

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

ANNOTATED

PLAINTIFFS' SUBMISSIONS



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I INTERNET PUBLICATION

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

II ISSUES

2. The Plaintiffs adopt the statement of issues in S119 of 2014 (**the Duncan proceeding**) and submit that an additional issue arises in their case:
 - (a) Is Schedule 6A inconsistent with the *Copyright Act 1968* (Cth) and invalid to the extent of the inconsistency by force of s 109 of the *Constitution*?

III NOTICE OF CONSTITUTIONAL MATTER

3. The Plaintiffs have served notices under s 78B of the *Judiciary Act 1903* (Cth).

10 IV REASONS FOR JUDGMENT IN COURT BELOW

4. This proceeding is brought in the original jurisdiction of the High Court conferred by s 30(a) of the *Judiciary Act 1903* (Cth).

V MATERIAL FACTS

5. The material facts are contained in the Special Case (“SC”). The Plaintiffs adopt the statement of material facts in the Duncan proceeding. They highlight the following additional facts.
6. The Second Plaintiff and the Third Plaintiff each caused to be created in relation to its relevant exploration licence a “Final Geological Report” dated May 2014 (SC [52]–[53]). Copyright subsists in parts of the Final Geological Reports, and the Second and Third Plaintiffs own that copyright (SC [54]–[55]). On 26 March 2014, after the enactment of the impugned legislation, the Department of Trade and Investment required lodgement of the Final Geological Reports and lodgement was made on 30 May 2014 (SC [56]–[57]). The Department of Trade and Investment asserts an entitlement to make the Final Geological Reports “open file to the public” and asserts that “[p]ublication of the geological reports is authorised under the Mining Act” and a statutory licence under s 183(1) of the *Copyright Act 1968* (Cth) (SCB 1019).

VI ARGUMENT

Adoption of argument and additional matters

7. The Plaintiffs adopt the written submissions of the plaintiff in the Duncan proceeding.
- 30 8. The Plaintiffs make submissions on two additional matters:

- (a) The impugned legislation is not a “law” within the meaning of s 5 of the *Constitution Act 1902* (NSW), and is invalid for that reason.
- (b) The impugned legislation is inconsistent with the *Copyright Act 1968* (Cth) and invalid to the extent of the inconsistency.

Impugned legislation not a “law”

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

10 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: Provided that all Bills for appropriating any part of the public revenue, or for imposing any new rate, tax or impost, shall originate in the Legislative Assembly.

10. In *Kable v Director of Public Prosecutions (NSW)*, Dawson J expressed, in effect, the view that the word “laws” is to be read in s 5 as a synonym for “statutes”.¹ However, not only was his Honour in dissent in that case, the recent trend of authority favours the adoption of a more restrictive reading of the term “law” and one that is not synonymous with the literal contents of a statute. What has been said to be the hallmark of a “law” within the meaning of s 51 of the Commonwealth *Constitution* does not extend to the making of adverse findings in respect of the conduct of individuals, and the meting out of punishment or penalty consequent upon the making of such findings.

11. Section 51 of the Commonwealth *Constitution* speaks, in its chapeau, of the power of the federal Parliament “to make laws for the peace, order and good government of the Commonwealth” with respect to various matters, including, for example, “naturalization and aliens”. In the course of argument in *Plaintiff S157/2002 v Commonwealth*, the Commonwealth postulated, as a valid law, a hypothetical enactment which conferred upon the Minister for Immigration “the power to exercise a totally open-ended discretion” as to which aliens may or may not come to and remain in Australia,² subject only to the High Court’s jurisdiction to determine any dispute concerning the “constitutional fact” of alien status.

12. A plurality of the High Court rejected this aspect of the Commonwealth’s argument. This was on the basis that the hypothetical law would lack “that hallmark of the exercise

¹ (1996) 189 CLR 51, 76–77 (Dawson J). See also at 64 per Brennan CJ. McHugh J agreed with both Brennan CJ and Dawson J at 109.

² (2003) 211 CLR 476, 512–513 [101]–[102].

of legislative power” described by Latham CJ in *Commonwealth v Grunseit*³ (*Grunseit*), namely, the determination of “the content of a law as a rule of conduct or a declaration as to power, right or duty”.⁴ What was described as the “hallmark” of legislative power does not encompass the making of adverse findings and the imposition of consequences following the making of such findings.

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13. In like fashion, the majority in the *Work Choices Case*⁵ appeared to accept that invalidity might befall a statute that purported to confer a power to make regulations, unaccompanied by any indication of the parameters within which those regulations might extend. Thus, in that case, whether or not there was a “law” in the sense described in *Grunseit* turned upon whether the effect of the relevant regulation-making power was to define the “prohibited content” which was to be prescribed in the regulations as being “whatever the Executive says should not be contained in a workplace agreement”.⁶
- 20
14. In the Plaintiffs’ submission, just as the word “laws” in s 51 of the Commonwealth *Constitution* is not to be given an open-ended meaning but a meaning that conforms to the observations of Latham CJ in *Grunseit*, there is no reason why the same word in s 5 of the *Constitution Act* should not be understood in a similar way. This is so for at least three reasons. First, the *Constitution Act* was enacted after the adoption of the Commonwealth *Constitution*, lending greater force to the proposition that s 5 of the former should be construed in a manner that reflects the construction given to the chapeau in s 51 of the latter. Secondly and more importantly, the *Constitution Act* is expressly stated to be subject to the Commonwealth Constitution. One would not expect the same fundamental term in these two constitutional instruments to differ in meaning. Thirdly, and reinforcing the second reason, s 109 of the Commonwealth Constitution employs the phrases “a law of a State” and “a law of the Commonwealth”; on orthodox principles of statutory interpretation, the same term employed in the same provision would ordinarily bear the same character. That is to say, one would expect there to be no difference in character between a *law* of a State and a *law* of the Commonwealth.

³ (1943) 67 CLR 58, 82.

⁴ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 513 [102]; see also *Plaintiff M79/2012 v Minister for Immigration and Citizenship* (2013) 298 ALR 1, 24 [88] (Hayne J).

⁵ (2006) 229 CLR 1, 176 [400].

⁶ (2006) 229 CLR 1, 176 [400].

15. Prior to *Grunseit*, Dixon J (as he then was and with whom Rich J agreed) spoke of a law of the Commonwealth and a law of State within the meaning of s 109 as legislation “prescrib[ing] what the rule of conduct shall be” and “the rule to be observed”.⁷ An award of the then Commonwealth Court of Conciliation and Arbitration, binding specific parties, and quasi-judicial in character,⁸ was not a “law of the Commonwealth” within the meaning of s 109.

