Duncan v NSW: the NSW BLF case nearly 30 years on

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Introduction

Who would have thought 30 years ago when the NSW Court of Appeal dismissed the challenge in the *NSW BLF Case*, that the State constitutional landscape would be so transformed. Today, thanks to *Kable*, there is at least a basis for such a challenge under Ch III. Those who despaired in 1986 at the prospect of unbridled State legislative power can relax – but only a little. Despite the protective cloak of Ch III, each State Parliament retains considerable power to protect itself from adverse legal proceedings, and probably to continue to exercise judicial power.

There are in fact two *Duncan* decisions from last year. Both involved challenges brought by mining identity, Mr Travers Duncan, Cascade Coal Pty Limited and NuCoal Resources Limited, to the validity of New South Wales legislation enacted in response to ICAC investigations into the activities of the former NSW Resources Minister. The first challenge in *Duncan v New South Wales* argued that the NSW Parliament could not exercise judicial power. The High Court sidestepped this issue after finding an exercise of legislative, not judicial, power. The second challenge, *Duncan v Independent Commission Against Corruption*, argued an impermissible legislative interference in the judicial process. This too failed, being a mere change in the substantive law. Both challenges were essentially based on Ch III of the Commonwealth Constitution.

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1 *Building Construction Employees and Builders’ Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372.
4 [2015] HCA 32.
After dealing with both Duncan cases, their impact on the NSW BLF case is considered.

**Duncan v New South Wales**

The challenge in Duncan v New South Wales was to the validity of a NSW Act amending the Mining Act 1992 (NSW) by cancelling three specified exploration licences issued under the latter Act. The NSW Parliament took this legislative action after considering ICAC reports which found corrupt conduct in relation to the issue of those licences.

Clause 3 of Schedule 6A prefaced the purposes and objects of the amendment (to restore public confidence, promote integrity and to place the State in the same position as if the licences were never granted) with the declaration that: “Parliament, being satisfied because of information that has come to light as a result of [ICAC investigations], that the grant of the relevant licences … were tainted by serious corruption …”. Clause 4(1) specified that the three exploration licences “are cancelled by this Schedule”. Clause 7 stated that compensation is not payable by the State.

The High Court, in a rare unanimous joint judgment, rejected the challenge to the Amendment Act on all grounds.

The first ground was that the Amendment Act was not a “law” within s 5 of the Constitution Act 1902 (NSW). The Court made short-shrift of this argument, holding the Amendment Act to be a “law” despite the fact that it specifically applied to only three licences:

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. In particular, the word carries no implication limiting the specificity of such rights, duties, liabilities or immunities as might be the subject of enactment or the purpose of their enactment.5

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5 [2015] HCA 13 at [39].
The second ground, the primary basis of the challenge, was that the Amendment Act was an impermissible exercise of judicial power by Parliament. This argument also failed but only because the Court rejected its minor premise, finding that Parliament had not exercised judicial power.

The Amendment Act lacked all the typical features of an exercise of judicial power: it quelled no controversy between parties; it did not preclude any determination by a court of past criminal or civil liability; it did not determine the existence of any accrued right or liability. Nor did it possess the two common features of a bill of pains and penalties: a determination of guilt and a consequent imposition of a legal burden. The Court emphasised that the Amendment Act did not deal with any individual involved – all of whom remained subject to the ordinary processes of the criminal law.

Having correctly found no exercise of judicial power, the Court deliberately deferred argument on the plaintiffs’ major premise that the State Parliament cannot exercise judicial power. According to the joint judgment, the Plaintiffs relied on an implied limitation derived from “an historical limitation on colonial legislative power unaffected by the Australia Act 1986 (Cth) or from Ch III of the [Cth] Constitution”. It is this major premise that I wish to explore.

Let me first paint, roughly, the relevant constitutional landscape.

**Constitutional Landscape**

Before *Kable*, the consistent rejection of a doctrine of separation of powers at the State level meant that the States were free of the Ch III restrictions imposed on the Commonwealth. Hence:

- State courts could be vested with non-judicial power;
- State judicial power could be vested in non-judicial bodies;
- State Parliaments could exercise judicial power; and

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6 Ibid at [42].
7 Ibid at [43] and [44].
8 Ibid at [45].
9 Ibid at [51].
10 Ibid at [3].
• State Parliaments could interfere in the judicial process.

