranteed, subject to exceptions and regulations, when State judicial power is being exercised.

20 13. It is only in these ways that the judicial system in Australia can be, and has been, properly described as 'integrated'. The terms of Chapter III are otherwise silent on the constitutional arrangements at the State level for the exercise of government power and, indeed, the characterisation of that government power as judicial or non-judicial. It is only by implication from the terms or structure of Chapter III that State constitutional arrangements are otherwise affected, and those implications can be drawn only if logically or practically necessary to give effect to the scheme in Chapter III.[10]

14. It is not, and cannot be, suggested that the plaintiff's proposition is necessary to protect or enhance the exercise of *Commonwealth judicial power* by State
30 courts.[11] Indeed, the decision of the Court in *Re Wakim; Ex parte McNally*[12] that State judicial power could not be exercised by federal courts was for the very reason that it was not 'necessary or proper to render effective the judicial power that is given by Ch III'.[13] Consequently, the plaintiff's proposition must be drawn as an implication from the High Court's jurisdiction to hear appeals from a State Supreme Court's exercise of State judicial power.

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8 See, eg, plaintiff's submissions at [25], [32].

9 See, eg, *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at 38 [63] (Gaudron, Gummow and Hayne JJ).

10 *Durham Holdings Pty Limited v New South Wales* (2001) 205 CLR 399 at 410 [14]. As Brennan CJ said in *Kable* at 66 (although in dissent in the result) '[i]f the constitutional text does not clearly support an implication of restraint, the court declaring the restraint is plunged into political controversy in which it is ill-fitted to engage and from which it is hard put to withdraw'.

11 at 579 [118] (Gummow and Hayne JJ); see also at 562 [70] (McHugh J).

12 (1999) 198 CLR 511.

13 at 579 (Gummow and Hayne JJ); see also at 562 (McHugh J).

Kirk v Industrial Court (NSW)

15. The plaintiff recognises that acceptance of his proposition requires an extension of the Court's decision in *Kirk v Industrial Court (NSW)*[14] (***Kirk***). The plaintiff contends that this extension involves a 'small step'.[15] The Commonwealth contends that this would involve a large and unsupportable step that would effect a radical transformation in the constitutional arrangements of the States.

16. In *Kirk*, the High Court relevantly accepted that:

    16.1. 'Chapter III of the *Constitution* requires that there be a body fitting the description "the Supreme Court of a State"';

    16.2. a 'defining characteristic of State Supreme Courts is the power to confine inferior courts and tribunals within the limits of their authority to decide by granting relief in the nature of prohibition and mandamus, and ... also certiorari, directed to inferior courts and tribunals on grounds of jurisdictional error'; and

    16.3. a 'privative provision in State legislation, which purports to strip the Supreme Court of the State of its authority to confine inferior courts within the limits of their jurisdiction by granting relief on the ground of jurisdictional error, is beyond the powers of the State legislature'.[16]

17. In considering whether these principles support the plaintiff's first proposition, it is fundamental to understand their basis and purpose.

Functional basis for identifying essential characteristics

18. In setting out the principle referred to in paragraph 16.1 above, the High Court referred to s 73(ii) of the Constitution, which contains the expression 'the Supreme Court of any State', and to a passage from the joint judgment of Gummow, Hayne and Crennan JJ in *Forge v Australian Securities and Investments Commission*[17] (***Forge***). Their Honours in *Forge* had said:

> Because Ch III requires that there be a body fitting the description "the Supreme Court of a State", it is beyond the legislative power of a State so to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description.

19. At issue in *Forge* was s 37 of the *Supreme Court Act 1970* (NSW), which authorises the appointment of acting judges to the New South Wales Supreme Court. The plurality linked the expression 'the Supreme Court of any State' in

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14 (2010) 239 CLR 531.

15 Plaintiff's submissions at [34].

16 At 566-567 [55]. The applicability of these principles to decisions of the executive government was confirmed in *Public Services Association of South Australia Inc v Industrial Relations Commission of (SA)* (2012) 249 CLR 398.

17 (2006) 228 CLR 45 at 76 [65].

s 73(ii) to the test of 'institutional integrity' that had been applied in *Kable*,[18] *Fardon v Attorney-General (Qld)*[19] and *North Australian Aboriginal Legal Aid Service Inc v Bradley*[20] as a necessary condition for State courts exercising Commonwealth judicial power.[21] In other words, the essential characteristics of a State court, including State Supreme Courts, were *functionally* defined as those necessary for a State court to exercise Commonwealth judicial power.

20. As already submitted, no reliance has been, or can be, placed on this integrating feature of Chapter III to support the plaintiff's first proposition.

Historical basis for identifying essential characteristics

21. The importance of the Court's decision in *Kirk* is the expansion from this *functional* basis for identifying the essential characteristics of State Supreme Courts to a *historical* basis. The Court accepted that the essential characteristics could be discerned from those that characterised Supreme Courts at 1900. 'At federation', their Honours said, 'each of the Supreme Courts referred to in s 73 of the *Constitution* had jurisdiction that included such jurisdiction as the Court of Queen's Bench had in England'.[22] In response to suggestions that statutory privative provisions had been enacted by colonial legislatures limiting that jurisdiction, the Court referred to a passage from *Colonial Bank of Australasia v Willan*,[23] and concluded:[24]

> That is, accepted doctrine at the time of federation was that the jurisdiction of the colonial Supreme Courts to grant certiorari for jurisdictional error was not denied by a statutory privative provision. The supervisory jurisdiction of the Supreme Courts was at federation, and remains, the mechanism for the determination and the enforcement of the limits on the exercise of State executive and judicial power by persons and bodies other than the Supreme Court. That supervisory role of the Supreme Courts exercised through the grant of prohibition, certiorari and mandamus (and habeas corpus) was, and is, a defining characteristic of those courts.

22. Relying on this historical approach, it was held by the Court that the 'power to confine inferior courts and tribunals within the limits of their authority to decide by granting relief in the nature of prohibition and mandamus' was characteristic of Supreme Courts at federation and, consequently, was a constitutional characteristic protected by Chapter III (ie, the principles at paras 16.2. and 16.3 above).[25]

23. The plaintiff does not, and cannot, rely upon this historical approach to support the first proposition. At 1900, Colonial Parliaments could enact laws that

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18 (1996) 189 CLR 51.
19 (2004) 223 CLR 575.
20 (2004) 218 CLR 146.
21 *Forge* at 76 [63].
22 At 580 [97].
23 (1874) LR 5 PC 417 at 440.
24 At 580-581 [97]-[98].
25 At 566-567 [55].

operated in a way that might be characterised, at the federal level, as judicial in nature.[26] Subject to repugnancy and extraterritoriality limits and manner and form requirements, the legislative power of Colonial Parliaments was as plenary as that of the Imperial Parliament,[27] and the Imperial Parliament could enact laws of that character.