16. More recently, in *Momcilovic v The Queen*, Hayne J referred with approval to the judgment of Dixon J in *Ex Parte McLean* and echoed his Honour’s language, observing that “the Parliament of the Commonwealth and the Parliament of the State each legislate upon the same subject matter and prescribe what the rule of conduct should be”.⁹

17. In *Momcilovic*, Gummow J observed that (at 106 [226]):

In various provisions the Constitution speaks of a “law” or “laws” and of a “proposed law” or “proposed laws”. By “law”, it is meant, at least as regards s 109, something more than a text. The point was made by Isaacs J in *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466 at 497 when he said:

[T]he “law” is not the piece of parchment or paper, nor is it the letters and words and figures printed upon the material. It consists of the “rule” resolved upon and adopted by the legislative organ of the community as that which is to be observed, positively and negatively, by action or inaction according to the tenor of the rule adopted.

(footnotes omitted)

Gummow J continued (at 106 [229]):

The Constitution was framed, at least so far as s 109 is concerned, during the currency of doctrines which have been described as legal positivism and are associated with the writings of Jeremy Bentham and John Austin. With the writings of Austin, Sir Isaac Isaacs, at least, was familiar. The passage set out above from his reasons in *Clyde Engineering* is expressive of positivist doctrine. The terms “command”, “duty” and “sanction” were used in this discourse each to denote an inseparable element of the notion of a “law” imposed by a sovereign authority. More recent scholarship has tended to concentrate on the deficiencies of positivist doctrine for an understanding of the case law system; this is at the expense of concentration upon its continuing significance for the study of statute law.

⁷ *Ex Parte McLean* (1930) 43 CLR 472, 483.

⁸ See, for example, *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 306 (Williams J).

⁹ (2011) 245 CLR 1, 136 [326].

18. His Honour’s analysis did not cast doubt upon the fundamentally positivist character of the word “law” or “laws”. At [232] his Honour spoke of certain criteria of a “law”. At [233], his Honour said:

Each law of the Commonwealth and law of a State which are said to engage s 109 will comprise both the norm or rule of conduct each lays down and the attached sanctions and remedies. To consider these as discrete matters and to treat the first as conceptually distinct from the second may engender confusion.

10 Hayne J adopted a similar analysis (at 126–127 [292]). “Laws” specify but do not impose penalties. Penalties are specified in “laws” for breaches of the norms of conduct that are prescribed in those “laws”.

19. The short point is that, in the making of adverse findings and the visiting of deleterious consequences upon individuals as a result of such findings, Schedule 6A of the *Mining Act* does not answer the description of a “rule of conduct” or of a “declaration as to right, duty or power”. It does not lay down a norm or rule of conduct, nor does it prescribe a penalty for breach of that norm.

20. This submission is further supported by the fact that the Commonwealth Constitution, to which s 5 of the *Constitution Act* is subject, itself distinguishes between the laws and judicial proceedings of the States. Thus, s 51(xxv) of the *Constitution* confers upon the Commonwealth Parliament the power to make laws with respect to “the recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States”, and s 118 speaks in similar fashion of full faith and credit being given throughout the Commonwealth “to the laws, the public Acts and records, and the judicial proceedings of every State”. Implicit in this is a recognition that the word “law”, in the context of describing governmental action by the States, is not apt to encompass determinations or orders made in the exercise of judicial power or having a judicial character. Both s 51(xxv) and s 118 impliedly recognise that State judicial power is to be exercised in “judicial proceedings”.

30 21. On that basis, it is the Plaintiff’s ultimate submission that the legislative power of New South Wales did not extend to authorise enactment of Schedule 6A to the Act (or alternatively clauses 3 to 8 of Schedule 6A) because that Schedule did not constitute a “law” within the meaning of s 5 of the *Constitution Act*.

22. This argument gains further support from Canadian jurisprudence, as pointed out by Harrison Moore, *The Constitution of the Commonwealth of Australia*.¹⁰ Lefroy, whom Harrison Moore cited, had made reference to the decision of the Supreme Court of British Columbia in *Sewell v The BC Towing and Transportation Co Limited* (“the *Thrasher Case*”), which concerned the validity of a law enacted by the Provincial Assembly of British Columbia, pursuant to which sittings of the Supreme Court of that province for the purpose of reviewing, amongst other things, *nisi prius* decisions and motions for new trials would be convened only once a year. It was submitted on behalf of the Attorney-General of British Columbia that the law was supported by s 92 of the *British North America Act 1867* (Imp), which relevantly provided:

In each Province the Legislature may exclusively make laws in relation to matters coming the classes of subjects next herein after enumerated.

...

- (13) Property and civil rights in the province.
- (14) The administration of Justice in the Provinces, including the constitution, maintenance and organization of Provincial Courts, both of Civil and Criminal jurisdiction, and including procedure in civil matters in those Courts.

20 23. In addressing this argument, Begbie CJ said:

nothing but *essentially legislative functions* are conferred by section 92, which grants to a legislative body power ‘to make laws’ in relation to civil rights and the administration of Justice ... The management of public lands and works, a large part of taxation, the whole law of inheritance to real and personal property, the rights of creditors against the person and property of their debtors, of husband and wife, the law of juries and attorneys and numbers other matters are left to the local Legislature; *executive and judicial functions, however, are not given, and therefore are expressly forbidden to them, even in regard to these topics.*

30 (emphasis added)

On that basis, the Chief Justice concluded, adopting a line of reasoning that reflected the reasoning of other members of the Court, that the Provincial Legislature did not have power to set the procedures of the Supreme Court of British Columbia. The Plaintiffs’ case, insofar as the proper construction of s 5 of the *Constitution Act* is concerned, goes no further than what was decided in the *Thrasher Case*. Indeed, in many respects, it falls far short of the *ratio* of that decision, as there is no suggestion on the Plaintiffs’ part that

¹⁰ (2nd ed, 1910) at 95, fn 2, citing Lefroy, *Legislative Power in Canada* at 125.

the New South Wales Parliament lacks power to make laws with respect to the procedures of the State's Courts.

