IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S119 of 2014

BETWEEN:

TRAVERS WILLIAM DUNCAN
Plaintiff

and

THE STATE OF NEW SOUTH WALES
Defendant

ANNOTATED SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

PART I: CERTIFICATION

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

PART II: ISSUES

2. The issues are reflected in the questions for the Court's opinion, which are set out on page 15 of the Special Case. The following submissions of the Attorney-General for the State of Queensland ("**Queensland**") address the first question, which is:

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

PART III: BASIS OF INTERVENTION

3. Queensland intervenes under s 78A of the *Judiciary Act 1903* (Cth) in support of the defendant.

Intervener's submissions

Filed on behalf of the Attorney-General for the State of Queensland
Form 27C
Dated: 2014
Per Wendy Ussher
Ref PL8/ATT110/3138/KZJ

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PART IV: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

4. Not applicable.

PART V: STATUTORY PROVISIONS

5. Queensland adopts the defendant's statement of applicable legislative provisions.

ARGUMENT

6. Queensland intervenes to address question (a) of the Special Case.

7. The relevant facts are agreed between the Plaintiff and the Defendant and are set out in the Special Case paragraphs 1 to 34, inclusive.

8. In summary, the Plaintiff submits that clauses 1 to 13 of Schedule 6A to the *Mining Act 1992* (NSW) (the ***Act***), or alternatively, any of them, are invalid because they are a purported exercise of judicial power and that it is beyond the power of the New South Wales Parliament to exercise judicial power.[1]

9. The Plaintiff in this proceeding makes submissions (***Duncan PS***) which advance three central propositions.[2] The Duncan PS are addressed to propositions 1 and 2. The present submissions address those propositions.

10. In S206 of 2014 (the ***Cascade proceeding***) the submissions of the plaintiffs (***Cascade PS***) adopt the Duncan PS.[3] Similarly, Queensland's submissions in the Cascade proceeding (***Cascade QS***) adopt the present submissions.

11. The Cascade PS address proposition 3 and an argument that the impugned legislation is invalid for inconsistency with the *Copyright Act 1968* (Cth). The Cascade QS address proposition 3. Queensland in this proceeding adopts the Cascade QS.

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1 Plaintiff's submissions at [19], [22(a)] and [23].
2 Duncan PS [22].
3 Cascade PS [7].

Summary of argument

12. Queensland submits that the New South Wales Parliament may exercise judicial power, but that in passing the impugned legislation[4] it did not exercise judicial power.

13. This submission is structured as follows.

14. In respect of the Plaintiff's **proposition 1**, Queensland submits that the Parliament of a State may exercise judicial power. While there is a separation of Commonwealth judicial power under Chapter III, there is no such separation of power at State level. The principles in *Kable* and *Kirk* are limited exceptions in respect only of the exercise of judicial power by State courts, not the enactments of State Parliament.

15. In respect of the Plaintiff's **proposition 2**, Queensland submits that the enactment of the impugned provisions do not in any event constitute the exercise of judicial power. The essential character of judicial power is that it resolves legal controversies by the application of existing law to findings of fact.

16. The Plaintiff argues[5] that the impugned provisions are judicial in character in several distinct respects. Queensland rejects each of these specific attacks because at least one essential element of exclusive judicial power is absent in each case. Queensland addresses each specific attack as follows.

17. *Fact-finding and punishment*: The Plaintiff argues[6] that what it characterises as a determinative relationship between findings of fact in clause 3 and punishment in the operative provisions, clauses 4 to 13, makes them an exercise of judicial power. Queensland submits that, irrespective of the Plaintiff's wrong characterisation of the provisions, they are still not an exercise of judicial power as they lack the essential judicial application of an existing law to determine an existing legal controversy.

18. *Parliament must also inform itself*: Queensland further submits that the exercise of power on the basis of findings of fact is not determinative of the exercise of judicial

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4 *Mining Amendment (ICAC Operations Jasper and Acacia) Act 2014* (NSW) (the ***Amendment Act***) which inserted Sch 6A (the ***impugned legislation***) into the *Mining Act 1992* (NSW).

5 Duncan PS at [44] – [59].

6 Duncan PS at [45].

power, because fact-finding is also a necessary incident of the valid exercise of legislative power.