'Superintendence' of judicial power, 'one common law' and 'islands of power'

24. The plaintiff contends that, unless Proposition 1 is accepted:

    24.1. the High Court 'would cease to exercise final superintendence over the exercise of judicial power';

    24.2. '[t]here would cease to be "but one common law in Australia which is declared by [the High court] as the final court of appeal"'; and

    24.3. Parliament 'would operate as an "island or power" of the kind that Chapter III of the *Constitution* proscribes'.[28]

25. When these statements by the Court in *Kirk* are seen in context, they do not give rise to the attributions contended by the plaintiff. Having identified review for jurisdictional error as a characteristic of Supreme Courts at federation, the Court further said:[29]

> And because, "with such exceptions and subject to such regulations as the Parliament prescribes", s 73 of the Constitution gives this Court appellate jurisdiction to hear and determine appeals from all judgments, decrees, orders and sentences of the Supreme Courts, the exercise of that supervisory jurisdiction is ultimately subject to the superintendence of this Court as the "Federal Supreme Court" in which s 71 of the *Constitution* vests the judicial power of the Commonwealth. There is but one common law of Australia. The supervisory jurisdiction exercised by the State Supreme Courts by the grant of prerogative relief or orders in the nature of that relief is governed in fundamental respects by principles established as part of the common law of Australia. That is, the supervisory jurisdiction exercised by the State Supreme Courts is exercised according to principles that in the end are set by this Court. To deprive a State Supreme Court of its supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power by persons and bodies other than that Court would be to create islands of power immune from supervision and restraint.

26. The supervisory jurisdiction found to be entrenched in the words 'Supreme Courts' operates to keep exercises of State governmental power, whether by

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26 See, eg, *Kable* at 64-66 (Brennan CJ), 77-78 (Dawson J), 92-94 (Toohey J), 109, 118, 121 (McHugh J); *Building Construction Employees and Builders' Labourers Federation (NSW) v Minister of Industrial Relations* (1986) 7 NSWLR 372 at 381 (Street CJ), 401 (Kirby P), 407 (Glass JA), 408-409, 412 (Mahoney JA), 419 (Priestley JA).

27 See *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 9-10, citing *R v Burah* (1878) 3 App Cas 889; *Hodge v The Queen* (1883) 9 App Cas 117; *Powell v Apollo Candle Company* (1885) 10 App Cas 282; *Riel v The Queen* (1885) 10 App Cas 675.

28 Plaintiff's submissions at [32].

29 At 580-581 [98]-[99].

State courts, tribunals or other executive decision-makers, within the scope of their jurisdiction. This is the case whether the character of the power being exercised can be described as judicial or non-judicial. In other words, it is the institutional mechanism within the constitutional framework for ensuring accountability for the exercise of public power by officers of the State. It is a jurisdiction that mirrors the operation of s 75(v) of the Constitution at the Commonwealth level to keep officers of the Commonwealth, whether they are federal court judges, tribunals or other administrative decision-makers, within their jurisdiction. That jurisdiction, the Court said in *Plaintiff S157/2002 v Commonwealth*,[30] is 'a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them'. This was said to be a 'textual reinforcement' of the rule of law.[31]

27. Again speaking of s 75(v), the Court said in *Bodruddazza v Minister for Immigration and Multicultural Affairs*,[32] citing the decision in *Corporation of the City of Enfield v Development Assessment Commission*,[33] that '[a]n essential characteristic of the judicature provided for in Ch III is that it declares and enforces the limits of the power conferred by statute upon administrative decision-makers. Section 75(v) furthers that end by controlling jurisdictional error'. The essential characteristic of State Supreme Courts derived by the Court in *Kirk* is a manifestation, by implication, of the same purpose discernible from the text of s 75(v): it is a reinforcement of the rule of law.

28. It is in this sense that the Court in *Kirk* identified the 'supervisory jurisdiction' of State Supreme Courts, which is then 'subject to the superintendence' of the High Court. It is in this sense that *Kirk*, together with s 75(v), operate to prevent the creation of 'islands of power immune from supervision and restraint'. And, it is in this sense that the Court referred to the common law principles developed by the High Court for the exercise of that supervisory jurisdiction. When properly understood, *Kirk* has nothing to say about the integration of Commonwealth and State judicial power within Chapter III. The High Court's decision does not prevent state judicial power being exercised by decision-makers other than courts, including a State Parliament. Chapter III does not, as contended by the plaintiff, integrate 'the several judicial powers ... in a closed, hierarchical system of law'.[34] At the federal level, s 75(v) does not operate in the way that the plaintiff contends for the principles in *Kirk*. The object of *Kirk*, like the object of s 75(v), is directed to ensuring the supervision of jurisdiction given by law to an officer of the State, whether a court, tribunal or other administrative decision-maker.

29. It would effect a radical transformation of the constitutional arrangement at the State level to prevent a State Parliament, as a general proposition, from exercising power that might, at the Commonwealth level, be characterised as

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30 (2003) 211 CLR 476 at 513-514 [104].

31 At 513 [103].

32 (2007) 228 CLR 651 at 668-669 [46].

33 (2000) 199 CLR 135 at 152-153 [43].

34 Plaintiff's submissions at [28].

judicial in nature. For the reasons given, *Kirk* does not provide a platform for the imposition of that limitation on State Parliaments. At the federal level, that separation is achieved by a textual and structural implication derived from Chapters I, II and III of the Constitution. The imposition of a similar constraint on State Parliaments would require a conclusion that the federal separation of judicial power principle applies to State Parliament. That proposition is not pressed by the plaintiff and, in any event, has been rejected by the Court.

Superintendence of State Parliaments

30. That is not to say that State Parliaments operate outside the Court's supervision: the *law* also imposes constraints on State Parliaments. However, given the character of State Parliaments, their coordinate status alongside the courts, and their accountability to the people for their decisions, the *legal* constraints placed on State Parliaments, and their superintendence by the High Court, are necessarily of a different nature.

31. The law imposes constraints on State Parliaments in two ways: first, the written and entrenched Commonwealth Constitution imposes limits, express and implied, on the exercise of power by State Parliaments; and, secondly, State Parliaments must comply with entrenched manner and form provisions.[35] The limits imposed by the Constitution on Australian legislatures have been described as 'legislative jurisdiction'[36] and, accordingly, it might be said that the Court supervises the excesses of jurisdiction by those legislatures. However it is expressed, the Court's jurisdiction over a State Parliament's legislative power ensures that State Parliaments comply with those legal requirements. This jurisdiction of the Court, whether original or appellate, operates irrespective of the character of the power being exercised by State Parliaments. Consequently, it is incorrect to say, as the plaintiff contends, that a rejection of Proposition 1 would place State Parliaments 'beyond the final superintendence of the High Court'.[37] The nature of that jurisdiction necessarily differs to the supervisory jurisdiction exercised in relation to decisions of State courts, tribunals and other administrative decision-makers. However, that is simply a reflection of the character of State Parliaments and the differing understandings of the constraints imposed by *law*. They reflect the different ways in which the rule of law is achieved within the constitutional system.