24. The inability of the legislature to pass "laws" which are judicial in nature is also supported by the Parliament's lack of inherent power to punish for contempt. There can be no dispute that "[t]he privileges of the respective Houses of the United Kingdom Parliament do not provide a valid measure of the privileges" of either the Legislative Assembly or the Legislative Council of New South Wales.¹¹ Except where statute has intruded upon the field, the powers and privileges of these latter two Chambers are limited to those that are "necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute".¹² Crucially, whereas Westminster has long asserted a power, say, to punish both members and non-members for contempt of Parliament, it has been said, in relation to the Legislative Assembly of New South Wales, that "protective and self-defensive powers only, and not punitive are necessary".¹³ Thus, the Speaker of the Legislative Assembly was held in *Willis and Christie v Perry*¹⁴ not to have the power to direct the arrest and forcible return to that Chamber of a member, who was guilty of disorder but had subsequently ceased to be in attendance.
25. One reason given for the common law's refusal to extend to what were previously colonial legislatures the full range of the privileges enjoyed by the Houses of the Parliament in Westminster is the historical status of Westminster as a court of record.¹⁵ In other words, one of the bases upon which legislatures in the position of the New South Wales Parliament, all being creatures of statute, have been denied the power, say, to punish their own members for disorder is the fact that they are not, and did not originate, as courts.
26. The New South Wales Parliament is no more a court when it enacts laws. If the fact that it is not a court is sufficient, under the general law, to deny either of its chambers the inherent power to impose punishment by resolution or by a ruling from its presiding officer, then that same fact should favour a construction of s 5 of the *Constitution Act*

¹¹ *Namoi Shire Council v Attorney-General (NSW)* [1980] 2 NSWLR 639, 643.

¹² *Kielley v Carson* (1842) 4 Moo PC 63, 88; 13 ER 225, 234; *Egan v Willis* (1998) 195 CLR 424, 447 [31] (Gaudron, Gummow and Hayne JJ), 463 [72] (McHugh J).

¹³ *Barton v Taylor* (1886) 11 App Cas 197, 203.

¹⁴ (1912) 13 CLR 592.

¹⁵ *Namoi Shire Council v Attorney-General (NSW)* [1980] 2 NSWLR 639, 643; *Egan v Willis* (1998) 195 CLR 424, 472 [92] (McHugh J).

which precludes the *ad hominem* imposition by statute of punitive sanctions following adverse findings by Parliament.

Section 109 inconsistency

Introduction

27. Clause 11 of Sched 6A (**the State provision**) is inconsistent with the *Copyright Act 1968* (Cth) (**the Commonwealth law**) and is therefore invalid by force of s 109 of the Constitution. That result follows from the following four propositions.
28. *First proposition:* the State provision purports to authorize the Defendant to do acts comprised in the copyright which, it is common ground, the second and third plaintiffs hold in certain original literary or artistic works (SCB 61 [52]–[55]): the “*information*” that is the subject of the State provision, on its proper construction, encompasses original literary or artistic works in which copyright subsists; and the “*use*” and “*disclosure*” which the State provision purportedly authorizes, on its proper construction, encompasses acts comprised in the plaintiffs’ copyright. It does so without provision for compensation and, in fact, with express provision to the effect that no compensation is payable.
29. *Second proposition:* the Commonwealth law, especially Div 2 of Pt VII, provides a scheme for the authorized use by the Defendant of the plaintiffs’ copyright. There are two salient characteristics of that scheme. The first characteristic is that it is a comprehensive and exhaustive scheme: its provisions strike the legislative balance between the interests of the copyright-holder and the public interest in convenient Crown use of copyright material. The second characteristic is that it is a scheme within which “terms” (or, in relation only to the right of reproduction, “equitable remuneration”) is the mandated “*quid pro quo*” for the qualification that the scheme imposes upon the exclusive rights comprised in the copyright.
30. *Third proposition:* the State provision is inconsistent with the Commonwealth law in two independent ways. The first way in which the State provision is inconsistent with the Commonwealth law is that the State provision alters, impairs or detracts from the legislative balance that the Commonwealth law comprehensively strikes. That would be so even if the State provision did not in terms contradict any provision of the Commonwealth law, for the very existence of the State provision intrudes upon the field that is governed exclusively by the scheme of the Commonwealth law. The second way in which the State provision is inconsistent with the Commonwealth law is that the State provision *does* in terms contradict the Commonwealth law, because it purports to

authorize the State to do the acts comprised in the plaintiffs' copyright without provision for compensation.

31. *Fourth proposition:* insofar as the Defendants appear to contend that Condition 46 of each of the cancelled Mt Penny and Glendon Brook Licences authorizes it to do certain acts comprised in the plaintiffs' copyright (SCB 42, Defence [67.3]), the contention is not only irrelevant to the validity of the State provision, but also wrong, because Condition 46 is not a "preserved condition" within the meaning of cl 13 of Sched 6A.

First proposition: State provision authorises State to do acts comprised in copyright

- 10 32. Clause 11 of Sched 6A (**the State provision**) is about the "use" and "disclosure" of certain "information" by the Director-General under the Mining Act or under the *Environmental Planning and Assessment Act 1979* (NSW) (**Planning Act**).

33. "Use includes reproduce" and "disclose includes publish or communicate": cl 11(7). These definitional provisions expressly extend cl 11 to the reproduction, publication and communication of the information that the clause covers. Reproduction in a material form, publication and communication to the public are all acts comprised in the copyright in literary and artistic works: s 31(1)(a) and (b) of the *Copyright Act 1968* (Cth). It is not, of course, necessarily the case that "reproduce", "publish" and "communicate" must bear precisely the same meaning in both cl 11 and in the Commonwealth law. For example, "communicate" is defined in s 10 of the *Copyright Act 1968* (Cth) in terms of
20 "electronic" communication. But "reproduce" and "publish", at least, bear their ordinary, natural meanings in both laws. "Reproduce" would appear to encompass the somewhat narrower concept of "reproduce in a material form" and "communicate" would appear to include the somewhat narrower concept of "communicate to the public". Subject to these points, there is nothing in either cl 11 or the *Copyright Act 1968* (Cth) to suggest that the notions of "reproduce", "publish" and "communicate" do not, at the very least, substantially overlap.

34. The "information" covered by cl 11 is "information obtained in connection with the administration or execution of [the Mining Act] or the Planning Act in respect of a relevant licence or relevant land". The cancelled licences are "relevant licences": cl 2
30 ("relevant licence") read with cl 4(1)(b) and (c).