19. *Bill of pains and penalties*: The Plaintiff further submits[7] that the impugned enactment is akin to a bill of pains and penalties, so that what the Plaintiff characterises as the selective and punitive nature of clauses 4 to 13 is sufficient, even absent the application of any existing law, to make the enactment an impermissible exercise of judicial power. Queensland argues that, irrespective of whether the State Parliament is or is not prohibited from such enacting a bill of pains and penalties, this enactment could not be characterised as such because it is not penal or punitive, or at least not to the level required to engage such a prohibition on parliamentary discretion.

20. *Circumventing judicial process*: The Plaintiff also objects[8] to the impugned enactment on the basis that there is an existing, reviewable process by which licenses may be cancelled, and which the enactment has circumvented or made redundant in this particular case. Queensland says that there is no authority that this is an exercise of judicial power, and that there is authority of this Court to the contrary that it is a valid exercise if legislative power.

21. *Void and of no effect*: The Plaintiff also particularly attacks clause 5,[9] a declaration that certain applications are void and of no effect, as the expression of a legal conclusion. Queensland rejects that characterisation because it is not a declaration that has any legal effect, as no legal rights are vested in mere applications.

22. *Clause 3 is severable*: Queensland finally submits that, were the Court to find that a link between a finding of fact, purpose or object in clause 3 and the subsequent operative provisions did give the enactment an impermissible judicial character, clause 3 may be severed from the enactment without impairing the practical operation or valid legislative character of the remaining provisions.

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7 Duncan PS at [21b] and [51]
8 Duncan PS at [18] and [45].
9 Duncan PS at [48]-[50].

Plaintiff proposition 1: Chapter III precludes the exercise of judicial power by State legislatures

The Parliament of a State may exercise judicial power

23. Queensland submits in response to proposition 2 that the enactment of the impugned provisions did not constitute the exercise of judicial power, and if that submission is accepted, it is not necessary to consider proposition 1. If, however, that submission is not accepted, Queensland submits that the New South Wales Parliament may exercise judicial power.

Separation of power

24. The separation of the judicial power of the Commonwealth from its legislative and executive powers means that the judicial power can only be exercised by Chapter III courts and that the Commonwealth courts can only exercise judicial power.[10]

25. But it does not follow that the judicial power of a State may only be exercised by State courts and not by the State Parliament. It is settled that no separation of judicial power is constitutionally required at State level[11] The Plaintiff correctly accepts as much.[12] The *Kable*[13] and *Kirk*[14] principles are but limited qualifications to the general proposition that there is no separation of judicial power at the State level.

The Kable principle

26. The most recent authoritative statement of the *Kable* principle was made by six Justices of this Court in *Attorney-General (NT) v Emmerson*:[15]

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10 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; *Attorney-General (Cth) v The Queen* (1956) 95 CLR 529 (PC).

11 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 1, 65 (Brennan CJ), 77 (Dawson J), 92 (Toohey J), 103 (Gaudron J), 109 (McHugh J) and 132 (Gummow J); *Clyne v East* (1967) 68 SR (NSW) 385; *Moffatt v R* [1998] 2 VR 229, 249 (Hayne JA as his Honour then was); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 598-9 [37] (McHugh J); *Queensland v Together Queensland* [2014] 1 Qd R 257, 276 [59].

12 Duncan PS at [24].

13 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 1

14 *Kirk v Industrial Relations Court (NSW)* (2010) 239 CLR 531.

15 (2014) 88 ALJR 522, 533 [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) (references omitted).

> The principle for which *Kable* stands is that because the *Constitution* establishes an integrated court system, and contemplates the exercise of federal jurisdiction by State Supreme Courts, State legislation which purports to confer upon such a court a power or function which substantially impairs the court's institutional integrity, and which is therefore incompatible with that court's role as a repository of federal jurisdiction, is constitutionally invalid.

27. The Plaintiff's submission overstates the *Kable* principle by asserting that "Chapter III of the *Constitution* establishes an integrated system for the exercise of the judicial powers of the Commonwealth and of the several states".[16] As appears from the Court's statement in *Emmerson*, Chapter III establishes an integrated *court* system, not an integrated system of judicial power. It thus affects the exercise of judicial power by State courts. But there is no requirement that State judicial power be exercised by a Chapter III court.