The High Court in *Kable* and its progeny has significantly qualified this position by extending Ch III protection to State courts as repositories of federal judicial power. In *Duncan v ICAC*, the joint judgment of French CJ, Kiefel, Bell and Keane JJ adopted the statement of the *Kable* principle from *Attorney-General (NT) v Emmerson*:

State legislation which purports to confer upon [a State] court a power or function which substantially impairs the court’s institutional integrity, and which is therefore incompatible with that court’s role as a repository of federal jurisdiction, is constitutionally invalid.

So far, this overarching principle of institutional integrity has only been recognised as qualifying three of the four capacities above.

**State Parliaments exercising judicial power: *Duncan v NSW***

The only aspect of Ch III’s extension to the States that remains unconsidered by the High Court (indeed by any court) is whether State Parliaments are in some way constrained by Ch III in their presumed capacity to exercise judicial power as such.

Since the line of State authority (including the *NSW BLF* case) denying a doctrine of separation of powers at the State level, there has been an assumption that State Parliaments possess judicial power. This assumption was challenged in *Duncan v NSW*.

**Do State Parliaments possess judicial power at all?**

NuCoal’s extensive submissions endeavoured to establish that the NSW Parliament has never been vested with judicial power. Reliance was placed on the colonial history of NSW to show: that Parliament had only ever been vested with legislative power; “not a single document suggests that ...
any legislature either possessed or believed that it possessed judicial power”; “from the first days of settlement, judicial power was exercised by a judicial authority and nobody else”; and the lack of power to punish for contempt of parliament. Reference was also made to the last time in England an Act of Attainder was passed in 1746 (against 47 Jacobites following the 1745 uprising14) and a Bill of Pains and Penalties in 1820 (against Queen Caroline).15 Yet, no decisive judicial authorities were cited in support other than a footnote reference to an obiter comment by Lord Justice Mellish in Attorney-General (Hong Kong) v Kwok-a-Sing16 in 1873.

The submissions of New South Wales as Defendant, and those of the interveners, the Commonwealth, Queensland, South Australia, Victoria and Western Australia, all supported the capacity of the NSW Parliament to exercise judicial power. NSW relied principally on the NSW BLF case and the judgments of Brennan CJ, Dawson, Toohey and McHugh JJ in Kable.17 South Australia’s submissions referred to the apparent lack of bills of attainder and of pains and penalties by the Australian colonies “for want of need rather than power”. All they discovered was a bill of attainder enacted by the Province of Upper Canada in 1838.18

Clearly, there is a lack of authority on this issue. A ripe area of historical research. For instance, even in the NSW BLF case, only Street CJ looked into this issue, referring to the English Parliament exercising judicial power since the Middle Ages by impeachment19 and acts of attainder, and later in Private Acts of divorce, to conclude that “the Parliament in this State has power to adjudicate between parties by an exercise of judicial power equally as has Parliament in England.”20

14 WA Submissions in Duncan v NSW fn 51.
16 (1873) 5 LRPC 179
17 Paras 57-58.
18 See fn 97.
19 (1986) 7 NSWLR 372 at 380 relies on Holdsworth to claim that the last impeachment was of Lord Melville in 1805.
20 Ibid at 381.
In the end, NuCoal’s submissions adopted a cautious approach by only denying State Parliaments judicial power to adjudge guilt and impose punishment.

More persuasive is the proposition, that since State Parliaments can vest judicial power in non-judicial bodies, they must also be able to exercise judicial power.

*Chapter III*

Even if State Parliaments possess judicial power, it could still be argued that a doctrine of separation of powers applies to preclude its use. Sensibly, in the light of *Kable*, this was not argued by anyone in *Duncan v NSW*. The focus was solely on Ch III and its extension to the States by the *Kable* principle.

This requires the Court to test the validity of State legislation, which amounts to an exercise of judicial power, by reference to two fundamental principles derived from Ch III: whether that exercise of judicial power either undermines the institutional integrity of State courts, or deprives them of one of their defining characteristics as a court.

The Plaintiffs’ written submissions in *Duncan v NSW* relied principally on the second of these principles. Both seem to offer some hope to rein in a State Parliament which threatens the liberty of its citizens.

*Supervision argument*

In *Duncan v NSW*, counsel for Mr Duncan argued in their written submissions that State Parliaments are incompetent to exercise judicial power because they are not amenable to supervision by the State Supreme Court and hence by the High Court, as required by *Kirk v Industrial Court (NSW)*.