35. It is well settled that copyright subsists not in “information” itself, but rather in the “particular form of expression in which the ... information [is] conveyed”.¹⁶ The “particular form of expression” is “the words, figures and symbols in which the pieces of information are expressed, and the selection and arrangement of that information”.¹⁷
36. This distinction between “mere information” and “expression”, being a distinction of art, does not appear to be observed within cl 11 of Sched 6A. That is to say, the meaning of “information” within cl 11 is wider than the meaning of “mere information” in copyright law and, properly construed, extends to pick up the “expression” of information, in which copyright may subsist, as well as the information itself.
- 10 37. One factor supporting that wider construction of “information” is cl 11(3), which provides in relevant part that “[n]o intellectual property right ... prevents the use or disclosure of information ... as authorised by this clause”. That provision contemplates that the “information” covered by cl 11 may be information in which intellectual property rights subsist. There may be “intellectual property rights” apart from copyright to which that provision could sensibly be directed (although it is not obvious what they might be), but the emphatic language of “no intellectual property right” suggests an intention to adopt a far-reaching approach in cl 11.
38. Another factor supporting the wide construction of “information” is the sense in which that word is used in the definition of “exploration information” in cl 10(4). That
20 definition contemplates that “information” may be “information ... comprising the results of any test, study, survey, analysis or research”. The notion of information “comprising” results is not apt to maintain the distinction of art between mere information and the expression of information because, it might be thought, information that is “comprised” in certain results is likely to be “expressed” in a material form.
39. Yet a further factor supporting the wide construction of “information” is the use of that word elsewhere in the Mining Act. For example, certain provisions deal with applications or tenders for certain authorities: see, eg, ss 13, 15, 33, 51, 53. Those provisions require the application or tender to be accompanied by “the required information”, which is the “information” specified in certain cognate sub-sections: see,
30 eg, ss 13(5), 15(2), 33(5), 51(4), 53(1). The matters specified in those sub-sections,

¹⁶ *Computer Edge Pty Ltd v Apple Computer Inc* (1986) 161 CLR 171 at 181 (Gibbs CJ).

¹⁷ *IceTV Pty Limited v Nine Network Australia Pty Limited* (2009) 239 CLR 458, 472 [28] (French CJ, Crennan and Kiefel JJ); see also at 495 [102] (Gummow, Hayne and Heydon JJ).

although described as “information”, have (at the very least) real prospects of attracting copyright protection. For example: “a description ... of the proposed exploration area” (s 13(5)(a)); “particulars of the program of work” (s 15(2)(b) and s 53(2)(b)); “an assessment of the mineral bearing capacity of land” (s 33(5)(b)); and “a description ... of the proposed mining area” (s 51(5)(a)). This scheme indicates a broad meaning of “information” that is not configured to accommodate the fine distinction of art, adapted for the purposes of copyright law, between “mere information” and the “expression” of information.

- 10 40. The Final Geological Reports submitted to the Department of Trade and Investment pursuant to s 163C of the Mining Act are, on the construction advanced above, “information” obtained in connection with the administration of the Mining Act in respect of a relevant licence or relevant land. The reproduction, publication and communication of the Final Geological Reports are acts comprised in the copyright subsisting in those works. Clause 11 of Sched 6A, properly construed, therefore purports to authorise officers of the Defendant to do acts comprised in the plaintiffs’ copyright, and expressly provides that “[n]o liability attaches to the State or any other person in connection with the use or disclosure of information as authorised by [cl 11]”.
- 20 41. Moreover, cl 7 of Sched 6A provides that “[c]ompensation”, which is defined to include “damages or any other form of compensation”, is “not payable by or on behalf of the State” because of “any direct or indirect consequence” of the enactment of Sched 6A “including any conduct under the authority of” that enactment.

Second proposition: Commonwealth law governs authorisation of State to do acts comprised in copyright completely and by requiring provision of terms

- 30 42. The plaintiffs’ copyright is created and regulated by the Commonwealth law. In particular, the Commonwealth law provides that a person who is not the owner of the relevant copyright “infringes” that copyright by doing, or authorizing the doing of, acts comprised in the copyright: s 36. “Infringement” is actionable and attracts remedies under the Commonwealth law: s 115. The provision for “infringement” in s 36 is, however, expressly made “subject to” the Commonwealth law. That subordination of s 36 reflects, among other things, the provision elsewhere in the Commonwealth law for various licensing regimes that render as non-infringing what would otherwise be

infringing conduct.¹⁸ The scheme of the Commonwealth law is, evidently, to strike a compromise or balance between the interests of copyright owners and other competing public interests in the use and exploitation of copyright material.

43. Of particular relevance in the present case is Div 2 of Pt VII, which is headed “Use of copyright material for the Crown”. Section 183(1) provides that copyright “is not infringed by ... a State, or by a person authorized in writing by ... a State, doing acts comprised in the copyright if the acts are done for the services of the ... State”. As the Court recently explained of this statutory licence scheme:

10 The purpose of the scheme is to enable governments to use material subject to copyright “for the services of the Crown” without infringement. Certain exclusive rights of the owner of “copyright material” are qualified by Parliament in order to achieve that purpose. It is the statutory qualification of exclusive rights which gives rise to a statutory *quid pro quo*.¹⁹

44. That “*quid pro quo*” is the provision of “terms” or “equitable remuneration”. Section 183(5) provides that an act comprised in copyright done under the authority conferred by s 183(1) is to be on “such terms as are ... agreed between ... the State and the owner of the copyright or, in default of agreement, as are fixed by the Copyright Tribunal”. Section 183(5) is supported by a notice requirement in s 183(4).

- 20 45. Section 183A is headed “Special arrangements for copying for services of government”. The operation of s 183A is summarised in *Copyright Agency Limited v New South Wales* (2008) 233 CLR 279 at 290–291 [17]–[22]. In broad outline, s 183A disapplies sub-ss 183(4) and (5) in relation to “government copies”. In relation to “government copies”, and where there is a relevant collecting society, the interests of the copyright owner are protected instead by s 183A(2), which provides that the government is to pay equitable remuneration not to individual copyright owners but to the relevant collecting society.

- 30 46. The critical point for present purposes is that s 183A governs only the *reproduction* of copyright material and does not govern *other acts* comprised in the copyright, such as publication or communication. That result follows from the circumstance that s 183A(1) disapplies sub-ss 183(4) and (5) *only* “in relation to a government copy” and “government

¹⁸ See Pts VA, VB, VC, VII of the *Copyright Act 1968* (Cth); see also *Copyright Agency Limited v New South Wales* (2008) 233 CLR 279, 297 [49] (Gleeson CJ, Gummow, Heydon, Crennan and Kiefel JJ).

