IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: No. S138 of 2014

**NUCOAL RESOURCES LIMITED**
Plaintiff

and

**STATE OF NEW SOUTH WALES**
Defendant



# ANNOTATED SUBMISSIONS OF THE ATTORNEY-GENERAL FOR SOUTH AUSTRALIA

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**Part I: Certification**

1. This submission is in a form suitable for publication on the internet.

**Part II: Basis for intervention**

2. The Attorney-General for South Australia (**South Australia**) intervenes pursuant to s78A of the *Judiciary Act 1903* (Cth) in support of the Defendant.

**Part III: Leave to intervene**

3. Not applicable.

**Part IV: Applicable legislative provisions**

4. South Australia adopts the Defendant's statement of the applicable legislative provisions.

**Part V: Submissions**

5. The Plaintiff contends that Schedule 6A to the *Mining Act 1992* (NSW) (**Mining Act**) is inconsistent with the *Copyright Act 1968* (Cth). South Australia makes no submission on this issue.

6. Of the remaining issues, the Plaintiff's propositions can be summarised as follows:

   i. clauses 1 to 13 of Schedule 6A to the Mining Act, either individually or in combination, amount to a purported exercise of State judicial power by the Parliament of New South Wales because their operation in substance amounts to a legislative finding of criminal guilt in respect of which punishment is imposed; (**proposition (i)**)

   ii. it is beyond the competence of the Parliament of New South Wales to exercise State judicial power because:

      *a.* that Parliament does not, and never has had, such power conferred upon it (**proposition (ii)**); and

      *b.* an implication to be drawn from the Commonwealth *Constitution* derived from the rule of law prohibits the exercise of State judicial power by a State Parliament (**proposition (iii)**).

7. As in matters S119 and S206 of 2014, the key to the Plaintiff's submissions is the contention that the power exercised was judicial or judicial in nature. If that contention is not made good, propositions (ii) and (iii) become academic and should not be further considered, consistent with

this Court's practice.[1]

8. In summary, South Australia submits that:

   i. in enacting clauses 1 to 13 of Schedule 6A to the Mining Act, the Parliament of New South Wales did not exercise State judicial power because the provisions of that Schedule:

      *a.* operate as a prospective alteration of various rights and obligations which may be exercised pursuant to, or in connection with, certain exploration licences previously granted under the Mining Act, and the land and minerals that those licences pertained to;

      *b.* do not result in a finding of guilt against any person; nor is any person or class of persons punished in consequence of a determination of guilt;

   ii. if, contrary to the above, Schedule 6A does amount to an exercise of judicial power, propositions (ii) and (iii) should not be accepted because:

      *a.* both historically and post-federation, the Parliament of New South Wales has had plenary power to allocate State legislative, executive and judicial power, including the power to itself pass legislation which may be characterised as judicial in effect, subject only to constraints derived from the Commonwealth *Constitution* or Imperial legislation;

      *b.* the Commonwealth *Constitution* does not, either expressly or by necessary implication, prohibit a State Parliament from exercising State judicial power.

9. South Australia repeats its submissions in matters S119 and S206 of 2014 in support of the above contentions, and adds the following.

***Schedule 6A does not determine guilt or impose punishment***

10. The Plaintiff asserts that Schedule 6A exhibits the characteristics of criminal judgment and sentence.[2] It is an implicit premise of the Plaintiff's argument that judgment of criminal guilt and imposition of sentence is a function exclusive to the judicial power, more relevantly, the State judicial power. In this regard, it ought not be assumed that State and Commonwealth judicial power are necessarily defined in the same terms or are of equal breadth.[3] The scope of Commonwealth judicial power may be defined by the structural limitations imposed by the

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1 See eg *Plaintiff M76/2013 v Minister for Immigration* (2013) 88 ALJR 324, [148] (Crennan, Bell and Gageler JJ); *Hutchison 3G Australia Pty Ltd v City of Mitcham* (2006) 80 ALJR 711, [110] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

2 Plaintiff submissions at [16].

3 *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458, 466-7 [22] (French CJ).