32. The complexities of the constitutional arrangement at the Commonwealth and State levels, and at the interface between the two, require this nuanced understanding of the supervisory jurisdiction of the Court and role that the rule of law plays. That nuanced understanding requires a rejection of the simple proposition that State Parliaments cannot exercise judicial power.

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35 *Attorney-General (WA) v Marquet* (2003) 217 CLR 545; *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394.

36 See the use of that expression in *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 678-679, 696 (Evatt and McTiernan JJ); *Ffrost v Stevenson* (1937) 58 CLR 528 at 593-594, 596 (Evatt J); *Worthing v Rowell and Muston Pty Ltd* (1970) 123 CLR 89 at 103 (Barwick CJ). See also Mark Leeming, *Authority to Decide: The Law of Jurisdiction in Australia* (2012), 14.

37 Cf plaintiff's submissions at [34].

Plaintiff's Proposition 2: the impugned legislation constitutes the exercise of judicial power

33. The plaintiff's second proposition rests on two premises: first, that the determination of existing rights is the exclusive preserve of judicial power; and secondly, that the impugned legislation constitutes a determination of existing rights.

34. It may be accepted that, as a general proposition, the determination of existing rights involves an exercise of judicial power. However, the Commonwealth submits that the impugned legislation does not satisfy this threshold requirement. The plaintiff's contention that the impugned provisions constitute a *determination* of existing rights requires consideration of (i) the existing rights that are said to be determined and (ii) the character of the impugned provisions.

What is the existing right being determined?

35. The plaintiff's submissions are unclear as to what existing right is said to be determined by the impugned provisions. Four possibilities are discernible from the plaintiff's submissions:

    35.1. First, that the cancellation of the statutory licence operates to determine that licence, the right being the statutory licence;

    35.2. Secondly, that the cancellation of the statutory licence operates to invalidate the initial grant of the licence, the right presumably being the entitlement to the initial grant of the licence;

    35.3. Thirdly, that the cancellation constitutes an adjudgment and punishment of an offence of 'serious corruption';

    35.4. Fourthly, that the cancellation constitutes an adjudgment and punishment of the offences that were considered by ICAC in the course of reaching its findings and recommendations.

36. As will be explained below, the impugned provisions cannot be said to constitute a determination of rights in any of these four ways. Before turning to those contentions, it is first necessary to characterise the operation of the impugned provisions.

Character of the impugned provisions

37. The impugned provisions were enacted in response to the findings and recommendations of Independent Commission Against Corruption (**ICAC**). Their character, viewed most generally, is that Parliament has made a decision that the public interest requires the removal of a statutory entitlement by reason of circumstances not known or foreseen at the time of the grant, circumstances revealed through the processes and findings of ICAC; and that such removal did not warrant a grant of compensation. In more detail, then:

The ICAC Act

38. ICAC's principal functions include the investigation of 'corrupt conduct', the making of findings that a person has engaged in such conduct, and reporting to Parliament in relation to any matters referred to it (ss 13, 73-74A of the *Independent Commission Against Corruption Act 1988* (NSW) (**ICAC Act**).[38] 'Corrupt conduct' is any conduct that falls within the description of corrupt conduct in s 8 of the ICAC Act, but which is not excluded by s 9. Section 8 identifies a wide range of conduct as corrupt conduct, including, for example, any conduct of any person that adversely affects the honest or impartial exercise of official functions or any conduct of a public official that constitutes or involves the dishonest exercise of official functions (see s 8(1)(a) and (b) of the ICAC Act). Subsection 9(1) provides that, despite s 8, conduct does not amount to corrupt conduct unless it constitutes or involves (a) a criminal offence, (b) a disciplinary offence, (c) reasonable grounds for dismissing a public official, or (d) in the case of a Minister or member of Parliament, a substantial breach of a code of conduct.

39. It is plain from the interaction between ss 8 and 9 that it is neither necessary nor sufficient for corrupt conduct to constitute or involve a criminal offence. A criminal offence is only one of several pathways in s 9 for conduct to constitute 'corrupt conduct' for the purposes of s 8 and, even if ICAC follows the criminal offence pathway in s 9, ICAC must proceed to determine the separate question whether the conduct falls into one of the types of corrupt conduct identified in s 8.

40. Furthermore, it is clear that a distinction is drawn in the Act between, on the one hand, ICAC's view that conduct constitutes or involves a criminal offence for the purpose of identifying 'corrupt conduct' and, on the other hand, the role of a court to determine criminal guilt for an offence. In forming the view that conduct constitutes or involves a criminal offence for the purposes of the ICAC Act, ICAC cannot make a finding or form an opinion that a specified person is guilty of, or has committed, a criminal offence. Additionally, a finding or opinion that a person has engaged in corrupt conduct is expressly *not* a finding or opinion that the person is guilty of, or has committed, a criminal offence (see ss 13(4) and 74B(1) of the ICAC Act).[39] The role of a court in determining criminal guilt and imposing punishment is unaffected by the fact finding role of ICAC under the ICAC Act.

ICAC's reports

41. This proceeding and the Cascade proceeding arose from the ICAC investigation called 'Operation Jasper'. ICAC's July 2013 report contained

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38 In exercising those functions, ICAC shall regard the public interest and the prevention of breaches of public trust as its paramount concerns (s 12 of the ICAC Act) and is to direct its attention to serious corrupt conduct and systemic corrupt conduct (s 12A of the ICAC Act).

39 This is clearly demonstrated by ICAC's approach to s 9(1)(a): Special Case Book (SCB) at 240. While ICAC formed a view as to whether the conduct would satisfy a criminal offence, it clearly recognised that a court with appropriate criminal jurisdiction would determine guilt of that offence.

findings of corrupt conduct against various persons,[40] including the plaintiff.[41] In making those findings, ICAC was satisfied that, if the facts as found were to be proved on admissible evidence to the criminal standard and accepted by the appropriate tribunal, they would be grounds on which the tribunal would find that the person had committed a criminal offence. In its December 2013 Report, ICAC (i) formed the view that the granting of the relevant licences were so tainted by corruption that they should be 'expunged or cancelled and any pending applications regarding them should be refused'; and (ii) recommended that 'the NSW Government considers enacting legislation to expunge' the relevant licences.[42]

The impugned provisions

42. The preamble to Sch 6A to the Mining Act provides that (cl 3(1)): 'The Parliament, being satisfied because of information that has to come to light as a result of investigations and proceedings of the Independent Commission Against Corruption ... 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 impugned provisions.