28. The State legislatures may make laws which directly impact on judicial proceedings. In *Lay v Employers Mutual Ltd*,[17] Bryson JA (with whom Santow and McColl JJA agreed) expressly characterised this as the legislative exercise of judicial power:[18]

> In the constitutional law of New South Wales there is no legislated separation of the judicial power from other powers, and except in the application of the *Kable* doctrine and implications derived from Ch III of the Commonwealth Constitution, the legislature of New South Wales is empowered to make laws which have direct impacts on judicial orders and judicial proceedings.
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> ...
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> The limitations which a constitutional separation of the judicial power impose on legislative exercise of judicial power are not part of constitutional law of New South Wales, and in my opinion they are not part of the *Kable* doctrine, which relates to the different subject of the suitability of courts to exercise federal jurisdiction, not the unsuitability of legislatures for the exercise of the judicial power. In the law of New South Wales there is no constitutional entrenchment of the separation of judicial power, and there is no corresponding limitation on the validity of legislation by which the legislature prescribes ...

The Kirk principle

29. *Kirk* is authority for the proposition that a State Parliament may not deprive the State's Supreme Court of its jurisdiction to supervise inferior courts and tribunals for jurisdictional

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16 Duncan PS at [26], emphasis added.
17 (2005) 66 NSWLR 270.
18 66 NSWLR at 287 [50], 290 [59] (emphasis added).

error. It is not authority for the Plaintiff's proposition that a State Parliament may not exercise judicial power. Six Justices said:[19]

> 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 ... 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. It would permit what Jaffe described as the development of "distorted positions". And as already demonstrated, it would remove from the relevant State Supreme Court one of its defining characteristics.

30. *Kirk* was not concerned with and therefore did not consider the possibility of the exercise of State judicial power by a Parliament. The passage makes clear that the Court was concerned with the exercise of judicial and executive power by inferior courts and decision-makers. It is subject to the implicit qualification that the exercise by a State Parliament of judicial power, rare though that case might be, is *not* subject to supervision for jurisdictional error by the Supreme Court and ultimately this Court.

31. Queensland submits that the *Kirk* principle must be understood as being subject to the implicit qualification mentioned above, which arises from the general principles of parliamentary supremacy.[20]

32. In *British Railways Board v Pickin*[21] the Privy Council rejected an argument that "fundamental principles" higher than parliamentary sovereignty may inhibit legislative

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19 (2010) 239 CLR at 580-581 [98]-[99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

20 *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1.

21 [1974] AC 765, 782.

supremacy as being incompatible with historical and constitutional facts. In *Building and Construction Employees and Builders Labourers' Federation (NSW) v Minister for Industrial Relations*,[22] Kirby P agreed with Lord Reid's speech in *British Railways Board* concerning the supremacy of Parliament and said:

> I do so in recognition of years of unbroken constitutional law and tradition in Australia and, beforehand, in the United Kingdom. That unbroken law and tradition has repeatedly reinforced and ultimately respected the democratic will of the people as expressed in Parliament ...
>
> This conclusion does not leave our citizens unprotected from an oppressive majority in Parliament. The chief protection lies in the democratic nature of our Parliamentary institutions.[23]

33. Parliaments are not, and need not, be subject to supervision by the Supreme Courts. Enactments are ultimately sanctioned, or not, by the people. Queensland submits that the result is that State Parliaments may validly exercise judicial power.[24]

Plaintiff proposition 2: the impugned legislation constitutes an exercise of judicial power

The impugned provisions are not an exercise of judicial power

34. Queensland submits that the clauses 1 to 13 of Schedule 6A of the *Mining Act* do not represent the exercise of judicial power, either individually or collectively as a scheme.

The character of judicial power

35. This Court has said many times that it is impossible to give an exhaustive definition of judicial power.[25]

36. In *Huddart Parker & Co Pty Ltd v Moorehead*, Griffith CJ said:[26]

> I am of opinion that the words 'judicial power' as used in s.71 of the Constitution means the power which every sovereign must of necessity have to decide controversies between its subjects, or between itself and its subjects,

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22 *Building Construction Employees and Builders' Labourers Federation (NSW) v Minister for Industrial Relations* (1986) 7 NSWLR 372.