Commonwealth *Constitution*. Judicial power derives from the power inherent in every sovereign to determine controversies between its subjects;[4] it follows that State judicial power has a source separate and distinct from Chapter III.[5]

11. It is necessary to identify what is the quintessential judicial act or acts in the adjudgment and punishment of guilt by the judicial branch. In *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*,[6] in the context of the exercise of Commonwealth judicial power, it was stated that "*the adjudgment and punishment of criminal guilt under a law of the Commonwealth*" "*appertains exclusively to*" and "*could not be excluded from*" the judicial power of the Commonwealth.[7] Not every statement of satisfaction of wrongdoing amounts to an adjudgment of criminal guilt in the exclusively judicial sense referred to in *Lim*. The adjudgment of criminal guilt is characterised by a conclusive and binding determination made in the exercise of judicial power, following proof by evidence or plea that an individual has committed all elements of an offence[8] such that a conviction should be entered in the record.[9] The liability of the offender merges in judgment upon the entry of conviction into the record. Such judgment then serves to trigger the coercive power of the State to impose punishment for the wrong done.

12. As set out at [24] to [26] of South Australia's S119 and S246 submissions, in enacting Schedule 6A the legislature has not assumed the role of adjudgment of criminal guilt in the relevant sense,[10] because the legislature has not either expressly or implicitly purported to make a conclusive and binding determination that any individual has committed an offence known to the law of New South Wales.

13. Moreover, not every imposition of detriment comprises the exercise of judicial power to impose punishment.[11] As Hayne J stated in *Al-Kateb v Godwin*,[12] *"[p]unishment exacted in the exercise of judicial power is punishment* **for** *identified and articulated wrongdoing"*.[13] Legislation which operates to impose a

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4 *TCL Air Conditioner (Zhongshan) Co Ltd v the Judges of the Federal Court of Australia* (2013) 87 ALJR 410, [27]-[28] (French CJ and Gageler J); *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ).

5 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, [108] (Gummow and Hayne JJ, Gleeson CJ and Gaudron J agreeing); B Lim, "Attributes and Attribution of State Courts - Federalism and the Kable Principle" (2012) 40 Federal Law Review 31, 40

6 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 ("Lim").

7 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ); See also *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434, 444 (Griffith CJ); *Re Tracey; ex parte Ryan* (1989) 166 CLR 518, 580 (Deane J).

8 *Re Nolan; ex parte Young* (1991) 172 CLR 460, 497 (Gaudron J); *Magaming v The Queen* (2013) 302 ALR 461, [63] (Gageler J).

9 *Victoria v Australian Building Construction Employees' & Builders Labourers' Federation* (1982) 152 CLR 25, 53 (Gibbs CJ), 128 (Wilson J); *McGuinness v Attorney-General (Victoria)* (1940) 63 CLR 73, 84 (Latham CJ).

10 Plaintiff submissions at [27].

11 Although any imposition of detriment might colloquially be referred to as "punishment", the relevant concept is narrower: *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1, [17] Gleeson CJ.

12 *Al-Kateb v Godwin* (2004) 219 CLR 562.

13 *Al-Kateb v Godwin* (2004) 219 CLR 562, [265] (Hayne J) (emphasis in original); *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 537 (Mason CJ).

detriment is only capable of being seen as an exercise of judicial power if it has this distinctive character. Punishment *for* identified wrongdoing requires more than a causative link between conduct and detriment.[14] The detriment must be intended to be punitive. In that regard, the purpose for which the detriment is imposed serves as the "*yardstick*"[15] in answering the characterisation question. Legislation which evinces a non-punitive purpose underlying the imposition of a detriment may not properly be characterised as imposing punishment in the relevant sense.[16]

14. The alteration of the rights and obligations attaching to the identified exploration licences effected by Schedule 6A does not amount to the imposition of punishment in the relevant sense. Indeed, the operation of Schedule 6A lacks two of the five characteristics of the 'standard case of punishment' asserted by the Plaintiff:[17]

    i. it is not *for* an offence;

    ii. it is not imposed on an actual or supposed *offender* for his or her offence.