¹⁹ *Copyright Agency Limited v New South Wales* (2008) 233 CLR 279, 301 [68] (Gleeson CJ, Gummow, Heydon, Crennan and Kiefel JJ).

copy” is defined in s 182B as a “reproduction”: “*government copy* means a reproduction in a material form of copyright material made under subsection 183(1)”. In respect of acts comprised in the copyright apart from reproduction, the regime for “terms” in s 183 will therefore apply. This construction is supported by several other considerations as follows.

47. First, the heading to s 183A (which is part of the Commonwealth law by force of s 13 of the *Acts Interpretation Act 1901* (Cth)) makes clear that the section is about “copying” copyright material.

10 48. Second, s 183A(3) contemplates that the method for determining “equitable remuneration” will place particular significance on “the estimated number of copies made for the services of government”, but does not overtly contemplate any consideration of other acts comprised in the copyright.

49. Third, the Explanatory Memorandum to the Copyright Amendment Bill 1997 (Cth), which enacted s 183A, confirms that the regime was intended to apply in respect of “reproduction” (at [151]–[152]):

20 The governments under s 183(1) may do any act comprised in the copyrights of others without infringement if the act is done for the services of government ... Section 183(5) provides for the determination of terms by negotiation between the copyright owner (or agent) and the government or, if negotiations fail, by the Copyright Tribunal.

The amendments [s 183A] ... will vary the operation of s 183(4) and 183(5) of the Act to permit payments for the reproduction of copyright materials by a government to be made the basis of sampling, rather than the present method of full record-keeping under s 183, where there is a declared copyright collecting society.

(emphases added)

30 50. It follows from the above considerations that the Commonwealth law, and Div 2 of Pt VII especially, establishes a scheme that authorizes the Defendant to do acts comprised in the plaintiffs’ copyright, but which scheme is: comprehensive and exhaustive; and dependent upon the negotiation or determination of “terms”, at least in respect of acts comprised in the copyright other than reproduction.

Third proposition: State provision is inconsistent with Commonwealth law

51. Section 109 of the Constitution operates to render a State law that is inconsistent with a Commonwealth law invalid to the extent of the inconsistency. A State law is relevantly “inconsistent” with a Commonwealth law if the State law “would alter, impair or detract

from the operation of the Commonwealth law in a “significant and not trivial” way giving rise to a “real conflict”.²⁰ A State law is also relevantly “inconsistent”: “if it appears from the terms, the nature or the subject matter of [the Commonwealth law] that it was intended as a complete statement of the law governing a particular matter or set of rights and duties” and the State law seeks to “regulate or apply to the same matter or relation”.²¹

10 52. These two ways of describing “inconsistency” may be shades of the same meaning and may both apply to reach the same result.²² That may be so, for example, because if a federal law is intended to be “a complete statement of the law” on a particular topic, then there may be an “implicit negative proposition” that the law is only as contained within that law, such that any other provision on that topic in a State or Territory law will conflict with that proposition.²³

53. Cl 11 of Sched 6A is inconsistent with the *Copyright Act 1968* (Cth) in both of the above respects. First, the *Copyright Act 1968* (Cth) is intended as a complete statement of the law in respect of the authority of the State to do acts comprised in a person’s copyright for the services of the State. That follows from the comprehensive and exhaustive character of the scheme as advanced above. The very existence of the State provision intrudes upon that complete statement of the law and impairs or detracts from it.

20 54. Secondly, as explained above, ss 183 and 183A of the *Copyright Act 1968* (Cth) require the provision of “terms” (whether negotiated or determined by the Copyright Tribunal) at least in respect of the doing of acts comprised in the copyright other than reproduction. The State provision, by expressly providing that no compensation is payable, directly collides with the Commonwealth provision for “terms”, which is wide enough to permit compensation. The State provision thereby alters, impairs or detracts from the Commonwealth law and is inconsistent with it to that extent.

²⁰ *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 at 525 [41]–[42] (French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ).

²¹ *Dickson v The Queen* (2010) 241 CLR 491, 502 [13].

²² *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 at 525 [42] (French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ).

²³ See, eg, *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441, 468 [59].

Fourth proposition: Condition 46 not relevant

55. The Defendant appears to contend that a condition of each of the cancelled licences authorizes it to do acts comprised in the copyright in the Final Geological Reports (SCB 42, Defence [67.3]).
56. Even if that were so, it would have no bearing on the validity of cl 11 of Sched 6A. The validity of cl 11 must turn on its construction, its interaction with the *Copyright Act 1968* (Cth) properly construed, and the application of s 109 of the Constitution. The existence of some other source of authority, contained in a licence condition, to do the acts comprised in the copyright, even if that authority existed, is simply irrelevant to the question of validity.
57. In any event, the asserted authority does not exist. Condition 46 provided (SCB 163):
- (a) The licence holder grants to the Minister, by way of a non-exclusive licence, the right in copyright to publish, print, adapt and reproduce all exploration reports lodged in any form and for the full duration of copyright.
 - (b) The non-exclusive licence will operate as consent for the purposes of section 365 of the [Mining Act].
58. Schedule 6A cancelled the relevant licences of which Condition 46 was a condition. The plaintiffs accept that notions of “voidness” or “voidability” may not always be helpful in contexts like this,²⁴ and that the true consequences in respect of the copyright licence of the cancellation of the exploration licences must be determined by statutory construction.
59. Schedule 6A was enacted for purposes, among others, of “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)) and to “ensure that the tainted processes have no continuing impact and cannot affect any future processes ... in respect of the relevant land” (cl 3(2)(a)). Sched 6A makes explicit provision for certain, identified licence conditions to be continued: cl 13. Condition 46 is not among those specifically preserved licence conditions. The scheme of Schedule 6A is therefore one for the complete nullification of the licences, coupled with express preservation of specifically identified licence conditions. It is properly construed to have brought to an end the effect of

²⁴ Cf *New South Wales v Kable* (2013) 298 ALR 144, 149–150; 87 ALJR 737, 743–744 [20]–[23] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

Condition 46 and, with it, the juridical existence of any “non-exclusive licence” to do acts comprised in the plaintiffs’ copyright. Consistent with the express purposes of Sched 6A, the “non-exclusive licence” conferred by Condition 46 must be regarded as having never been granted. At the very least, the licence cannot apply to copyright works post-dating its cancellation, such as the Final Geological Reports dated May 2014.

60. This result cannot be said to be inconvenient in any way, because the *Copyright Act 1968* (Cth) already gives to the State a statutory licence to do the acts comprised in the plaintiffs’ copyright. It is useful to compare the holding in *Copyright Agency Limited v New South Wales* (2008) 233 CLR 279 at 305–306 [92]–[93], to the effect that that statutory licence meant that there was no “necessity” capable of founding a licence implied by law.

