SHORT PARTICULARS OF CASES

COMMENCING TUESDAY, 3 FEBRUARY 2015

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COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED SERVICES UNION OF AUSTRALIA & ORS v. QUEENSLAND RAIL & ANOR (B63/2013)

Writ of summons filed: 12 November 2013

Date special case referred to the Full Court: 28 July 2014

The central issue in this case is whether Queensland Rail, the first defendant, is a corporation within the meaning of s 51(xx) of the Constitution despite s 6(2) of the *Queensland Rail Transit Authority Act* 2013 (Qld) ("the Act") which provides that Queensland Rail "is not a body corporate". The plaintiffs (each of whom has members who are employees of Queensland Rail) submit that it possesses all the essential characteristics of being such a corporation. Further, the plaintiffs also contend that Queensland Rail is a trading corporation within the meaning of s 51(xx) of the Constitution as it was established to carry on a commercial enterprise, its trading activities are significant and substantial, and those trading activities are an integral part of its operations.

Prior to the commencement of the Act on 3 May 2013 Queensland Rail's operations were undertaken by Queensland Rail Limited, a government owned corporation within the meaning of the *Government Owned Corporations Act* 1993 (Qld). Various of the plaintiffs were parties to two industrial instruments with Queensland Rail Limited – the Queensland Rail Limited Traincrew Collective Workplace Agreement ("the Traincrew Agreement") made in 2009 under the *Workplace Relations Act* 1996 (Cth) and the Queensland Rail Rollingstock Agreement ("the Rollingstock Agreement") made in 2011 under the *Fair Work Australia Act* 2009 (Cth) ("the FW Act").

By the terms of the Act, the employees and assets of Queensland Rail Limited were transferred to a newly established entity, Queensland Rail, which informed the plaintiffs that, by virtue of the Act, clause 22 of the Rollingstock Agreement no longer had any effect and that the request to commence consultation pursuant to that clause was without foundation and also that the unions' request to negotiate for a new enterprise agreement to replace the Traincrew Agreement, in accordance with the FW Act, was not legally correct. The plaintiffs submit that the apparent intent of the creation of the new entity, and the provision in s 6(2) of the Act, is to remove the employees from being subject to the terms of the FW Act and industrial instruments made thereunder.

On 9 December 2013 the plaintiffs filed a s 78B notice. The Attorney-General of the Commonwealth and the Attorneys-General for the states of New South Wales, South Australia, Victoria and Western Australia have advised the Court that they will be intervening in this matter.

The questions stated in the Special Case for the opinion of the Full Court are:

1. Is the first defendant (Queensland Rail), a corporation within the meaning of s 51(xx) of the Commonwealth Constitution?

2. If so, is Queensland Rail a trading corporation within the meaning of s 51(xx) of the Commonwealth Constitution?

3. If so, does the FW Act apply to Queensland Rail and its employees by the operation of s 109 of the Constitution, to the exclusion of the Act or the *Industrial Relations Act* 1999 (Qld) or both?

4. What relief, if any, are the plaintiffs entitled to?

5. Who should pay the costs of the special case?

QUEENSLAND NICKEL PTY LIMITED v. COMMONWEALTH OF AUSTRALIA (B25/2013)

Writ of summons filed: 16 May 2013

Date special case referred to the Full Court: 28 August 2014

The plaintiff owns and operates a nickel and cobalt refinery at Yabulu, near Townsville in North Queensland. There are three other producers of nickel and cobalt in Australia, namely BHP Billiton Nickel West Pty Limited, First Quantum Minerals Limited and Murrin Murrin Operations Pty Limited which are located in Western Australia. Each of the plaintiff, Nickel West, First Quantum and Murrin Murrin was a "liable entity" for the fixed charge years commencing on 1 July 2012 and 1 July 2013 for the purposes of s 20(3) of the *Clean Energy Act* 2011 (Cth) "the Act".

Section 99 of the Constitution provides that "the Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof".

The plaintiff claims that the legal and practical effect of Division 48 of Part 3 of Schedule 1 to the *Clean Energy Regulations* 2011 (Cth), as amended by the *Clean Energy Amendment Regulation* 2012 (No 7) (Cth), is to give preference to Western Australia, or alternatively to particular regions in Western Australia, over Queensland or alternatively North Queensland, by imposing upon the plaintiff, as a nickel producer in North Queensland, a financial impost which differs from (and is greater than) that imposed upon nickel producers in Western Australia. This is contrary to s 99.

The whole of the Act was repealed, with effect from 1 July 2014, by the *Clean Energy Legislation (Carbon Tax Repeal) Act* 2014 (Cth). However, despite that repeal, the operation of the Act and related legislation was preserved insofar as it related to the liability of liable entities to pay unit shortfall charges for the years beginning on 1 July 2012 and 1 July 2013.