15. The Plaintiff's attempt to characterise Schedule 6A as punitive is premised on its assertion that Parliament has "*declared the complicity of the licence holders in conduct involving corruption*".[18] This construction of the legislation is not open.[19] For the same reasons that Parliament has not adjudged the guilt of the licence holders, the rights and obligations attaching to the identified exploration licences cannot be characterised as having been altered as punishment *for* any conduct of the licence holders. The mischief against which Schedule 6A is expressed to be directed is the corruption in the processes leading to the grant of the licences by the Minister, irrespective of who was involved in that corruption and the part they may have played.

16. The expressed purposes of Schedule 6A are not themselves punitive, and nor do they permit a

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14 For example, disciplinary sanctions may be imposed *because of* identified conduct, but they are not imposed *for* identified conduct.

15 *Al-Kateb v Godwin* (2004) 219 CLR 562, [294] (Callinan J).

16 See eg *Haskins v Commonwealth* (2011) 244 CLR 22, [26], [30] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1, [60] (McHugh J); *Pollentine v Bleijie* (2014) 88 ALJR 796, [64]-[65] (Gageler J); *Al-Kateb v Godwin* (2004) 219 CLR 562, [44]-[45] (McHugh J); *Fardon v Attorney-General (Queensland)* (2004) 223 CLR 575, [216]-[219] (Callinan and Heydon JJ).

17 Plaintiff submissions at [19].

18 Plaintiff submissions at [21].

19 In ascertaining the purpose underlying a legislative imposition of detriment, it may be appropriate to have regard to Parliamentary debates: *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1, [60] (McHugh J). However, the protected freedom of proceedings in Parliament requires that such extrinsic material be admitted and "given effect to" without questioning the truth of the purposes expressed by Parliament. It is not open to seek to go behind the expressed purposes and impute some other, unexpressed purpose to the legislature: *Pepper v Hart* [1993] AC 593, 638–9 (Lord Browne-Wilkinson); *Rann v Olsen* (2000) 76 SASR 450, [119] (Doyle CJ). Although see the remarks of Kirby J in *Egan v Willis* (1998) 195 CLR 424 at 492-493 as to the limits of this principle of non-intervention in the Constitutional context.

punitive purpose to be inferred.[20] While each of the purposes underlying Schedule 6A are said to fall within the *"conventional rationale for punishment"*,[21] only deterrence is one of the necessary purposes of punishment asserted by the Plaintiff.[22] Insofar as deterrence is a feature of punishment, it is a feature shared by the imposition of detriment for protective and disciplinary purposes.[23] For the reasons set out at [27] to [29] of South Australia's S119 and S246 submissions, the provisions of Schedule 6A evince clear non-punitive purposes. Schedule 6A is directed towards restorative aims; it is not, and is not intended to be, retributive or punitive[24] against the Plaintiff for its past conduct.

***Whether the Parliament of New South Wales may exercise State judicial power: propositions (ii) and (iii)***

17. If this Court accepts proposition (i), South Australia contends that the Plaintiff's propositions (ii) and (iii) need not be considered.

*Proposition (ii)*

18. The Plaintiff asserts that the legislative history of New South Wales demonstrates that the colonial legislature never had judicial power conferred upon it. However, the Plaintiff's assertion that *"from the first days of settlement, judicial power was exercised by a judicial authority and nobody else"*[25] may be doubted.

    i. As acknowledged by the Plaintiff, from the earliest stages of colonisation, the Governor constituted the ultimate appellate authority within the colony.[26]

    ii. At [49] of its submissions in matters S119 and S206 of 2014, South Australia has sought to demonstrate that colonial legislatures, including that of New South Wales, did exercise powers which were judicial in nature. At federation, the distribution of judicial functions in each colony was under the immediate control of its parliament, and the parliament was thereby the immediate source of all judicial authority in the colony.[27] Such power was

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20 This is not an instance where the Act is silent as to its purposes, and where the form of detriment imposed is so closely linked to punishment (such as involuntary detention) as to make it possible to infer a punitive purpose: *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1, [60] (McHugh J).