43. It is clear from this statement that, in enacting Sch 6A, the NSW Parliament reached a state of satisfaction that licence cancellation was necessary on the basis of ICAC's investigation, proceedings, findings of serious corruption and recommendations. Importantly, contrary to the plaintiff's contention,[43] Parliament did not, *itself*, make any findings: it chose to act upon the findings made by ICAC in reaching its satisfaction that it should cancel the licence.[44]

44. The purposes for the licence cancellation were identified as: 'restoring public confidence in the allocation of the State's valuable mineral resources' (cl 3(1)(a)); 'promoting integrity in public administration above all other considerations, including financial considerations, and deterring future corruption' (cl 3(1)(b)); and 'placing the State, as nearly as possible, in the same position as it would have been had those relevant licences not been granted' (cl 3(1)(c)).

45. The specific objects were identified as: 'to cancel the relevant licences and ensure that the tainted processes have no continuing impact and cannot affect any future processes' (cl 3(2)(a)); 'to ensure that the State has the opportunity, if considered appropriate in the future, to allocate ... rights ... according to proper processes in the public interest' (cl 3(2)(b)); 'to ensure that no person

40 SCB at 152-153.

41 SCB at 153.

42 SCB at 339.

43 Cf plaintiff's submissions at [16].

44 See, eg, *Kariapper v Wijesinha* [1968] AC 717 which involved legislation enacted by the Parliament of Ceylon imposing civic disabilities on persons consequent on the findings of a commission of inquiry. The Privy Council concluded that 'Parliament did not make any finding of its own...' (at 736).

(whether or not personally implicated in any wrongdoing) may derive any further direct or indirect financial benefit from the tainted processes' (cl 3(2)(c)); and 'to protect the State against the potential for further loss or damage and claims for compensation' (cl 3(2)(d)).

46. In stating these purposes and objects, Parliament had considered a range of interests and considerations. These interests and considerations included, not only that ICAC had made findings of serious corruption, but also that: 'it is not practicable in the circumstances to achieve, through financial adjustments or otherwise, an alternative outcome in relation to the relevant licenses' (cl 3(1)(c)); no person should benefit from the tainted processes 'whether or not personally implicated in any wrongdoing' (cl 3(2)(c)); and the provisions should not preclude 'actions for personal liability against individuals, including public officials, who have been implicated by tainted processes and have not acted honestly and in good faith' (cl 3(2)(d)).

47. It is evident from s 3 that Parliament enacted a polycentric law altering existing rights, without compensation, in response to its assessment of what the public interest required in exceptional circumstances, and in full awareness of the diverse impact that the provisions might have on financial interests.

48. To give effect to these purposes and objects, the operative provisions: *cancelled* the relevant licences from the date of royal assent of the amending provisions (cl 4); *expunged* associated applications made before the cancellation date (cl 5); *refunded* application fees (cl 6); *immunised* the State from liability to pay compensation because of the enactment of the impugned provisions (cl 7) and the granting of the cancelled licences (cl 8); and *provided* for the gathering, disclosure and use of reports by the holders of the cancelled licences (cll 9-11). It is clear, then, that the impugned provisions operated to excise the cancelled licences from the broader legislative scheme that applied to other statutory licences, and subjected them to a special legislative scheme.

Characterising the impact of the law on the alleged right in question

49. As mentioned, there appear to be four ways in which the plaintiff contends that an existing right is determined. As will be seen, none of these propositions should be accepted.

50. At the outset, it should be emphasised that the plaintiff's contention is based, in major part, on the proposition that the NSW Parliament has purported to 'find' the fact of 'serious corruption'.[45] However, when the impugned provisions are properly construed, this is not the case. The Parliament did not, *itself*, find any facts. It reached a state of *satisfaction* that it was appropriate to enact the impugned provisions on the basis of a range of matters, including but not limited to ICAC's investigations, procedures, findings and recommendation.

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45 Plaintiff's submissions at [45].

51. In any event, as will be explained, the impugned provisions cannot be seen as involving a determination of any rights.

(i). The cancellation does not operate to determine the statutory right

52. In support of Proposition 2, the plaintiff seeks to draw a distinction between rights-determination (which involves an exercise of judicial power) and rights-creation (which involves an exercise of non-judicial power).[46] While the distinction may be accepted in broad terms, the plaintiff's description of the function of *rights-creation* is under-inclusive and, consequently, leads the plaintiff into error. The exercise of legislative power can include both the creation *and the alteration or modification* of existing rights. By limiting the scope of the legislative category to the *creation* of rights, the plaintiff asserts a wider field of operation for the function of rights-determination than is appropriate.

53. Correctly viewed, the impugned legislation can still be seen as *legislative* in character, even though it *affects* existing rights. On established principles, the impugned provisions operate to cancel the relevant licences and expunge related applications. That may *affect* those existing rights, but there is no determination of a dispute about them.

(ii). The cancellation does not operate to invalidate the initial grant of the licence

54. The fact that one of the purposes of the impugned provisions (cl 3(1)(c)) is to return the State 'as nearly as possible' to the position it would have been in does not, as the plaintiff contends, proceed 'upon an assumption that the plaintiffs were never entitled to the benefit of the exploration licences granted in their favour'.[47] That is simply not the case. In operation and effect, the impugned provisions excise the cancelled licences from the provisions of the Act, and create a new set of rights that apply to those licences.

55. In a similar argument, the plaintiff contends that cl 5 of Sch 6A, in its use of the words 'void and of no effect', is 'framed as a pronouncement upon the legal effect of steps taken pursuant to a statute, as distinct from an attempt at defining the rights and liabilities of parties ... by reference to whatever situation would have prevailed if, say, the associated applications had been void'.[48] These submissions should not be accepted. The meaning of the words 'void and of no effect' in cl 5 must be ascertained in the context of the entirety of Sch 6A and the relevant provisions in the Act. Clause 5 is nothing more than a consequential provision that operates to *alter* the rights that were capable of arising under the general provisions of the Act if the cancelled licences had not been cancelled.

56. In that context, the expression 'void and of no effect' identifies the legal consequences of the associated applications for the purposes of the Act. It is

46 Plaintiff's submissions at [41]-[42], [46].

47 Plaintiff's submissions at [47].

48 Plaintiff's submissions at [48].

nothing more than a drafting technique. Within its statutory context, there is no warrant for attributing to those words the meaning contended by the plaintiff.[49] Clause 5 simply changes the legal rules to be applied by a court.[50]

(iii). The cancellation does not constitute an adjudgment and punishment of an offence of 'serious corruption'

57. The short answer to this contention[51] is that, in enacting the impugned provisions, Parliament has altered existing rights. It has not determined a dispute about existing rights involving the adjudgment and punishment of criminal guilt for 'serious corruption'. The Parliament has neither retrospectively created this new criminal offence, nor adjudged guilt under it and then imposed punishment. It is useful, however, to develop this response by reference to the options available to the NSW Parliament when it received the ICAC reports.