23 (1986) 7 NSWLR 372, 405-6.

24 See also: *Building Construction Employees and Builders' Labourers Federation (NSW) v Minister for Industrial Relations* (1986) 7 NSWLR 372, 378-382 (Street CJ), 406, 408-413 (Mahoney JA); *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 109 (McHugh J).

25 *Luton v Lessels* (2002) 210 CLR 333, 373 footnote 162 (Kirby J); see also *R v Davison* (1954) 90 CLR 353, 366 (Dixon CJ and McTiernan J).

26 (1908) 8 CLR 330 at 357.

> whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.

37. In *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd*, Kitto J described the content and distinguishing characteristics of judicial power as follows:[27]

> Thus a judicial power involves, as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons. In other words, the process to be followed must generally be an inquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined to the facts as determined; and the end to be reached must be an act which, so long as it stands, entitles and obliges the persons between whom it intervenes, to observance of the rights and obligations that the application of law to facts has shown to exist. It is right, I think, to conclude from the cases on the subject that a power which does not involve such a process and lead to such an end needs to possess some special compelling feature if its inclusion in the category of judicial power is to be justified.

38. More recently, the Court unanimously affirmed that there are "many positive features which are essential to the existence of [judicial] power" but which "are not by themselves conclusive of it."[28]

39. However, three important features of judicial power have been identified as follows:[29]

    (a) there must generally exist a 'controversy' between two parties;[30]

    (b) the resolution of the controversy determines the parties' existing rights on the basis of the law (whether derived from statute or the common law);[31] and

    (c) the resolution is 'conclusive' or final and binding, even if subject to appeal proceedings.[32]

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27 (1970) 123 CLR 361, 374–5.

28 *Precision Data Holdings* (1991) 173 CLR 167, 188-9, citing *Re Ranger Uranium Mines Pty. Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 CLR 656, 665-7; *Re Cram* (1987) 163 CLR 149. See also *R v Davison* (1954) 90 CLR 353, 366.

29 In *Luton v Lessels* (2002) 210 CLR 333, 388 Callinan J stated a test by reference to eleven questions, not all of which would be of equal importance in every case.

30 *R v Davison* (1954) 90 CLR 353, 365-8. As noted there, there are examples of functions which may be conferred upon a court the performance of which thereby becomes the exercise of judicial power, but which do not involve a 'controversy' between two parties, such as the making of voluntary sequestration orders.

31 *Luton v Lessels* (2002) 210 CLR 333.

40. Where the determination binds, 'although it is based on an erroneous view of facts or law, then the *power* authorising it is judicial.'[33]

41. From this description, several other features of judicial power, relevant for present purposes, can be identified. The exercise of judicial power is a process (usually, by hearing) which:

10 (a) decides a question about existing rights or obligations;

(b) involves an inquiry about what the law is and what the relevant facts are; and

(c) applies the law as found to the facts as found.

Fact-finding and punishment

42. The Plaintiff argues that there is a determinative relationship between clauses 3, on the one hand, and clauses 4 to 13, on the other, which gives the Schedule 6A scheme a
20 judicial character:

> ... the finding (of serious corruption) operates in substance as to determine in conclusive and binding manner the rights of the holders of the exploration licenses, and to impose severe punishment in consequence.[34]

43. While fact-finding and punishment together might indeed be indicative of the exercise of judicial power, they are not sufficient. What is also required is a concurrent finding of existing law that links the findings of fact with a legal punishment.[35]
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44. There is no existing law under which the facts identified by parliament in clause 3 legally determine, and certainly not in a conclusive and binding manner, that the licenses be cancelled. The most the Plaintiff can say is that Parliament points to that finding as predicating its legislative action.[36] That is entirely characteristic of the exercise of legislative, not judicial, power.

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32 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

33 *R v Davison* (1954) 90 CLR 353, 367 (Dixon CJ and McTiernan J) citing *R v Local Government Board* (1902) 2 IR 349, 373 (Palles CB) (emphasis in original).