21 Plaintiff submissions at [22].

22 Plaintiff submissions at [20].

23 Such as that considered in *Mohamed Samsudeen Kariapper v S. S. Wijesinha and Anor* [1968] AC 717 and *R v White; Ex parte Byrnes* (1963) 109 CLR 665. Thus, in *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1, [61] McHugh J stated: *"Deterrence that is an intended consequence of an otherwise protective law will not make the law punitive in nature unless the deterrent aspect itself is intended to be punitive"*. See also *Al-Kateb v Godwin* (2004) 219 CLR 562, [291] (Callinan J); *Kamha v Australian Prudential Regulation Authority* (2005) 147 FCR 516, [73] (Emmett, Allsop and Graham JJ).

24 Or even rehabilitative.

25 Plaintiffs submissions at [29].

26 Plaintiff submissions at footnote 46.

27 A. Inglis Clark, *Studies in Australian Constitutional Law,* Charles F Maxwell (G Partridge & Co) 1901, p32; *Colonial Laws Validity Act 1865* (Imp) s5.

continued by section 107 of the Commonwealth *Constitution*. As noted at [52] and [53] of South Australia's submissions in matters S119 and S206 of 2014, and contrary to the Plaintiff's submission at [62], that continued by force of section 107 cannot be lost because it has not been exercised or by reason of the development of the common law.[28]

19. Irrespective of the historical position, the Plaintiff accepts that the legislative power of a State parliament today extends to permit it to enact a law that confers State judicial power on a body other than a court.[29] This suggests that the New South Wales Parliament has power to allocate the judicial power of the State. If the Parliament has such power to allocate, no reason arises as to why it cannot itself exercise such power. The Plaintiff does not provide any such reason. The Plaintiff instead points to the example of the Commonwealth Parliament as having legislative power to establish federal courts but no judicial power itself.[30] However the State and Commonwealth Parliaments are relevantly different:

    i. the scope of the powers of the Commonwealth Parliament is limited to that enumerated within the Commonwealth *Constitution*, whereas the plenary powers of the former colonies continue to be available to State parliaments, as alluded to above and at [34] of South Australia's submissions in matters S119 and S246 of 2014;

    ii. the Commonwealth Parliament is prevented from exercising judicial power by virtue of the Commonwealth *Constitution* and the separation of powers it embodies. As discussed at [47] of South Australia's submissions in matters S119 and S246 of 2014 and further below, the doctrine of the separation of powers derived from the structure of the *Constitution* has no equivalent foundation or operation at the State level.

*Proposition (iii)*

20. The Plaintiff further asserts that the exercise of State judicial power by the New South Wales Parliament is prevented "*because of the effect of the Constitution upon State constitutions.*"[31] The posited 'effect' is expressed as a "*limitation based upon the requirement that a State legislature may not enact a law which destroys State courts as impartial and independent bodies … because to do so would be contrary to the Constitution interpreted consistently with the rule of law.*"[32] A law whereby a State Parliament purports to

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28 *Lange v Australian Broadcasting Corporation* (1997) 178 CLR 520, 566; *Lipohar v The Queen* (1999) 200 CLR *485*, 509-510; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 527-528.

29 Plaintiff submissions at [28]; see eg *Clyne v East* (1967) SR (NSW) 385, 395, 400; *Nicholas v State of Western Australia* [1972] WAR 168; *Gilbertson v South Australia* (1976) 15 SASR 66, 85; *Grace Bible Church v Reedman* (1984) 36 SASR 376; *Building Construction Employees and Builders Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372.

30 Plaintiff submissions at [63].

31 Plaintiff submissions at [28].

32 Plaintiff submissions at [49].

exercise State judicial power "*would be capable of rendering otiose the courts of the States.*"[33]

21. The Plaintiff's argument appears to proceed as follows:

    i. the rule of law is an assumption upon which the Commonwealth *Constitution* is erected and informs the interpretation of the Commonwealth *Constitution*;[34]

    ii. the rule of law requires the separation of the judicial branch from the executive and the legislature to ensure the continued existence of an impartial and independent body to declare and apply the law which will bind the executive and the legislature;[35]

    iii. the possession by a parliament of judicial power would 'render otiose,' or at least subvert, the operation of the impartial and independent judiciary in its role in declaring and applying the law which will bind the executive and the legislature (such role being required by the rule of law);[36]

    iv. the Commonwealth *Constitution* therefore, as informed by the principle of the rule of law, prohibits the exercise of judicial power by a parliament (at either the Federal or State level).