Conclusion on section 109 inconsistency

61. Cl 11 of Sched 6A is invalid to the extent that it purports to authorise the Defendant to do acts comprised in the plaintiffs’ copyright, and to immunise the Defendant from liability in respect of doing those acts, which authorisation and liability is completely governed by the *Copyright Act 1968* (Cth), and governed in a way that requires the provision of “terms”, contrary to the exclusion of compensation by Sched 6A.

VII APPLICABLE PROVISIONS

62. The applicable constitutional provisions and statutes as in force at the date of these submissions, to the extent they are not already set out in Annexure A to the Plaintiff’s submissions in the Duncan proceeding, are set out in Annexure A to these submissions.

VIII ORDERS SOUGHT

63. The questions stated for the opinion of the Full Court should be answered as follows:
1. Are clauses 1 to 13 of Schedule 6A to the *Mining Act 1992* (NSW), or any of them, invalid?
Answer: Clauses 1 to 13 of Schedule 6A to the *Mining Act 1992* (NSW) are invalid.
 2. Is clause 11 of Schedule 6A to the *Mining Act 1992* (NSW) invalid?
Answer: Yes.
 3. Who should pay the costs of this Special Case?
Answer: The Defendant.

IX ESTIMATE OF TIME

64. The Plaintiffs will require, together with the plaintiff in the Duncan proceeding, 3 hours for the presentation of their oral argument.

Date: 22 October 2014



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ANNEXURE A



Copyright Act 1968

No. 63, 1968 as amended

Compilation start date: 24 June 2014

Includes amendments up to: Act No. 31, 2014

7 Act to bind the Crown

Subject to Part VII, this Act binds the Crown but nothing in this Act renders the Crown liable to be prosecuted for an offence.

13 Acts comprised in copyright

(1) A reference in this Act to an act comprised in the copyright in a work or other subject-matter shall be read as a reference to any act that, under this Act, the owner of the copyright has the exclusive right to do.

(2) For the purposes of this Act, the exclusive right to do an act in relation to a work, an adaptation of a work or any other subject-matter includes the exclusive right to authorize a person to do that act in relation to that work, adaptation or other subject-matter.

31 Nature of copyright in original works

(1) For the purposes of this Act, unless the contrary intention appears, copyright, in relation to a work, is the exclusive right:

- (a) in the case of a literary, dramatic or musical work, to do all or any of the following acts:
 - (i) to reproduce the work in a material form;
 - (ii) to publish the work;

(iii) to perform the work in public;

(iv) to communicate the work to the public;

(vi) to make an adaptation of the work;

(vii) to do, in relation to a work that is an adaptation of the first-mentioned work, any of the acts specified in relation to the first-mentioned work in subparagraphs (i) to (iv), inclusive; and

(b) in the case of an artistic work, to do all or any of the following acts:

(i) to reproduce the work in a material form;

(ii) to publish the work;

(iii) to communicate the work to the public; and

(c) in the case of a literary work (other than a computer program) or a musical or dramatic work, to enter into a commercial rental arrangement in respect of the work reproduced in a sound recording; and

(d) in the case of a computer program, to enter into a commercial rental arrangement in respect of the program.

(2) The generality of subparagraph (1)(a)(i) is not affected by subparagraph (1)(a)(vi).

(3) Paragraph (1)(d) does not extend to entry into a commercial rental arrangement in respect of a machine or device in which a computer program is embodied if the program is not able to be copied in the course of the ordinary use of the machine or device.

(4) The reference in subsection (3) to a device does not include a device of a kind ordinarily used to store computer programs (for example, a floppy disc, a device of the kind commonly known as a CD ROM, or an integrated circuit).

(5) Paragraph (1)(d) does not extend to entry into a commercial rental arrangement if the computer program is not the essential object of the rental.

(6) Paragraph (1)(c) does not extend to entry into a commercial rental arrangement if:

(a) the copy of the sound recording concerned was purchased by a person (*the record owner*) before the commencement of Part 2 of the *Copyright (World Trade Organization Amendments) Act 1994*; and

(b) the commercial rental arrangement is entered into in the ordinary course of a business conducted by the record owner; and

(c) the record owner was conducting the same business, or another business that consisted of, or included, the making of commercial rental arrangements of the same kind, when the copy was purchased.

(7) Paragraph (1)(d) does not extend to entry into a commercial rental arrangement in respect of a computer program if:

(a) the copy of the computer program was purchased by a person (*the program owner*) before the commencement of Part 2 of the *Copyright (World Trade Organization Amendments) Act 1994*; and

(b) the commercial rental arrangement is entered into in the ordinary course of a business conducted by the program owner; and

(c) the program owner was conducting the same business, or another business that consisted of, or included, the making of commercial rental arrangements in respect of computer programs, when the copy was purchased.

36 Infringement by doing acts comprised in the copyright

(1) Subject to this Act, the copyright in a literary, dramatic, musical or artistic work is infringed by a person who, not being the owner of the copyright, and without the licence of the owner of the copyright, does in Australia, or authorizes the doing in Australia of, any act comprised in the copyright.

(1A) In determining, for the purposes of subsection (1), whether or not a person has authorised the doing in Australia of any act comprised in the copyright in a work, without the licence of the owner of the copyright, the matters that must be taken into account include the following:

(a) the extent (if any) of the person's power to prevent the doing of the act concerned;

(b) the nature of any relationship existing between the person and the person who did the act concerned;

(c) whether the person took any reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice.

(2) The next three succeeding sections do not affect the generality of this section.

115 Actions for infringement

(1) Subject to this Act, the owner of a copyright may bring an action for an infringement of the copyright.

(2) Subject to this Act, the relief that a court may grant in an action for an infringement of copyright includes an injunction (subject to such terms, if any, as the court thinks fit) and either damages or an account of profits.

(3) Where, in an action for infringement of copyright, it is established that an infringement was committed but it is also established that, at the time of the infringement, the defendant was not aware, and had no reasonable grounds for suspecting, that the act constituting the infringement was an infringement of the copyright, the plaintiff is not entitled under this section to any damages against the defendant in respect of the infringement, but is entitled to an account of profits in respect of the infringement whether any other relief is granted under this section or not.