58. Having received the ICAC findings and recommendations, the NSW Parliament could have responded in at least three ways. First, it could have enacted legislation creating a liability to having a licence cancelled in circumstances of 'serious corruption' and conferred jurisdiction on a *court* to determine whether the circumstances involved 'serious corruption'.[52] The conferral of that jurisdiction on a court would have involved a regular exercise of the judicial function to resolve a 'matter', even if the exercise of jurisdiction was conditioned by a criterion of 'public interest'. The plaintiff concedes that it would have been open to the NSW Parliament to respond in this way.[53]

59. Secondly, it could have enacted legislation providing for the cancellation of licences in circumstances of 'serious corruption' and conferred authority on an *administrative decision-maker* or tribunal to consider whether there were circumstances of serious corruption. In exercising such authority, the administrative decision-maker or tribunal would be determining a factum (ie, whether there had been 'serious corruption', perhaps in the 'public interest') upon which the legislative provisions would operate to alter or modify existing

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49 Plaintiff's submissions at [50].

50 See, eg, the description of marriages as being 'void' in certain circumstances in s 23 of the *Marriage Act 1961* (Cth). Judicial decrees of nullity can be obtained if a marriage is void: see *Magill v Magill* (2006) 226 CLR 551 at 582-583 [98].

51 See the plaintiff's submissions at [44]-[45].

52 See, eg, *R v Their Honours the Judges of the Commonwealth Industrial Court; Ex parte Amalgamated Engineering Union, Australian section* (1960) 103 CLR 368; *Mikasa (NSW) Pty Ltd v Festival Stores* (1972) 127 CLR 617; *R v Joske; Ex parte Shop Distributive and Allied Employees' Association* (1976) 135 CLR 194; *Thomas v Mowbray* (2007) 233 CLR 307. The definition of 'serious corruption' would have had to be capable of judicial application, but it might have been defined without constitutional difficulty in the way defined in the ICAC Act.

53 Plaintiff's submissions at [45].

rights.[54] Again, the plaintiff concedes that it would have been open to the NSW Parliament to respond in this way.[55]

60. Thirdly, it could, as it has done, enact legislation to alter existing rights by cancelling the licences on the basis of the investigation, proceedings, findings and recommendations of ICAC, and substituting a new set of rights. In responding in this way, it has acted directly in the public interest, with full accountability to the electorate, after having taken into account a range of considerations and interests.

61. Two analogous statutory schemes were considered by the Court in *H A Bachrach Pty Ltd v Queensland*[56] (***Bachrach***) and *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth* (**the *BLF* case**).[57]

62. In *Bachrach,* a rezoning decision by the shire council to permit a building development had been the subject of an unsuccessful review in the Planning and Environment Court and was the subject of an appeal to the Queensland Court of Appeal when legislation was enacted permitting the property development to proceed. The legislation was challenged on the basis that it offended the requirements of Chapter III of the Constitution. By considering the impugned provisions as if they were Commonwealth provisions,[58] the Court held that the Queensland Parliament had power to facilitate the development 'by creating a special legal regime which would apply by way of amendment to that set up'[59] by the *Local Government (Planning and Environment) Act 1990* (Q). The impugned provisions were held to be valid even though a challenge to the review by the Planning and Environment Court of the rezoning decision had been instituted in the Queensland Court of Appeal. They were, necessarily, considered by the Court to involve an exercise of legislative power.

63. In the *BLF* case, the Australian Building Construction Employees' and Builders Labourers' Federation's registration under the *Conciliation and Arbitration Act 1904* (Cth) had been cancelled by special legislation – the *Builders Labourers' Federation (Cancellation of Registration) Act 1986* (Cth) (**Cancellation of Registration Act**). The *Builders Labourers' Federation (Cancellation of Registration – Consequential Provisions) Act 1986* (Cth) (**Consequential Provisions Act**) then put in place a special legal regime for its re-registration. The legislative cancellation operated despite pending judicial proceedings in the Court challenging an administrative deregistration process that had already commenced under the broader legislative scheme for de-registration. The

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54 See, eg, *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361; *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167; *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542; *Visnic v Australian Securities and Investments Commission* (2007) 231 CLR 381; *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350 (***Albarran***).

55 Plaintiff's submissions at [45].

56 (1998) 195 CLR 547.

57 (1986) 161 CLR 88.

58 At 561-562 [14].

59 At 562 [16].

Cancellation of Registration Act and Consequential Provisions Act were challenged on the basis that they involved an exercise of judicial power or an interference with it. In rejecting the challenge, the Court concluded that deregistration of the organisation was an exercise of power that was not inherently judicial. There was nothing in the registration system or in the nature of deregistration which made it 'unsusceptible to legislative determination'. It was entirely appropriate for Parliament to select the organisations to be registered and, subsequently, to decide which organisations should be excluded, if need be, with an exercise of legislative power.[60]

64. In each case, the legislature acted directly in the public interest, having taken account of relevant considerations and interests, to alter existing rights. In each case, the existing rights had been altered by the impugned provisions creating, by amendment, a targeted and special legal regime applicable in limited and defined circumstances. In neither case, was the power exercised considered to be judicial in character.

65. The impugned provisions in this case operate in the same way: they exclude the relevant licences from the operation of the Mining Act and apply to them and associated applications a special legal regime. There is nothing in the nature of the statutory licences or their cancellation that makes them insusceptible of legislative alteration. Indeed, as indicated, the plaintiff accepts that they might be the subject of judicial or administrative determination.

66. Once the impugned provisions are properly characterised, it is clear that they cannot be seen as involving any adjudgment and punishment of an offence (not previously known to law) of 'serious corruption'. The impugned provisions operate to alter existing rights in relation to the cancelled licences. Indeed, none of the three options available to Parliament to respond to the ICAC reports could be characterised as involving the adjudgment and punishment of criminal guilt. The fact that the financial interests of some persons may be affected by the cancellations, whether or not they are implicated in any wrongdoing, supports the conclusion that the cancellation does not involve an exercise of judicial power. The disentitlement in no way can be seen as consequent on wrongdoing: it forms part of a legislative response, in the public interest, having weighed various considerations and interests.