22. The Plaintiff does not define the content of 'the rule of law', nor does the Plaintiff identify with any specificity the textual or structural anchor located in the Commonwealth *Constitution* upon which the rule of law operates so as to necessarily require the asserted limitation on State legislative power.

23. Agreement as to the meaning and effect of the rule of law is elusive: it has both formal and aspirational aspects,[37] and its scope is nebulous and disputed.[38] It may be accepted that the Commonwealth *Constitution* is framed upon the general assumption of the application of the rule of law, and that that assumption at least forms part of the context for its interpretation.[39] However, this does not take the issue very far. It is necessary to determine what effect the assumption has in interpreting the Commonwealth *Constitution.*

24. It may be accepted that aspects of the rule of law (including aspirational elements) have been

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33 Plaintiff submissions at [54].
34 Plaintiff submissions at [43], [44].
35 Plaintiff submissions at [47].
36 Plaintiff submissions at [54].
37 M Gleeson, "Courts and the Rule of Law", in C Saunders and K Le Roy *The Rule of Law* (Federation Press, 2003), p178.
38 C Saunders and K Le Roy, "Perspectives on the Rule of Law", in C Saunders and K Le Roy *The Rule of Law* (Federation Press, 2003), p5 and 11; see also L McDonald "The entrenched minimum provision of judicial review and the rule of law" (2010) 21 PLR 14 at 25 - 26.
39 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 193 (Dixon J); *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 492, [31] (Gleeson CJ). *Miller v TCN Nine* (1986) 161 CLR 556, 581 (Murphy J); *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 381 (Gummow and Hayne JJ); *Abebe v Commonwealth* (1999) 197 CLR 510, 560 (Gummow and Hayne JJ).

used by this Court in understanding or developing the common law or in interpreting statutes.[40] However, the rule of law has had a more limited role in the constitutional context. It is clear that the Commonwealth *Constitution* assumes that the law will be obeyed by subjects and governments alike, and this aspect of 'the rule of law' provides a context for understanding the Commonwealth *Constitution.*[41] Certain constitutional provisions can be identified as expressing or reflecting the rule of law.[42] Certain implications necessarily drawn from the text or structure of the Commonwealth *Constitution* have been described by this Court as "*giving practical effect to the rule of law*".[43] However 'the rule of law' on its own does not demand that any particular constitutional implication be drawn. As observed by McHugh and Gummow JJ:

> In Australia, the observance by decision-makers of the limits within which they are constrained by the Constitution and by statutes and subsidiary laws validly made is an aspect of the rule of law under the Constitution. It may be said that the rule of law reflects values concerned in general terms with abuse of power by the executive and legislative branches of government. But it would be going much further to give those values an immediate normative operation in applying the Constitution.[44]

25. A constitutional assumption is not the same as a constitutional implication.[45] An assumption informs interpretation. It has no independent normative operation, unlike an implication. An implication requiring a limitation on legislative power may be drawn from either the text or structure of the Commonwealth *Constitution.* That said, it is critical that any such implication be securely based.[46] Underlying or overarching doctrines may explain or illuminate the meaning of the text or structure of the Commonwealth *Constitution* but such doctrines are not independent sources of the powers, authorities, immunities and obligations conferred by the Commonwealth *Constitution.*[47]

26. As a starting point therefore, South Australia submits that whatever the content of the rule of law, it is incapable of forming an independent source of constitutional limitation in the absence of a textual or structural conduit. The Plaintiff's assertion that the rule of law, as a constitutional assumption, *requires* a particular approach to the allocation of judicial power at the State level is unsustainable unless that requirement can necessarily be implied in the text or structure of the

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40 See *Watson v Lee* (1979) 144 CLR 374, 394-395 (Stephen J); *Ridgeway v The Queen* (1995) 184 CLR 19, 44 (Mason CJ, Deane & Dawson JJ); *Enfield v Development Assessment Commission* (2000) 199 CLR 135, 157 [56] (Gaudron J); *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 560 [106] (Gaudron, McHugh and Gummow JJ); *Lee v NSW Crime Commission* (2013) 251 CLR 196, 264, [171] (Kiefel J).