34 Duncan PS at [45].

35 *R v Trade Practices Tribunal; Ex Parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 374 (Kitto J); *Re Nolan; Ex parte Young* (1991) 1972 CLR 460, 497 (Gaudron J).

36 Duncan PS at [44].

45. This attack by the Plaintiff also fails for another reason. There is no justiciable controversy that is resolved by the impugned provisions.

46. The Plaintiff cites three authorities where this Court considered the nature of judicial power.[37] They include the statement of Kitto J in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* referred to above.

10 47. However the Plaintiff's claim that the impugned provisions determine the rights of the holders, invoking those authorities in support of its objection to them, shows a fundamental misconception as the nature of the provisions. For the Plaintiff has conflated two distinct acts:

(a) the *extinguishment* of an existing legal right, which is the effect of clause 4, and which is an exercise of legislative and not judicial power; and

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(b) the *determination* of a controversy as to the existence of a legal right, which may be an exercise of judicial power.[38]

48. Clause 4 does not purport to determine or find or declare that the licenses were invalidly created or granted to the license holders. Clause 4 simply cancels the licenses. There was and is no controversy as to the existence of the legal rights in the licenses. They existed, and the legislative act of cancellation necessarily acknowledges the licenses

30 were validly created and granted, and were valid up to the point of their cancellation.

49. The Plaintiff's error is clearly apparent when he submits that:

> ... certain other features of the impugned legislation highlight that the legislature has purported to determine existing rights and liabilities, rather than to create new liabilities.[39]

50. The Plaintiff's reference to clause 3(1) also fails to support his contention that

40 'Schedule 6A thus proceeds on an assumption that the plaintiffs were never entitled to

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37 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 374 (Kitto J). *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83, 110 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). *Luton v Lessels* (2002) 210 CLR 333, 345 (Gleeson CJ).

38 Duncan PS at [47].

39 Duncan PS at [46].

the benefit of the exploration licenses granted in their favour.'[40] The actual language of clause 3(1) is that the purpose is to place the State 'in the same position as it would have been had those relevant licenses not been granted' which plainly implies that the relevant licenses were validly granted.

51. The strongest evidence of the Plaintiff's error, and misconceived attack on the provisions, is found in the clear language of clause 4(1) itself: 'The following exploration licenses are cancelled by this Schedule ...'

52. There may well be justiciable controversies in relation to the actions of individuals and institutions associated with the granting of the licenses. The impugned provisions do not, however, purport to and do not in effect resolve those controversies or have any legal effect in respect of them.

53. Clause 3(d) provides explicitly that the object of Schedule 6A is not to preclude:

> ... actions for personal liability against individuals, including public officials, who have been implicated in the tainted process ...

54. Those actions would give rise to the exercise of judicial power in which the adducing of evidence and finding of fact would proceed under the usual judicial process and to the usual judicial standard. A prior legislative declaration of fact, such as that found in clause 3 of Schedule 6A, would not be binding on a court determining those justiciable controversies.[41]

Parliament must also inform itself

55. The Plaintiff contends that:

> The legislature has taken the extraordinary, and ad hominem, step of finding for itself the fact of "serious corruption" – and has done so outside the constitutional system for the supervision and restraint of such findings.[42]

56. He does not, however, seek judicial review to provide the supervision and restraint of that finding that he asserts is lacking. And it is not clear on what basis it could be

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40 Duncan PS at [47].

41 *Dawson v Commonwealth* (1946) 73 CLR 157, 175 and *Deputy Commissioner of Taxation (NSW) v W R Moran Pty Ltd* (1939) 61 CLR 735.

42 Duncan PS at [45].

judicially reviewed. There is no legal framework defining the facts that parliament found, a standard of proof that parliament should have satisfied, or a body of admissible evidence that Parliament should have considered.

57. With no alternative meaning possible, the Plaintiff's contention can only be that fact-finding is, in and of itself, exclusively an exercise of judicial power, and which Parliament is prohibited from exercising in carrying out its legislative function.

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58. And the Plaintiff does contend elsewhere that Parliament is incapable of finding facts on which it may act:[43]

> It may be that the legislation would have been valid if it provided for the cancellation of any exploration licenses that were determined by ICAC, or by another tribunal or by a Court, to be tainted by serious corrupt conduct. ... Instead, the legislature has purported to find the fact directly ...