The questions stated in the Special Case for the opinion of the Full Court include:

- Was Division 48 of Part 3 of Schedule 1 to the Regulations invalid in its application to the plaintiff on the ground that it gave preference to one State, or any part thereof, over another State, or any part thereof, contrary to s 99 of the Constitution?

- Should any or all of the following provisions:
  - Division 48 of Part 3 of Schedule 1 to the Regulations;
  - clauses 501 to 506, 701, 804, 901 to 913 of Schedule 1 to the Regulations;
  - sections 122 to 134, 145 and 312 of the Act; and,

- Part 3 of the *Clean Energy (Charges - Excise) Act* 2011 (Cth), Part 3 of the *Clean Energy (Charges - Customs) Act* 2011 (Cth) and the *Clean Energy (Unit Shortfall Charge - General) Act* 2011 (Cth);

be read down, in their application to the plaintiff, so as to avoid contravening s 99 of the Constitution and, if so, how?

- Who should pay the costs of the proceedings?

DUNCAN v THE STATE OF NEW SOUTH WALES (S119/2014)
CASCADE COAL PTY LIMITED & ORS v THE STATE OF NEW SOUTH WALES (S206/2014)

Dates writs of summons filed:	30 May 2014 (S119/2014) 24 July 2014 (S206/2014)
Dates special cases referred to Full Court:	25 September 2014 (S119/2014) 23 September 2014 (S206/2014)

Mr Travers Duncan is a director of a company which, as trustee of a trust of which Mr Duncan is a beneficiary, holds shares in Cascade Coal Pty Limited ("Cascade"). He was a director of Cascade from February to July 2009.

In June 2009, following a process of expressions of interest to the New South Wales Department of Primary Industries ("the DPI"), Cascade was selected by the Director-General of the DPI as the successful applicant for proposed coal exploration licences for areas known as Mount Penny and Glendon Brook. In October 2009 a licence was issued under the *Mining Act* 1992 (NSW) ("Mining Act") to each of two newly incorporated subsidiaries of Cascade, Mt Penny Coal Pty Limited ("MPC") and Glendon Brook Coal Pty Limited ("GBC").

MPC subsequently carried out extensive exploration and development work. In December 2010 the company lodged an application under the *Environmental Planning and Assessment Act* 1979 (NSW) for approval of a proposed open-cut coal mine at Mount Penny ("the Project Application").

In July 2013 the Independent Commission Against Corruption ("ICAC") published a report entitled "Investigation into the Conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and Others". Findings made by ICAC in its report included that Mr Duncan and the other directors of Cascade had engaged in corrupt conduct by taking steps to deceive public authorities as to the involvement of the Obeid family in the Mount Penny tenement. A further ICAC report, "Operations Jasper and Acacia – addressing outstanding questions", was published in December 2013. That report contained findings by ICAC that the Mount Penny tenement was created as a result of corrupt conduct and that Cascade had acquired the benefit of the Glendon Brook tenement as the result of a corrupt agreement it had made in relation to Mount Penny. That report also recommended that the New South Wales Government ("the Government") cancel the licences held by MPC and GBC.

On 31 January 2014 the *Mining Amendment (ICAC Operations Jasper and Acacia) Act* 2014 (NSW) added Schedule 6A to the Mining Act. Provisions of Schedule 6A declare the Project Application void, cancel the exploration licences of MPC and GBC (and a similar licence held by NuCoal Resources Limited) and oblige the companies to continue to provide reports and other information obtained from their mining exploration activities to the Government. Schedule 6A also provides that the Government is not liable to pay compensation for any consequence of the operation of the Schedule.

Mr Duncan then commenced proceedings in this Court, challenging the validity of Schedule 6A to the Mining Act. Similar proceedings were later commenced by Cascade, MPC and GBC ("the Cascade parties").

Mr Duncan and the Cascade parties submit that Schedule 6A determines rights and imposes punishment, thereby amounting to an exercise of judicial power. They contend that the exercise of such power is beyond the law-making power given to the New South Wales Parliament by s 5 of the *Constitution Act* 1902 (NSW), with the result that Schedule 6A is not a valid law. All plaintiffs also contend that, being an exercise of judicial power, Schedule 6A is invalid because it falls outside the integrated system prescribed by Chapter III of the Commonwealth Constitution. This is because that system involves the supervision by the relevant Supreme Court, and ultimately by this Court, of any exercise of judicial power in a State.

The Cascade parties additionally contend that clause 11 of Schedule 6A, which authorises certain officials to use information obtained under the Mining Act is, pursuant to s 109 of the Commonwealth Constitution, invalid to the extent of its inconsistency with the *Copyright Act* 1968 (Cth).