41 Covering Clause 5 of the Commonwealth *Constitution.*

42 For example, section 75(v): *Re Patterson; ex parte Taylor* (2001) 207 CLR 391, 415 [64] (Gaudron J); section 80: *Cheng v The Queen* (2000) 203 CLR 248, 277-278 [80] (Gaudron J).

43 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 351 (Gleeson CJ and Heydon J), referring to the conferral and denial of judicial power by Chapter III of the Constitution in accordance with its express terms and its necessary implications.

44 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 23.

45 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 135 (Mason CJ).

46 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 452 - 454 (Hayne J).

47 *McGinty v Western Australia* (1996) 186 CLR 140, 230 - 232 (McHugh J).

Commonwealth *Constitution.*

27. Neither the text nor the structure of the Commonwealth *Constitution* supports or requires that a State parliament be prohibited from exercising State judicial power.

28. At federation, and by operation of the Commonwealth *Constitution*, the former colonies ceased to be such and became States. Sections 106 and 107 provided their constitutions and powers as States referentially to the constitutions and powers which the former colonies enjoyed, including the power of alteration of those constitutions.[48] Those constitutions and powers were effectively continued by virtue of the Commonwealth *Constitution.* Significantly, s107 preserves the legislative competence of a State Parliament in respect of any topic that is not exclusively vested in the Federal Parliament[49] or withdrawn from the Parliament of the State,[50] and ss106 and 107 in combination the power to allocate functions among the branches of government. These provisions contain an implicit acknowledgment that, within the States, the supremacy of the Parliament, erected in mirror image to the Imperial Parliament, save for any express or necessarily implied alterations affected by the Commonwealth *Constitution* to the contrary,[51] or any Imperial limitation,[52] was to continue.

29. Neither sections 106 or 107 provide the necessary textual foundation required to support the limitation proposed by the Plaintiff. The Plaintiff must look elsewhere in the text. Section 73 of the Commonwealth *Constitution* cannot be called in aid, for the reasons set out at [43] to [54] of South Australia's submissions in matters S119 and S246 of 2014.

30. The Plaintiff suggests that the exercise of State judicial power by a State Parliament would defeat the grant of power conferred by section 77 of the Commonwealth *Constitution*, referring to dictum of McHugh J in *Kable.*[53] Seen in context, the point being made by His Honour is that section 77, along with the operation of other clauses of the Commonwealth *Constitution*,[54] implies the continuing existence of a system of State courts with a Supreme Court at the head of the State judicial system: *"[i]t necessarily follows, therefore, that the Constitution has withdrawn from each State the power to abolish its Supreme Courts or to leave its people without the protection of a judicial system."*[55] It

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48 *New South Wales v Commonwealth* (1975) 135 CLR 337, 372 (Barwick CJ), referred to in *McGinty v Western Australia* (1996) 186 CLR 140, 172 (Brennan CJ).

49 *R v Phillips* (1970) 125 CLR 93, 116 (Windeyer J); *Gerhardy v Brown* (1985) 159 CLR 70, 120 (Brennan J).

50 It may be accepted that a State legislative power may be 'withdrawn' by the Commonwealth Constitution either expressly or by necessary implication.

51 *McGinty v Western Australia* (1996) 186 CLR 140, 171-173 (Brennan CJ).