67. The plaintiff's submissions identify the 'constitutional vice in the impugned legislation' as the legislature taking 'the extraordinary, and *ad hominem,* step of finding *for itself* the fact of "serious corruption" – and has done so outside of the constitutional system for the supervision and restraint of such findings'.[61] There are at least two errors in this argument. First, for the reasons explained, the legislature did not, *itself*, make a finding of 'serious corruption'. Secondly, the argument deploys Proposition 1 in support of Proposition 2. The question of whether the impugned provisions are judicial in character is not advanced by assuming that the exercise of power must be amenable to judicial review.

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60 At 95.

61 Plaintiff's submissions at [45].

(iv). The cancellation does not constitute an adjudgment and punishment of the offences that were considered by ICAC

68. Once the character of the impugned provisions is properly understood, they cannot be seen as operating in this way.[62] Even if Parliament's stated satisfaction is taken to involve some level of endorsement of ICAC's findings that various persons are likely to have engaged in conduct that might be found by a court to constitute a criminal offence, that, in itself, is insufficient to transform the character of the power from legislative to judicial. In the context of administrative decision-making altering existing rights, it is well accepted that the power to alter those rights can retain its non-judicial character even though the alteration is predicated on a view about existing rights, including that criminal offences have been committed. As the Court said in *Re Cram; Ex parte The Newcastle Wallsend Coal Co Pty Ltd* in the context of concluding that an arbitral power involved the exercise of non-judicial power,[63] 'a tribunal may find it necessary to form an opinion as to the existing legal rights of the parties as a step in arriving at the ultimate conclusions on which the tribunal bases the making of an award intended to regulate the future rights of the parties.'

69. These observations are no less applicable to the opinion formed by the legislature when determining to alter or modify existing rights. As already canvassed, the ICAC provisions draw a clear distinction between the concept of a 'criminal offence' for the operation of that Act and criminal offences in other Acts. The circumstance that conduct could constitute a 'criminal offence' in the relevant sense operates to control the scope of the definition of 'corrupt conduct' for the purposes of the ICAC Act. The legislation is clear that a finding by ICAC of corrupt conduct has no legal consequence for the adjudgment and punishment of guilt in relation to the criminal offence. Once that is understood, any proposition that Parliament has adjudged and punished the criminal offences considered by ICAC cannot be accepted. The prosecution of those offences, the determination of guilt or otherwise, and any consequent imposition of punishment in the exercise of judicial power, is unaffected by the cancellation.

Bill of attainder

70. The plaintiff's bill of attainder argument is, as implicitly acknowledged by the plaintiff,[64] a different form of the judicial power argument. The reasons given in rejection of the broader judicial power argument equally apply to a rejection of the bill of attainder argument.

71. The Commonwealth makes the following additional submissions.

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62 Cf plaintiff's submissions at [55]-[57].

63 (1987) 163 CLR 140 at 149 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ). See also *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 CLR 656 at 666; *Albarran* at 361 [27]-[28]. These matters were also recently raised in this Court in *Australian Communications and Media Authority v Today FM* (decision reserved on 11 November 2014).

64 Plaintiff's submissions at [51].

71.1. The Court has cautioned against a transplantation of United States jurisprudence into the Australian constitutional context. The Bill of Attainder protections offered by Article 1, s 9, cl 3 and Article 1, s 10, cl 1 of the United States Constitution arise in a different constitutional context, and serve a different purpose, to the limitations that may be said to arise from the Australian Constitution. In *Haskins v The Commonwealth*[65] (***Haskins***) the joint reasons said:

> In *Polyukhovich*, it was pointed out that in the Australian constitutional context, an Act that is a bill of pains and penalties is not prohibited merely because it matches that description. As Dawson J said, 'the real question is not whether the Act amounts to a bill of attainder [or a bill of pains and penalties], but whether it exhibits that characteristic of a bill of attainder which is said to represent a legislative intrusion upon judicial power'. And Mason CJ, Toohey and McHugh JJ each made the same point.

71.2. This is the case even more so where the plaintiff's contention is not for a separation of powers, but an implication that derives from the integrated character of the federal judicial system established by Ch III.

71.3. In recognition of the differing constitutional contexts, the Court in *Haskins* adopted an approach to bills of attainder that looks to whether the provisions legislatively 'determine any question of guilt, or make crimes of any acts'.[66] Once their character is properly understood, the impugned provisions in this case do neither: the provisions of Sch 6A 'say nothing about the guilt or innocence of'[67] the person whose statutory entitlement has been altered or interests have been affected (Cascade) or the person whose conduct has been adversely viewed by ICAC in a foundation for the Parliament's exercise of power (Duncan). They 'made no legislative determination of guilt and did not make crimes of any acts after they had been done'.[68]

71.4. Nor is the cancellation of licences a relevant form of *punishment* consequent on the commission of an offence. As Gleeson CJ said in *Re Woolley; Ex parte Applicants M276/2003*,[69] '[p]unishment, in the sense of the inflicting of involuntary hardship or detriment by the State, is not an exclusively judicial function.' As the Court said in *Roche v Kronheimer*,[70]

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65 (2011) 244 CLR 22 at 37 [25].

66 At 39 [33].

67 *Haskins* at 40 [40].

68 *Haskins* at 37 [26].

69 (2004) 225 CLR 1 at 12.

70 (1921) 29 CLR 329 at 337. In that case, a ministerial order pursuant to statutory authority vested the property of a German national in the Public Trustee. The Court rejected an argument that the ministerial act involved an exercise of judicial power. See also at 340 (Higgins J): 'I can hardly understand how the point is arguable; for the vesting is not the result of a judicial finding as to rights – it is a defiance of admitted rights. To give the property of A to B is not a judicial proceeding'. See also *Adelaide Company of Jehovah's Witness Incorporated v The Commonwealth* (1943) 67 CLR 116 at 142 (Latham CJ), 156 (Starke J), 157 (McTiernan J). Provisions that effect the forfeiture of property in circumstances where there has been a contravention of a statutory requirement do not involve an exercise of judicial power: *Olbers Co Ltd v Commonwealth* (2004) 143 FCR 449 at 456 [19]; *Tran v Commonwealth* (2010) 187 FCR 54.

there is 'no reason why property should not be vested or divested by a legislative enactment or by an executive act done under the authority of the Legislature as well as by a judicial act'. The disadvantage suffered as a consequence of the cancellation is analogous to the disability suffered by the members of the Ceylon Parliament whose seats became vacant by operation of the Act considered by the Privy Council in *Kariapper v Wijesinha*.[71] The provisions were enacted following the findings of a commission of inquiry into allegations of bribery against members of Parliament. Delivering the judgment of the board, Sir Douglas Menzies said that 'the principal purpose' served by the disabilities 'is clearly enough not to punish but to keep public life clean for the public good'.[72] The Act was held not to constitute a bill of attainder. The restoration of public confidence in government decision-making and the State's valuable resources for future allocation are no less important public interests to be achieved.

