Validity of cancelling mining licences without compensation

Gideon Gee reports on *Duncan v New South Wales; NuCoal Resources Limited v New South Wales; Cascade Coal Pty Limited v New South Wales* [2015] HCA 13.

In a recent unanimous decision, the High Court (French CJ, Hayne, Kiefel, Bell, Gageler, Keane and Nettle JJ) confirmed the extent of the law making power of the New South Wales Parliament.

The Amendment Act

The New South Wales Parliament enacted the *Mining Amendment (ICAC Operations Jasper and Acacia) Act 2014* (NSW) (Amendment Act) to amend the *Mining Act 1992* (NSW) (Mining Act) in order to cancel, without compensation, three exploration licences that had been granted under the Mining Act.

The Amendment Act followed consideration of the Operations Jasper and Acacia reports laid before parliament by ICAC in 2013 and January 2014 (ICAC reports). In the ICAC reports, ICAC found that corrupt conduct had occurred in events leading to the grant of the three exploration licences and expressed the view that the licences were 'so tainted by corruption that [they] should be expunged or cancelled and any pending applications regarding them should be refused'.

The challenge

The licensees brought separate proceedings against the state in the original jurisdiction of the High Court challenging the validity of the cancellation of the licences. The Commonwealth and several states intervened.

There were three grounds to the challenge:

- The Amendment Act was not a 'law' within the competence of the New South Wales Parliament.
- The Amendment Act was an impermissible exercise of judicial power.
- Clause 11 of the Amendment Act was inconsistent with the *Copyright Act 1968* (Cth) (Copyright Act) and inoperative by force of s 109 of the Constitution.

None of these grounds was established.

The Amendment Act is a law

Section 5 of the *Constitution Act 1902* (NSW) (Constitution Act) provides:

> The legislature shall, subject to the provisions of the Commonwealth of Australia Constitution Act, have power to make laws for the peace, welfare, and good government of New South Wales in all cases whatsoever.

The plaintiffs submitted that Amendment Act involved an exercise of judicial power in the nature of a bill of pains and penalties, which was an impermissible exercise of judicial power by the state parliament.

Two of the plaintiffs submitted that the Amendment Act was not a law because it destroyed existing rights by way of punishment for what parliament had judged to be serious corruption.[1]

The High Court held that the word 'laws' in s 5 of the Constitution Act 'implies no relevant limitation as to the content of an enactment of the New South Wales Parliament', including no limit to the specificity of such enactments.[2]

This confirmed the view expressed in *Kable v Director of Public Prosecutions (NSW)*[3] by Brennan CJ[4] and Dawson J[5] (both in dissent) and adopted by McHugh J.[6] It was also said to be consistent with the holding of the majority in *Kable*, which rendered invalid the enactment in issue by operation of Ch III of the Constitution.[7]

The Amendment Act is not an exercise of judicial power

This was the principal and common ground to all three proceedings. The plaintiffs submitted that the Amendment Act involved an exercise of judicial power in the nature of a bill of pains and penalties, which was an impermissible exercise of judicial power by the state parliament. This limit on state legislative power was said to be derived either from Ch III of the Constitution or from an historical limit on colonial and state legislative power which was not overtaken by the *Australia Act 1986*.[8]

The plaintiffs relied on two elements of the purposes and objects clause of the Amendment Act to characterise the Amendment Act as an exercise of judicial power.

The first element was that parliament expressed that it was 'satisfied' that the grant of the exploration licences was 'tainted by serious corruption'. One of the plaintiffs, NuCoal, submitted that this reference should be understood as parliament being satisfied of the existence of facts that would amount, if proved on admissible evidence to the criminal standard, to one of the criminal offences identified in the ICAC reports. The other

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plaintiffs, Mr Duncan and the Cascade parties, submitted that it should be understood as parliament finding that the holders of the three specified licences had contravened a novel norm of conduct being the 'norm of not being involved in 'serious corruption", which had been retrospectively imposed by the Amendment Act.[9]

The second element was that one of the express purposes of the Amendment Act was to deter future corruption. The plaintiffs submitted that it was an important purpose of the Amendment Act 'to punish transgression and instil fear of similar punishment in those who might similarly transgress'.[10] This punitive purpose was achieved by the avoidance of renewal applications in respect of their licences under cl 5 of the Amendment Act and the confiscation of their intellectual property under cl 11 of the Amendment Act.

The High Court disagreed. The termination of a right conferred by statute is not an exercise of judicial power, even if the basis for the termination is satisfaction of the occurrence of conduct that could constitute a criminal offence.[11] The termination of the exploration licences did not exhibit any of the typical features of the exercise of judicial power. It did not quell any controversy or preclude future determination by a court of criminal or civil liability. Immunity from civil liability for the state and its employees did not alter this characterisation.[12]

The Amendment Act also did not bear two features that are commonly associated with the characterisation of a law as a bill of pains and penalties.[13] First, it did not involve legislative determination of breach of an antecedent standard of conduct. The individuals referred to in the ICAC reports remain subject to the criminal law.[14] Secondly, it did not involve a legislative imposition of punishment. Depriving the plaintiffs of the benefit of the exploration licences may have been a legislative detriment, but '[l]egislative detriment cannot be equated with legislative punishment'.[15]

Accordingly, this ground fell at the first hurdle and the High Court did not need to consider whether there was an implied limitation on state legislative power.[16]

The question of inconsistency did not arise

Clause 11 of the Amendment Act relevantly provides that no intellectual property right would prevent the state from using or disclosing any information it obtained under the Mining Act in relation to the three exploration licences for any further application or tender of the area the subject of those licences.

In performing any such acts, the state indicated it would rely on its statutory licence under s 183(3) of the Copyright Act and would discharge its obligation to pay equitable remuneration under s 183A of the Copyright Act.

The High Court found that in these circumstances it was not necessary to decide this question.

Endnotes

1. *Duncan v New South Wales; NuCoal Resources Limited v New South Wales; Cascade Coal Pty Limited v New South Wales* [2015] HCA 13 at [34].
2. Ibid., at [39].
3. (1996) 189 CLR 15; [1996] HCA 24.
4. (1996) 189 CLR 15 at 64.
5. Ibid., at 77.
6. Ibid., at 109.
7. Supra note 2.
8. Supra note 1 at [31].
9. Ibid., at [32].
10. Ibid., at [33].
11. Ibid., at [41].
12. Ibid., at [42].
13. Ibid., at [43].
14. Ibid., at [44].
15. Ibid., at [46].
16. For previous discussion, see *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 15 at 65 per Brennan CJ, 77 per Dawson J, 92 per Toohey J and 109 per McHugh J.