52 The last vestiges of which were removed by the *Australia Act 1986* (Cth) and the *Australia Act 1986* (UK).

53 Plaintiff submissions at [73], referring to McHugh J at 110-111 in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

54 His Honour refers to covering cl 5, s118, s51(xxiv), s51(xxv) and s73.

55 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 111 (McHugh J). See also *McGinty v Western Australia* (1996) 186 CLR 140, 292-3 (Gummow J); *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at [63] (Gleeson CJ).

does not follow, however, from section 77 or any other provision of the Commonwealth *Constitution*, that a State Supreme Court must be capable of reviewing all exercises of State judicial power, and consequently that the Commonwealth *Constitution* has withdrawn from each State the power to pass legislation which may be characterised as judicial in nature or effect.

i. The Plaintiff's assertion that the exercise of State judicial power by a State parliament would "render otiose" the courts of the States presents an extreme example that it is said could flow if legislation such as that here under consideration is enacted. The Plaintiff does not appear to contend that the enactment of Schedule 6A has this consequence, nor could such an argument reasonably be mounted. The Commonwealth *Constitution* should not be given meaning narrowed by an apprehension of "*extreme examples and distorting possibilities.*"[56]

ii. Such an assertion takes no account of the fact that State parliaments already exercise such powers, as set out at [49] of South Australia's submissions in matters S119 and S246 of 2014, with little consequence for the continued existence and operation of the courts.

31. Similarly no implication can be drawn from the structure of the Commonwealth *Constitution* in aid of the Plaintiff's assertion that the Commonwealth *Constitution*, as informed by the principle of the rule of law, prohibits the exercise of judicial power by a State parliament. Chapters I, II and III of the Commonwealth *Constitution* respectively address the legislative, executive and judicial power "*of the Commonwealth.*"[57] This structural separation of powers at the federal level implies the prohibition on the exercise of federal judicial power by either the federal executive or Commonwealth Parliament. However that separation sourced in the structure of the Commonwealth *Constitution* clearly does not apply to the States: the States are separately addressed within Chapter V of the Commonwealth *Constitution.* Given that the States are separately addressed in Chapter V, to the extent that any implication may be drawn from the structure of the Commonwealth *Constitution* in relation to the ability of a State Parliament to exercise State judicial power, it is adverse to the Plaintiff. The exclusion of the States from the application of Chapters I, II and III carries with it the implication that the State Parliaments are to remain free to allocate power among the branches of their governments. So much has been recognised by this Court in various judgments to the effect that the doctrine of separation of powers does not apply in the States.[58]

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56 *New South Wales v Commonwealth* (2006) 229 CLR 1, 117 [188] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); See also *Wainohu v New South Wales* (2011) 243 CLR 181 at [151]-[153] (Heydon J); *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at [46] (Gleeson CJ).

57 Sections 1, 61 and 71 of the Commonwealth *Constitution.*

58 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, [69] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Public Service Association and Professional Officers' Association Amalgamated of NSW v Director of Public Employment*

32. Neither the text nor structure of the Commonwealth *Constitution* therefore prohibits the exercise of State judicial power by a State Parliament. An appeal to the rule of law as a constitutional assumption cannot found a new constitutional limitation on State legislative power unsupported in any way by the text or structure of the Commonwealth *Constitution*. An aspect of the rule of law requires the courts to give effect to an expression of legislative will embodied in a valid statutory limitation on jurisdiction. As noted by Gleeson CJ, writing extra-judicially with respect to the construction of privative clauses:

> It may be an appropriate use of political rhetoric to contend that a privative clause is a derogation from the rule of law, but that is not a substitute for legal analysis. And the primary focus of legal analysis will be the legislative competence of the Parliament. If such competence exists, the rule of law requires that its exercise be respected by the judiciary.[59]

33. For the reasons set out above and in South Australia's submissions in matters S119 and S206 of 2014, the New South Wales Parliament has the competence to enact Schedule 6A of the Mining Act. Consistent with the rule of law, the Plaintiff's propositions (ii) and (iii) should not be accepted.

**Part VI: Estimate of time for oral argument**

34. South Australia estimates that 30 minutes will be required for the presentation of oral argument in this matter and the related matters S119 and S206 of 2014.

Dated 26 November 2014

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(2012) 293 ALR 450, [57] (Hayne, Crennan, Kiefel and Bell JJ); *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372; *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458, 466-7 [22] (French CJ), and authorities referred to therein.

59 M Gleeson, "Courts and the Rule of Law", in C Saunders and K Le Roy *The Rule of Law* (Federation Press, 2003), p188.