71.5. In support of the bill of attainder argument, the plaintiff seeks to impugn the legislative purposes set out in cl 3(1) of Sch 6A and the means chosen by the Parliament to achieve its objectives.[73] These submissions should not be accepted. First, the objective purpose of the impugned provisions is apparent from the purposes and objects in cl 3 of Sch 6A when viewed alongside the operative provisions. As the Court said in *Bachrach*, '[w]hether the Act constitutes an impermissible interference with judicial process, or offends against Ch III of the Constitution, does not depend upon the motives or intentions of the Minister or individual members of the legislature.' It is the 'operation and effect of the law which defines its constitutional character, and the determination thereof requires identification of the nature of the rights, duties, powers and privileges which the statute changes, regulates or abolishes.'[74] Secondly, the decision of the Court in *Haskins* is necessarily inconsistent with an approach that looks behind the terms of the statute to the legislative history to determine whether the provisions constitute a bill of attainder. Thirdly, even if a relevant consideration, the plaintiff advances no factual basis for this assertion. Fourthly, once it is discerned that the terms and objective purpose of the impugned provisions do not constitute a bill of attainder, there is no scope for a proportionality analysis. Whether the measures are too harsh on innocent parties is a political matter for the democratic process.

Plaintiff's Proposition 3: the impugned legislation is not a 'law'

72. To support the third proposition, the plaintiff adopts the submissions of the plaintiffs in the Cascade proceeding. The Commonwealth adopts its submissions in the Cascade proceeding on this matter.

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71 [1968] AC 717.

72 At 737.

73 Plaintiff's submissions at [66], [67].

74 At 561 [12].

PART IV ESTIMATED HOURS

It is estimated that one hour will be required for the presentation of the oral argument of the Commonwealth in this proceeding and the Cascade and NuCoal proceedings.

Dated: 12 November 2014

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ANNEXURE A

Independent Commission Against Corruption Act 1988 (NSW)

The following provisions were in force on 30 January 2014 and are still in force, in this form, on the date of making these submissions.

8 General nature of corrupt conduct

(1) Corrupt conduct is:

(a) any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority, or

(b) any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions, or

(c) any conduct of a public official or former public official that constitutes or involves a breach of public trust, or

(d) any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.

(2) Corrupt conduct is also any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the exercise of official functions by any public official, any group or body of public officials or any public authority and which could involve any of the following matters:

(a) official misconduct (including breach of trust, fraud in office, nonfeasance, misfeasance, malfeasance, oppression, extortion or imposition),

(b) bribery,

(c) blackmail,

(d) obtaining or offering secret commissions,

(e) fraud,

(f) theft,

(g) perverting the course of justice,

(h) embezzlement,

(i) election bribery,

(j) election funding offences,

(k) election fraud,

(l) treating,

(m) tax evasion,

(n) revenue evasion,

(o) currency violations,

(p) illegal drug dealings,

(q) illegal gambling,

(r) obtaining financial benefit by vice engaged in by others,

(s) bankruptcy and company violations,

(t) harbouring criminals,

(u) forgery,

(v) treason or other offences against the Sovereign,

(w) homicide or violence,

(x) matters of the same or a similar nature to any listed above,

(y) any conspiracy or attempt in relation to any of the above.

(3) Conduct may amount to corrupt conduct under this section even though it occurred before the commencement of this subsection, and it does not matter that some or all of the effects or other ingredients necessary to establish such corrupt conduct occurred before that commencement and that any person or persons involved are no longer public officials.

(4) Conduct committed by or in relation to a person who was not or is not a public official may amount to corrupt conduct under this section with respect to the exercise of his or her official functions after becoming a public official.

(5) Conduct may amount to corrupt conduct under this section even though it occurred outside the State or outside Australia, and matters listed in subsection (2) refer to:

(a) matters arising in the State or matters arising under the law of the State, or

(b) matters arising outside the State or outside Australia or matters arising under the law of the Commonwealth or under any other law.

(6) The specific mention of a kind of conduct in a provision of this section shall not be regarded as limiting the scope of any other provision of this section.

9 Limitation on nature of corrupt conduct

(1) Despite section 8, conduct does not amount to corrupt conduct unless it could constitute or involve:

(a) a criminal offence, or

(b) a disciplinary offence, or

(c) reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official, or

(d) in the case of conduct of a Minister of the Crown or a member of a House of Parliament—a substantial breach of an applicable code of conduct.

(2) It does not matter that proceedings or action for such an offence can no longer be brought or continued, or that action for such dismissal, dispensing or other termination can no longer be taken.

(3) For the purposes of this section:

applicable code of conduct means, in relation to:

(a) a Minister of the Crown—a ministerial code of conduct prescribed or adopted for the purposes of this section by the regulations, or

(b) a member of the Legislative Council or of the Legislative Assembly (including a Minister of the Crown)—a code of conduct adopted for the purposes of this section by resolution of the House concerned.

criminal offence means a criminal offence under the law of the State or under any other law relevant to the conduct in question.

disciplinary offence includes any misconduct, irregularity, neglect of duty, breach of discipline or other matter that constitutes or may constitute grounds for disciplinary action under any law.

(4) Subject to subsection (5), conduct of a Minister of the Crown or a member of a House of Parliament which falls within the description of corrupt conduct in section 8 is not excluded by this section if it is conduct that would cause a reasonable person to believe that it would bring the integrity of the office concerned or of Parliament into serious disrepute.

(5) Without otherwise limiting the matters that it can under section 74A (1) include in a report under section 74, the Commission is not authorised to include a finding or opinion that a specified person has, by engaging in conduct of a kind referred to in subsection (4), engaged in corrupt conduct, unless the Commission is satisfied that the conduct constitutes a breach of a law (apart from this Act) and the Commission identifies that law in the report.

(6) A reference to a disciplinary offence in this section and sections 74A and 74B includes a reference to a substantial breach of an applicable requirement of a code of conduct required to be complied with under section 440 (5) of the Local Government Act 1993, but does not include a reference to any other breach of such a requirement.

12 Public interest to be paramount

In exercising its functions, the Commission shall regard the protection of the public interest and the prevention of breaches of public trust as its paramount concerns.

12A Serious corrupt conduct and systemic corrupt conduct

In exercising its functions, the Commission is, as far as practicable, to direct its attention to serious corrupt conduct and systemic corrupt conduct and is to take into account the responsibility and role other public authorities and public officials have in the prevention of corrupt conduct.