Notices of a Constitutional Matter were filed by Mr Duncan and the Cascade parties. The Attorneys-General of the Commonwealth and the States of Victoria, Queensland, Western Australia and South Australia are intervening in both proceedings.

In each of the proceedings the parties filed a Special Case, which Justice Gageler referred for consideration by the Full Court.

The Special Case in proceedings number S119/2014 states the following questions for the opinion of the Full Court:

1. Are clauses 1 to 13 of Schedule 6A to the Mining Act, or any of them, invalid?

2. Who should pay the costs of this Special Case?

In proceedings number S206/2014 the following questions are stated:

1. Are clauses 1 to 13 of Schedule 6A to the Mining Act, or any of them, invalid?

2. Is clause 11 of Schedule 6A of the Mining Act inconsistent with the *Copyright Act* 1968 (Cth) and inoperative to the extent of that inconsistency?

3. Who should pay the costs of this Special Case?

NUCOAL RESOURCES LIMITED v STATE OF NEW SOUTH WALES
(S138/2014)

Date writ of summons filed: 25 June 2014

Date special case referred to Full Court: 23 September 2014

In December 2008 the New South Wales Minister for Mineral Resources granted an exploration licence under the *Mining Act* 1992 (NSW) ("Mining Act") to Doyles Creek Mining Pty Limited ("DCM"). In early 2010 the Plaintiff ("NuCoal") purchased all of the shares in DCM. NuCoal later paid for exploration and development work that had been carried out by DCM.

In November 2012 DCM applied for a renewal of its exploration licence ("the Renewal Application").

In August 2013 the Independent Commission Against Corruption ("ICAC") published a report entitled "Investigation into the Conduct of Ian Macdonald, John Maitland and others (Operation Acacia)". In that report ICAC made findings of corrupt conduct against several of NuCoal's shareholders who had in the past been directors of NuCoal and DCM. In a report published in December 2013, "Operations Jasper and Acacia – addressing outstanding questions", ICAC found that the grant of the exploration licence to DCM was tainted by corruption and that NuCoal's purchase of DCM had not been at arm's length. That report recommended that the New South Wales Government pass special legislation to cancel DCM's exploration licence and refuse applications associated with it.

On 31 January 2014 the *Mining Amendment (ICAC Operations Jasper and Acacia) Act* 2014 (NSW) ("the Amendment Act") added Schedule 6A to the Mining Act. Provisions of Schedule 6A cancel the exploration licence held by DCM (along with similar licences held by two subsidiaries of Cascade Coal Pty Limited) and declare void any associated applications (which include the Renewal Application). Schedule 6A also provides that the New South Wales Government is not liable to pay compensation for any consequences arising from the operation of the Schedule.

NuCoal was required to submit certain information from its exploration activities to the New South Wales Department of Trade and Investment under ss 163C and 248B of the Mining Act. Schedule 6A reinforces and extends the operation of those sections in respect of the cancelled licences. NuCoal has rights under the *Copyright Act* 1968 (Cth) ("Copyright Act") in respect of some of the exploration information it provided.

NuCoal commenced proceedings in this Court, challenging the validity of the Amendment Act or alternatively certain provisions of Schedule 6A to the Mining Act. NuCoal submits that in passing the Amendment Act, the New South Wales Parliament ("the Parliament") purported to assign guilt and impose punishment. NuCoal contends that the Parliament has never possessed such power. That lack of power, NuCoal submits, is borne out by relevant colonial-era statutes in relation to the establishment and powers of both the Parliament and the Supreme Court of New South Wales, and the *Constitution Act* 1902 (NSW) as impacted by the Commonwealth Constitution. NuCoal submits in the alternative that even if the Parliament has such power, the power must be exercised judicially. Such

exercise would involve hearing from affected parties, considering only relevant information and avoiding arbitrariness. NuCoal submits that Schedule 6A operates arbitrarily in that it punishes shareholders of the company who had no involvement in any corruption.

NuCoal also contends that clause 11 of Schedule 6A, which authorises certain officials to use information obtained under the Mining Act is, pursuant to s 109 of the Commonwealth Constitution, invalid to the extent of its inconsistency with the *Copyright Act* 1968 (Cth).

A Notice of a Constitutional Matter was filed by NuCoal. The Attorneys-General of the Commonwealth and the States of Victoria, Queensland, Western Australia and South Australia are intervening in the proceedings.

The parties filed a Special Case, which Justice Gageler referred for consideration by the Full Court.

The Special Case states the following questions for the opinion of the Full Court:

1. Are clauses 1 to 13 of Schedule 6A to the Mining Act, or any of them, invalid?

2. Is clause 11 of Schedule 6A to the Mining Act inconsistent with the Copyright Act and inoperative to the extent of that inconsistency?

3. Who should pay the costs of the Special Case?