20 59. Yet the exercise of legislative power cannot and does not occur in a vacuum. As a matter of practical necessity, the legislative creation or extinguishment of rights takes place within some factual matrix of which Parliament has informed itself. To suggest that Parliament cannot legislate for a purpose, unless a judicial body first determines the relevant factual matrix, is not only to propose the impossible but to attack the basis of parliamentary democracy.

30 60. Parliament *is*, contrary to the plaintiffs' contention, subject to supervision and restraint in the exercise of legislative power. It is answerable to the electorate. Beyond political considerations, however, the hallmark of legislative power is that parliament exercises its power to make laws at its discretion.[44] It follows that the manner in which Parliament informs itself is also at its discretion, subject only to electoral oversight.

Bill of pains and penalties

40 61. To overcome the lack of an explicit legal link between the clause 3 finding of fact and the operative provisions of clauses 4 to 13, the Plaintiff appears to propose that the

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43 Duncan PS at [45].

44 *R v Kirby; Ex Parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 279-280.

operative provisions are both selective and sufficiently punitive to characterise the enactment as a bill of pains and penalties.[45]

62. There is ample authority that Parliament can legislate for rights selectively in respect of named individuals or groups.[46] The issue is thus whether the act of cancelling the licenses is sufficiently punitive to characterise it as a bill of pains and penalties.

10 63. The rights in the licenses were not rights of general application. They were rights conferred exclusively, by parliament, on the licensees. The selective extinguishment of those rights merely returns those licensees to parity with the general population. Further, the actual effects of the license cancellations were both speculative and purely economic. The licenses were only for exploration, and profitable production was still highly contingent. At their highest, the Plaintiff lost an interest in a mere chance to earn exclusive economic profit, and expenditure "thrown away" in pursuit of that chance.
20 The common law has, traditionally, been reluctant to protect pure economic loss, even in tort, and has severely constrained both liability and recoverable damages for it.

64. In *Chu Kheng Lim v Minister for Immigration,*[47] this Court held that '... the involuntary detention of a citizen in custody by the State is penal or punitive in character.' The corporate licensees in this case suffered the mere loss of the chance of economic profit that might have flowed from their previous receipt of exclusive privileges. Queensland
30 submits that the effect of the impugned provisions cannot be reasonably compared with the involuntary detention of a citizen in custody, or some similar punishment, sufficient to characterize them as a bill of pains and penalties.

Circumventing judicial processes

65. The Plaintiff makes reference to an existing legal regime for the cancellation of licenses
40 under part 7, division 3 of the *Mining Act.*[48]

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45 Duncan PS at [22b] and [51].

46 *Queensland Medical Laboratory v Blewett* (1988) ALR 615, 635; *Newcrest Mining Ltd v Commonwealth* (1997) 190 CLR 513, 586-7, 636; *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88.

47 (1992) 176 CLR 1, 27.

48 Duncan PS at [17], [18] and [45].

66. There is clear authority of this Court that Parliament may enact a change to legal rights that makes redundant a judicial process that would otherwise deal with those rights. And it is no less legitimate that Parliament did so with that exact intention.

67. In *H A Bachrach Pty Ltd v Queensland* the plaintiff challenged legislation on the ground that it was explicitly designed to circumvent an existing judicial process. Nevertheless, the Court held that:[49]

> When a State legislature enacts legislation which sets up a general scheme of town planning and development control it does not thereby surrender its power to deal differently, by legislation, with particular areas of land where this, for a reason which commends itself to Parliament, is regarded as appropriate. Whether such a power should be exercised in relation to a given area becomes a political question.

68. The legislation in *Bachrach* did not involve direct legislative intervention in the judicial process,[50] Similarly, in the proceedings here, the impugned legislation does not involve any judicial process. In *Bachrach*, the High Court said:

> ... *Kable* took as a starting point the principles applicable to courts created by the Parliament under s 71 and to the exercise by them of the judicial power of the Commonwealth under Ch III. If the law in question here had been a law of the Commonwealth and it would not have offended those principles, then an occasion for the application of *Kable* does not arise.