13 Principal functions

(1) The principal functions of the Commission are as follows:

(a) to investigate any allegation or complaint that, or any circumstances which in the Commission's opinion imply that:

(i) corrupt conduct, or

(ii) conduct liable to allow, encourage or cause the occurrence of corrupt conduct, or

(iii) conduct connected with corrupt conduct,

may have occurred, may be occurring or may be about to occur,

(b) to investigate any matter referred to the Commission by both Houses of Parliament,

(c) to communicate to appropriate authorities the results of its investigations,

(d) to examine the laws governing, and the practices and procedures of, public authorities and public officials, in order to facilitate the discovery of corrupt conduct and to secure the revision of methods of work or procedures which, in the opinion of the Commission, may be conducive to corrupt conduct,

(e) to instruct, advise and assist any public authority, public official or other person (on the request of the authority, official or person) on ways in which corrupt conduct may be eliminated,

(f) to advise public authorities or public officials of changes in practices or procedures compatible with the effective exercise of their functions which the Commission thinks necessary to reduce the likelihood of the occurrence of corrupt conduct,

(g) to co-operate with public authorities and public officials in reviewing laws, practices and procedures with a view to reducing the likelihood of the occurrence of corrupt conduct,

(h) to educate and advise public authorities, public officials and the community on strategies to combat corrupt conduct,

(i) to educate and disseminate information to the public on the detrimental effects of corrupt conduct and on the importance of maintaining the integrity of public administration,

(j) to enlist and foster public support in combating corrupt conduct,

(k) to develop, arrange, supervise, participate in or conduct such educational or advisory programs as may be described in a reference made to the Commission by both Houses of Parliament.

(1A) Subsection (1) (d) and (f)–(h) do not extend to the conduct of police officers, Crime Commission officers or administrative officers within the meaning of the Police Integrity Commission Act 1996.

(2) The Commission is to conduct its investigations with a view to determining:

(a) whether any corrupt conduct, or any other conduct referred to in subsection (1) (a), has occurred, is occurring or is about to occur, and

(b) whether any laws governing any public authority or public official need to be changed for the purpose of reducing the likelihood of the occurrence of corrupt conduct, and

(c) whether any methods of work, practices or procedures of any public authority or public official did or could allow, encourage or cause the occurrence of corrupt conduct.

(2A) Subsection (2) (a) does not require the Commission to make a finding, on the basis of any investigation, that corrupt conduct, or other conduct, has occurred, is occurring or is about to occur.

(3) The principal functions of the Commission also include:

(a) the power to make findings and form opinions, on the basis of the results of its investigations, in respect of any conduct, circumstances or events with which its investigations are concerned, whether or not the findings or opinions relate to corrupt conduct, and

(b) the power to formulate recommendations for the taking of action that the Commission considers should be taken in relation to its findings or opinions or the results of its investigations.

(3A) The Commission may make a finding that a person has engaged or is engaging in corrupt conduct of a kind described in paragraph (a), (b), (c) or (d) of section 9 (1) only if satisfied that a person has engaged in or is engaging in conduct that

constitutes or involves an offence or thing of the kind described in that paragraph.

(4) The Commission is not to make a finding, form an opinion or formulate a recommendation which section 74B (Report not to include findings etc of guilt or recommending prosecution) prevents the Commission from including in a report, but section 9 (5) and this section are the only restrictions imposed by this Act on the Commission's powers under subsection (3).

(5) The following are examples of the findings and opinions permissible under subsection (3) but do not limit the Commission's power to make findings and form opinions:

(a) findings that particular persons have engaged, are engaged or are about to engage in corrupt conduct,

(b) opinions as to:

(i) whether the advice of the Director of Public Prosecutions should be sought in relation to the commencement of proceedings against particular persons for criminal offences against laws of the State, or

(ii) whether consideration should or should not be given to the taking of other action against particular persons,

(c) findings of fact.

Division 1 References to Commission by, and reports by Commission to, Parliament

73 References by Parliament

(1) Both Houses of Parliament may, by resolution of each House, refer to the Commission any matter as referred to in section 13.

(2) It is the duty of the Commission to fully investigate a matter so referred to it for investigation.

(3) It is the duty of the Commission to comply as fully as possible with any directions contained in a reference of a matter referred to in section 13 (1) (k).

(4) Both Houses of Parliament may, by resolution of each House, amend or revoke a reference made under this section.

74 Reports on referred matters etc

(1) The Commission may prepare reports in relation to any matter that has been or is the subject of an investigation.

(2) The Commission shall prepare reports in relation to a matter referred to the Commission by both Houses of Parliament, as directed by those Houses.

(3) The Commission shall prepare reports in relation to matters as to which the Commission has conducted a public inquiry, unless the Houses of Parliament have given different directions under subsection (2).

(4) The Commission shall furnish reports prepared under this section to the Presiding Officer of each House of Parliament.

(5), (6) (Repealed)

(7) A report required under this section shall be furnished as soon as possible after the Commission has concluded its involvement in the matter.

(8) The Commission may defer making a report under this section if it is satisfied that it is desirable to do so in the public interest, except as regards a matter referred to the Commission by both Houses of Parliament.

(9) (Repealed)

74A Content of reports to Parliament

(1) The Commission is authorised to include in a report under section 74:

(a) statements as to any of its findings, opinions and recommendations, and

(b) statements as to the Commission's reasons for any of its findings, opinions and recommendations.

(2) The report must include, in respect of each "affected" person, a statement as to whether or not in all the circumstances the Commission is of the opinion that consideration should be given to the following:

(a) obtaining the advice of the Director of Public Prosecutions with respect to the prosecution of the person for a specified criminal offence,

(b) the taking of action against the person for a specified disciplinary offence,

(c) the taking of action against the person as a public official on specified grounds, with a view to dismissing, dispensing with the services of or otherwise terminating the services of the public official.

(3) An "affected" person is a person described as such in the reference made by both Houses of Parliament or against whom, in the Commission's opinion, substantial allegations have been made in the course of or in connection with the investigation concerned.

(4) Subsection (2) does not limit the kinds of statement that a report can contain concerning any such "affected" person and does not prevent a report from containing a statement described in that subsection in respect of any other person.

74B Report not to include findings etc of guilt or recommending prosecution

(1) The Commission is not authorised to include in a report under section 74 a statement as to:

(a) a finding or opinion that a specified person is guilty of or has committed, is committing or is about to commit a criminal offence or disciplinary offence (whether or not a specified criminal offence or disciplinary offence), or

(b) a recommendation that a specified person be, or an opinion that a specified person should be, prosecuted for a criminal offence or disciplinary offence (whether or not a specified criminal offence or disciplinary offence).

(2) A finding or opinion that a person has engaged, is engaging or is about to engage:

(a) in corrupt conduct (whether or not specified corrupt conduct), or

(b) in specified conduct (being conduct that constitutes or involves or could constitute or involve corrupt conduct),

is not a finding or opinion that the person is guilty of or has committed, is committing or is about to commit a criminal offence or disciplinary offence.

(3) In this section and section 74A, criminal offence and disciplinary offence have the same meanings as in section 9.