IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No. S206 of 2014**

BETWEEN

CASCADE COAL PTY LIMITED
First Plaintiff

MT PENNY COAL PTY LIMITED
Second Plaintiff

GLENDON BROOK COAL PTY LIMITED
Third Plaintiff

AND

THE STATE OF NEW SOUTH WALES
Defendant

10

PLAINTIFFS' REPLY

Date of Document: 22 October 2014

Filed on behalf of Plaintiff by
TressCox Lawyers
Level 16, MLC Centre
19 Martin Place
Sydney NSW 2000

DX 123 Sydney
Tel: 02 9228 9200
Fax: 02 9228 9299
Reference: Ronald Heinrich

I INTERNET PUBLICATION

1. This reply is in a form suitable for publication on the Internet.

II SUBMISSIONS IN REPLY

2. The Plaintiffs adopt the submissions in reply of the Plaintiff in S119 of 2014 (**the Duncan proceeding**).

Not a "law"

3. Contrary to the Commonwealth's submissions,[1] that Latham CJ's observations in *Grunseit* were directed towards explaining the distinction between legislative and executive power does not mean that they are of no utility in construing s 5 of the *Constitution Act 1902* (NSW). Executive power encompasses all those powers, which are neither legislative nor judicial, that a polity must possess in order to function as a polity;[2] therefore, executive power can be distinguished from legislative power only if one first describes the outer boundaries of the latter. What was said in *Grunseit* should be understood as an attempt to do just that, with the result that those remarks have a greater significance than the Commonwealth would accept.

4. It is similarly no answer to the Plaintiffs' case to suggest, as both the Defendant and the Commonwealth do,[3] that the reasons for judgment of Gummow J and Hayne J in *Momcilovic v The Queen*[4] went no further than to describe the pre-conditions to the engagement of s 109 of the Constitution. That proposition ignores Isaacs J's observation in *Clyde Engineering Co Ltd v Cowburn* that the expression "a law of the Commonwealth" in s 109 means "a law within what is described in covering sec V as 'all laws made by the Parliament of the Commonwealth under the Constitution'".[5] It is surely no part of the Defendant's argument that the word "law" in s 51 of the Constitution has a meaning different from that which it bears in covering clause 5. Nor can it be said that there are any differences in meaning as between the uses of the word "law" in s 5 of the *Constitution Act* and s 51 of the Constitution. That being so, it does not follow from the focus upon s 109 of the Constitution in *Momcilovic* that the remarks made in that case, on

---

[1] **Cth** [9].

[2] *Williams v Commonwealth (No 2)* (2014) 88 ALJR 701 at 715 [78].

[3] **DS** [11]; **Cth** [13].

[4] (2011) 245 CLR 1.

[5] (1926) 37 CLR 466 at 496–497.

which the Plaintiffs now rely, should be quarantined from possible application in other contexts.

5. It should also be emphasised that the Defendant's submissions concerning Latham CJ's inclusion, among the hallmarks of an exercise of legislative power, of "a declaration as to power, right or duty" proceed upon the premise that Sched 6A does no more than to alter the rights and obligations of various persons in a manner that falls short of the infliction of punishment. The Plaintiffs do not accept the premise. If Sched 6A be characterised as inflicting punishment upon the Plaintiffs, then it would strain the very language used by Latham CJ in *Grunseit* to describe the Schedule as a mere "declaration as to power, right or duty". That is because punitive sanctions are no mere duties; they give rise to no correlative rights in the Hohfeldian sense and, more importantly, their imposition entails, amongst other things, the exaction of retribution,[6] a notion that, on any view, distinguishes the imposition of punishment from the imposition of legal obligations.

Section 109 inconsistency

6. The Defendant accepts much of the Plaintiffs' case on this point. Although it is not entirely clear, it seems that the Defendants concede that cl 11 must be invalid unless construed or read down so that:

   (a) it does not confer any greater authority to engage in acts comprised in the copyright than follows from the application of s 183(1) of the *Copyright Act*;[7] and

   (b) it does not deny the State's obligations to make payments pursuant to ss 183(5) and 183A(2) of the *Copyright Act*.[8]

7. The Commonwealth accepts even more of the Plaintiffs' case on this point.

8. There is a question whether unequivocal language such as "no liability" in cl 11(4) should be read down to mean "no liability except liability under the *Copyright Act*": Parliament's choice of words should be respected even if the consequence is invalidity.[9]

---

[6] *Veen v The Queen (No 2)* (1988) 164 CLR 465, 476.

[7] **DS** [38].

[8] **DS** [42].

[9] *Tajjour v New South Wales* [2014] HCA 35 at [31] (French CJ); *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 349 [42] (French CJ).

9. In any event, even if cl 11 and s 183 were perfectly on all fours with each other, s 109 would be engaged. Clause 11 intrudes upon the Commonwealth law's "comprehensive licence scheme for government use of copyright".[10]

10. The Commonwealth submits that s 183 "does not operate to confer rights to engage in acts comprising copyright" but that "because copyright is negative in nature, s 183(1) operates to qualify or roll back the operation of the Act so as not to relevantly apply to those Crown uses".[11] The only authority cited for that proposition is *Copyright Agency Ltd v NSW*,[12] which is to the effect that s 183 "qualifies" the exclusive rights of a copyright holder. But legislation might "qualify" one's exclusive rights in different ways: it might do that, as the Commonwealth suggests, by rolling back the exclusive right; or it might do that by conferring an additional limited right on someone else in derogation from what would otherwise be one's exclusive right. *Copyright Agency Ltd* is authority for the "qualification" of copyright, but not authority for the "rolling back" construction.

11. On its proper construction, s 183(1) confers a positive right or authorisation to do acts comprised in copyright. Only that construction is consistent with the language of s 183(3), (4), (5), and (8), which speak of acts comprised in the copyright being done "under" s 183(1) — the word, "under", reflecting that s 183(1) is the source of the authority and confers a right or power, not a provision that "rolls" anything "back". Thus, albeit in a different statutory context, the word "under" has been held to connote something "expressly or impliedly required or authorised by".[13] The Plaintiffs' construction is also the only construction consistent with the High Court's explanation of the scheme as a "comprehensive licence scheme for government use of copyright".[14]

Date: 22 October 2014

Andrew Bell

Gerald Ng

[10] (2008) 233 CLR 279 at [67].

[11] **Cth** [27].

[12] (2008) 233 CLR 279 at [68].

[13] *Griffith University v Tang* (2005) 221 CLR 99 at [89] (Gummow, Callinan and Heydon JJ).

[14] (2008) 233 CLR 279 at [67].

Phone (02) 9233 1370
Fax (02) 9232 7626
Email asbell@wentworthchambers.com.au

Phone (02) 9233 4275
Fax (02) 9221 5386
Email gng@selbornechambers.com.au

Brendan Lim
Phone (02) 8228 7112
Fax (02) 9232 7626
Email blim@wentworthchambers.com.au