(4) Where, in an action under this section:

(a) an infringement of copyright is established; and

(b) the court is satisfied that it is proper to do so, having regard to:

(i) the flagrancy of the infringement; and

(ia) the need to deter similar infringements of copyright; and

(ib) the conduct of the defendant after the act constituting the infringement or, if relevant, after the defendant was informed that the defendant had allegedly infringed the plaintiff's copyright; and

(ii) whether the infringement involved the conversion of a work or other subject-matter from hardcopy or analog form into a digital or other electronic machine-readable form; and

(iii) any benefit shown to have accrued to the defendant by reason of the infringement;
and

(iv) all other relevant matters;

the court may, in assessing damages for the infringement, award such additional damages as it considers appropriate in the circumstances.

Consideration for relief for electronic commercial infringement

(5) Subsection (6) applies to a court hearing an action for infringement of copyright if the court is satisfied that:

(a) the infringement (the *proved infringement*) occurred (whether as a result of the doing of an act comprised in the copyright, the authorising of the doing of such an act or the doing of another act); and

(b) the proved infringement involved a communication of a work or other subject-matter to the public; and

(c) because the work or other subject-matter was communicated to the public, it is likely that there were other infringements (the *likely infringements*) of the copyright by the defendant that the plaintiff did not prove in the action; and

(d) taken together, the proved infringement and likely infringements were on a commercial scale.

(6) The court may have regard to the likelihood of the likely infringements (as well as the proved infringement) in deciding what relief to grant in the action.

(7) In determining for the purposes of paragraph (5)(d) whether, taken together, the proved infringement and the likely infringements were on a commercial scale, the following matters are to be taken into account:

(a) the volume and value of any articles that:

(i) are infringing copies that constitute the proved infringement; or

(ii) assuming the likely infringements actually occurred, would be infringing copies constituting those infringements;

(b) any other relevant matter.

(8) In subsection (7):

article includes a reproduction or copy of a work or other subject-matter, being a reproduction or copy in electronic form.

116 Rights of owner of copyright in respect of infringing copies

(1) The owner of the copyright in a work or other subject-matter may bring an action for conversion or detention in relation to:

(a) an infringing copy; or

(b) a device (including a circumvention device) used or intended to be used for making infringing copies.

(1A) In an action for conversion or detention, a court may grant to the owner of the copyright all or any of the remedies that are available in such an action as if:

(a) the owner of the copyright had been the owner of the infringing copy since the time the copy was made; or

(b) the owner of the copyright had been the owner of the device since the time when it was used or intended to be used for making infringing copies.

(1B) Any relief granted by a court in an action for conversion or detention is in addition to any relief that the court may grant under section 115.

(1C) A court is not to grant any relief to the owner of the copyright in an action for conversion or detention if the relief that the court has granted or proposes to grant under section 115 is, in the opinion of the court, a sufficient remedy.

(1D) In deciding whether to grant relief in an action for conversion or detention and in assessing the amount of damages payable, the court may have regard to the following:

(a) the expenses incurred by the defendant, being a person who marketed or otherwise dealt with the infringing copy, in manufacturing or acquiring the infringing copy;

(b) whether the expenses were incurred before or after the infringing copy was sold or otherwise disposed of by the defendant;

(c) any other matter that the court considers relevant.

(1E) If the infringing copy is an article of which only part consists of material that infringes copyright, the court, in deciding whether to grant relief and in assessing the amount of damages payable, may also have regard to the following:

(a) the importance to the market value of the article of the material that infringes the copyright;

(b) the proportion the material that infringes copyright bears to the article;

(c) the extent to which the material that infringes copyright may be separated from the article.

(2) A plaintiff is not entitled by virtue of this section to any damages or to any other pecuniary remedy, other than costs, if it is established that, at the time of the conversion or detention:

(a) the defendant was not aware, and had no reasonable grounds for suspecting, that copyright subsisted in the work or other subject-matter to which the action relates;

(b) where the articles converted or detained were infringing copies—the defendant believed, and had reasonable grounds for believing, that they were not infringing copies; or

(c) where an article converted or detained was a device used or intended to be used for making articles—the defendant believed, and had reasonable grounds for believing, that the articles so made or intended to be made were not or would not be, as the case may be, infringing copies.

Part VII—The Crown

Division 2—Use of copyright material for the Crown

182B Definitions

(1) Subject to subsection (2), in this Division:

collecting society means a company in respect of which a declaration is in force under section 153F.

copyright material means:

(a) a work; or

(b) a published edition of a work; or

(c) a sound recording; or

(d) a cinematograph film; or

(e) a television or sound broadcast; or

(f) a work that is included in a sound recording, a cinematograph film or a television or sound broadcast.

government means the Commonwealth or a State.

Note: State includes the Australian Capital Territory, the Northern Territory and Norfolk Island: see paragraph 10(3)(n), as modified by the A.C.T. Self-Government (Consequential Provisions) Regulations (Amendment) (Statutory Rules 1989 No. 392).

government copy means a reproduction in a material form of copyright material made under subsection 183(1).

(2) A reference in subsection (1) to a work does not include a reference to a literary work that consists of a computer program or a compilation of computer programs.

182C Relevant collecting society

A company is the relevant collecting society in relation to a government copy if there is in force, under Division 3 of Part VI, a declaration of the company as the collecting society for the purposes of this Division in relation to:

- (a) all government copies; or
- (b) a class of government copies that includes the first-mentioned government copy.

183 Use of copyright material for the services of the Crown

(1) The copyright in a literary, dramatic, musical or artistic work or a published edition of such a work, or in a sound recording, cinematograph film, television broadcast or sound broadcast, is not infringed by the Commonwealth or a State, or by a person authorized in writing by the Commonwealth or a State, doing any acts comprised in the copyright if the acts are done for the services of the Commonwealth or State.

(2) Where the Government of the Commonwealth has made an agreement or arrangement with the Government of some other country for the supply to that country of goods required for the defence of that country:

- (a) the doing of any act in connexion with the supply of those goods in pursuance of the agreement or arrangement; and
- (b) the sale to any person of such of those goods as are not required for the purposes of the agreement or arrangement;

shall, for the purposes of the last preceding subsection, be each deemed to be for the services of the Commonwealth.

(3) Authority may be given under subsection (1) before or after the acts in respect of which the authority is given have been done, and may be given to a person notwithstanding that he or she has a licence granted by, or binding on, the owner of the copyright to do the acts.

(4) Where an act comprised in a copyright has been done under subsection (1), the Commonwealth or State shall, as soon as possible, unless it appears to the Commonwealth or State that it would be contrary to the public interest to do so, inform the owner of the copyright, as prescribed, of the doing of the act and shall furnish him or her with such information as to the doing of the act as he or she from time to time reasonably requires.