69. The part 7, division 3 regime is one under which a delegated decision-maker may cancel licenses in a range of defined circumstances. It does not follow that parliament is precluded from legislating further or alternatively in respect of license cancellation.

Void and of no effect

70. Clause 5 provides, in effect, that outstanding applications in relation to the cancelled licenses are henceforth "void and of no effect" and not to be dealt with further.

71. In its submissions in respect of clause 5, the Plaintiff does seem to accept the distinction, previously made, between the action of extinguishing a right and the action of determining a controversy as to its existence.

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49 (1998) 195 CLR 547, 559.

50 See also *Lay v Employers Mutual Ltd* [2005] NSWCA 450, [58].

> Clause 5 is thus framed as a pronouncement upon the legal effect of steps taken pursuant to a statute, as distinct from an attempt at defining the rights and liabilities of the parties ...[51]

72. The Plaintiff then characterises clause 5 as '... declaring, in unmistakably judicial language, that they are "on the cancellation date, void and of no effect."'[52]

73. Whether or not the language is judicial, and it is the substance and not form that must be determinative, the difficulty with the Plaintiff's objection to clause 5 is that it does not in substance resolve any controversy about existing *legal rights*.

74. The subject of clause 5 is an application. An application is not itself an instrument in which is vested or which vests legal rights. The applications the subject of clause 5 are requests to the executive that the licensee be vested with legal rights, but it is implicit that those legal rights are not yet in existence, and may never come into existence.

75. A declaration that the application is void or of no effect thus is not a declaration as to existing legal rights. The Plaintiff raises a false analogy with a judicial order for rescission of a contract.[53] But a declaration that an application is void is distinguishable in that a contract, unlike an application, creates, modifies or extinguishes legal rights in an enforceable way.

76. To the extent that an applicant might be said to have or have had legal rights relating to the administration of the application, those rights flow not from the applications themselves but from the applicant's status as licensee. It is the cancellation of the license under clause 4 that extinguishes those rights.

Clause 3 is severable

77. Clause 3 of Schedule 6A is a purpose or objects clause. Queensland submits that it is merely an aid to construction of the operative provisions of the Schedule; it has no substantive effect and the recital of 'facts' in that clause does not amount to conclusive findings of the facts. Clause 3 does not make or contain a finding of fact of a kind that a court would make.

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51 Duncan PS at [48].
52 Duncan PS at [48].
53 Duncan PS at [19].

78. An objects clause is a statement of intention as to how an act is to operate and is a modern-day variant on the use of a preamble to indicate the intended purpose of legislation. The general approach of the courts to the use of objects clauses has been much the same as the use of preambles.[54]

79. The recital of facts in a preamble does not mean that the recitals are conclusive evidence of those facts. They are prima facie evidence only.[55]

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80. *In Wacando v The Commonwealth*, Mason J stated (at 23):[56]

> It has been said that where the enacting part of a statute is clear and unambiguous it cannot be cut down by the preamble. But this does not mean that a court cannot obtain assistance from the preamble in ascertaining the meaning of an operative provision. The particular section must be seen in its context; the statute must be read as a whole and recourse to the preamble may throw light on the statutory purpose and object.

20 81. The operative provisions of Schedule 6A are valid legislative enactments in the absence of clause 3. Clause 3 is not essential to the operation of clause 4 or the subsequent operative clauses.

82. While the exercise of legislative power necessarily requires Parliament to inform itself, and while Parliament may choose to express its purpose and object within an enactment itself, it need not do so. In fact, Parliament is not bound to express any object, purpose
30 or fact on which its legislative enactments are founded. Such expressions, when made, are purely political.

83. Clause 4 would be a valid exercise of legislative power if clause 3 had never been enacted. It does not follow that the enactment of clause 3, a mere declaration with no legal effect, should therefore make clause 4 invalid.

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54 In *Re Yanner* (2000) 100 FCR 551, [95]-[97] and *S v Australian Crime Commission* (2005) FCR 431, [22] the Federal Court adopted the approach of the High Court in *Wacando v Commonwealth* (1981) 148 CLR 1, 15-6.

55 *Dawson v Commonwealth* (1946) 73 CLR 157, 175 (Latham CJ).

56 (1981) 148 CLR 1.

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