(5) Where an act comprised in a copyright has been done under subsection (1), the terms for the doing of the act are such terms as are, whether before or after the act is done, agreed between the Commonwealth or the State and the owner of the copyright or, in default of agreement, as are fixed by the Copyright Tribunal.

(6) An agreement or licence (whether made or granted before or after the commencement of this Act) fixing the terms upon which a person other than the Commonwealth or a State may do acts comprised in a copyright is inoperative with respect to the doing of those acts, after the commencement of this Act, under subsection (1), unless the agreement or licence has been approved by the Attorney-General of the Commonwealth or the Attorney-General of the State.

(7) Where an article is sold and the sale is not, by virtue of subsection (1), an infringement of a copyright, the purchaser of the article, and a person claiming through him or her, is entitled to deal with the article as if the Commonwealth or State were the owner of that copyright.

(8) An act done under subsection (1) does not constitute publication of a work or other subject-matter and shall not be taken into account in the application of any provision of this Act relating to the duration of any copyright.

(9) Where an exclusive licence is in force in relation to any copyright, the preceding subsections of this section have effect as if any reference in those subsections to the owner of the copyright were a reference to the exclusive licensee.

(11) The reproduction, copying or communication of the whole or a part of a work or other subject-matter for the educational purposes of an educational institution of, or under the control of, the Commonwealth, a State or the Northern Territory shall, for the purposes of this section, be deemed not to be an act done for the services of the Commonwealth, that State or the Northern Territory.

183A Special arrangements for copying for services of government

(1) Subsections 183(4) and (5) do not apply in relation to a government copy (whenever it was made) if a company is the relevant collecting society for the purposes of this Division in relation to the copy and the company has not ceased operating as that collecting society.

(2) If subsection 183(5) does not apply to government copies made in a particular period for the services of a government, the government must pay the relevant collecting society in relation to those copies (other than excluded copies) equitable remuneration worked out for that period using a method:

- (a) agreed on by the collecting society and the government; or
- (b) if there is no agreement—determined by the Tribunal under section 153K.

(3) The method of working out equitable remuneration payable to a collecting society in respect of government copies (other than excluded copies) for a period must:

(a) take into account the estimated number of those copies made for the services of the government during the period, being copies in relation to which the society is the relevant collecting society; and

(b) specify the sampling system to be used for estimating the number of copies for the purposes of paragraph (a).

(4) The method of working out the equitable remuneration payable may provide for different treatment of different kinds or classes of government copies.

(5) Subsections (3) and (4) apply whether the method is agreed on by the collecting society and the government or is determined by the Tribunal.

(6) In this section:

excluded copies means government copies in respect of which it appears to the government concerned that it would be contrary to the public interest to disclose information about the making of the copies.

183B Payment and recovery of equitable remuneration payable for government copies

(1) Equitable remuneration payable to a collecting society under subsection 183A(2) must be paid:

(a) in the manner, and at the times, agreed on by the collecting society and the government; or

(b) if the Tribunal has made an order under subsection 153K(3) specifying how and when payments are to be made—in the manner, and at the times, specified in the order.

(2) If equitable remuneration is not paid in accordance with the agreement or the Tribunal's order, the collecting society may recover the remuneration as a debt due to the society in a court of competent jurisdiction.

183C Powers of collecting society to carry out sampling

(1) This section applies if the method of working out equitable remuneration payable under subsection 183A(2) for government copies made for the services of a government has been agreed on by the government and the relevant collecting society or has been determined by the Tribunal.

(2) The collecting society may give written notice to the government that the society wishes to carry out sampling in accordance with the method during a specified period at specified premises occupied by the government. The period specified must not start earlier than 7 days after the day on which the notice is given.

(3) The government may give the collecting society a written objection, based on reasonable grounds, to the proposal to carry out sampling during the period, or at the premises, specified in the notice. However, if it does so, the notice of objection must propose an alternative period during which, or alternative premises at which, as the case may be, sampling may be carried out.

(4) If the government gives the collecting society an objection, sampling may not be carried out during the period, or at the premises, to which the objection relates unless the objection is withdrawn.

(5) If the government has not objected, or has withdrawn any objection it made, before or during the specified period, a person authorised in writing by the society may, during that period, enter the premises specified in the notice and carry out sampling in accordance with the method on any ordinary working day for government staff who work in the premises.

(6) The government must take reasonable steps to ensure that the person who attends at the premises is given all reasonable and necessary facilities and assistance for carrying out the sampling.

183D Annual report and accounts of collecting society

(1) As soon as practicable after the end of each financial year, a company that was a collecting society during any part of the year must prepare a report of its operations as a collecting society during the year and send a copy of the report to the Attorney-General.

(2) A collecting society must keep accounting records correctly recording and explaining the transactions of the society (including any transactions as trustee) and the financial position of the society.

(3) Accounting records must be kept in a manner that will enable true and fair accounts of the society to be prepared from time to time and to be conveniently and properly audited.

(4) As soon as practicable after the end of each financial year, a company that was a collecting society during any part of the year must:

(a) have its accounts audited by an auditor who is not a member of the society; and

(b) give a copy of the audited accounts and the auditor's report on the audit to the Attorney-General.

(5) The Attorney-General must cause a copy of a document given to the Attorney-General under subsection (1) or paragraph (4)(b) to be laid before each House of the Parliament within 15 sitting days of that House after the Attorney-General received the document.

(6) A collecting society must give its members reasonable access to copies of:

(a) all reports and audited accounts prepared by it under this section; and

(b) all auditors' reports on the audit of the accounts.

(7) This section does not affect any obligations of a collecting society relating to the preparation and lodging of annual returns or accounts under the law under which it is incorporated.

183E Alteration of rules of collecting society

If a collecting society alters its rules, it must give a copy of the altered rules, together with a statement of the effects of, and reasons for, the alteration, to the Attorney-General and the Tribunal within 21 days after the day on which the alteration was made.

183F Applying to Tribunal for review of distribution arrangement

(1) A collecting society or a member of a collecting society may apply to the Copyright Tribunal for review of the arrangement adopted, or proposed to be adopted, by the collecting society for distributing amounts it collects in a period.

(2) If the Tribunal makes an order under section 153KA varying the arrangement or substituting for it another arrangement, the arrangement reflecting the Tribunal's order has effect as if it had been adopted in accordance with the collecting society's rules, but does not affect a distribution started before the order was made.