This argument was based on the premise that Ch III creates not only an integrated system of law but also an “exhaustive system of courts and tribunals for the exercise of judicial power”, in the sense that all bodies exercising judicial power fall within the supervision of the Supreme Court and hence

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the High Court. Because State Parliaments lie outside that supervisory realm of Ch III, they cannot exercise judicial power. Otherwise, there would no longer be “one common law” for Australia. Each State Parliament would constitute an “island of power” outside Ch III.

Paragraph 34 of their submissions went on to argue:

*Kirk v Industrial Court (NSW)* holds that the Parliament of New South Wales is incompetent to create such an island of power by the purported deprivation of the Supreme Court of jurisdiction to grant certiorari for jurisdictional error.

It is a small step from that established constitutional principle (which is not challenged) to the proposition that neither may a State Parliament, exploiting its non-amenability to appeal or prerogative relief, act as the very same island of power itself. ... Chapter III denies to State parliaments competence to confer judicial power on any body beyond the supervision of the Supreme Court, and accordingly denies to those parliaments the competence to exercise judicial power for themselves.

This is not “a small step” – to assert a complete denial of judicial power on the part of a State Parliament. The NSW submissions, supported by the Commonwealth, refer to this as “a very large step indeed”, noting the “profound” difference between Parliament and its inferior courts and tribunals. 22

Although no authority on point was cited, support for the plaintiff’s submission can be found in an essay by Professor Zines in 2000 who thought it not unreasonable to argue that State judicial power could not be exercised by the legislature ... from which there is no appeal to a court, otherwise this would impair the constitutional positions of the Supreme Court at the apex of the State judicial...
system, the High Court at the apex of the national system and the guaranteed unity of the common law.\textsuperscript{23}

This might be so if the Parliament abrogated to itself all or most of the judicial power of the State. But I do not see how a specific exercise of judicial power by a State Parliament necessarily undermines the supervisory roles of the Supreme Court and of the High Court contemplated by Ch III.

The submissions of NSW responded by asserting that the \textit{Kirk} principle “cannot sensibly be understood as extending to State legislatures”; “Judicial power as exercised by a State legislature is not equivalent to judicial power exercised by a court or a tribunal”; and “the enactment of legislation which involves the exercise of the judicial power of a State ..., by definition, does not involve the application of the common law and could not distort or interfere with the High Court’s superintendence over the common law as administered by the courts”.\textsuperscript{24} Queensland’s submissions emphasised that \textit{Attorney-General (NT) v Emmerson}\textsuperscript{25} referred to Ch III establishing “an integrated court system”; it did not say “an integrated system of judicial power”.\textsuperscript{26}

These submissions appear persuasive.

\textit{Institutional integrity argument}

The other line of argument is to rely on the overarching principle of institutional integrity in Ch III. This seems the preferable approach. Although it does not appear front of stage in the Plaintiff’s submissions.

\begin{footnotesize}
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  \item \textsuperscript{24} Para 63-65.
  \item \textsuperscript{25} (2014) HCA 13 at 40.
  \item \textsuperscript{26} Para 27.
\end{itemize}
\end{footnotesize}
One begins with the basic undisputed Ch III principle that a State Parliament cannot exercise its power to undermine the institutional integrity of its State courts capable of exercising the judicial power of the Commonwealth.

Any law which appears to constitute an exercise of judicial power needs to be tested against that principle. Naturally, the outcome will vary depending on the nature of the impugned law. But in each case, likely absent, are the traditional protections of a fair trial.

At the extreme end of the spectrum, consider a State statute which adjudges guilt and punishes by detention (similar to a bill of attainder); or a State law which authorises the Executive or one of its bodies to hold indefinitely in custody anyone who is found, for example, to be demonstrating against the State Government.

Imagine in each case a writ of habeas corpus is sought. The Court finds the requisite authority in the State statute. Can it not be argued that judicial enforcement of such draconian legislation saps the institutional independence and integrity of the court?

This argument was hinted at in *Duncan v NSW* in the written submissions of counsel for NuCoal Resources:

> A criminal judgment by Parliament would result in judgements (sic) lacking finality, because of the power of repeal. Such a judgment would require the courts to give effect to legislative judgements (sic) and to act upon legislative findings of guilt.27

The latter scenario may have well occurred in *Duncan v NSW*, had the High Court found an exercise of judicial power in that case. Would judicial enforcement of the legislative judgment have placed the Court in a position where it was assisting the Parliament to exercise its judicial power in a manner inconsistent with natural justice or due process?

27 Para 51.
The enforcement by Ch III courts of legislative judgments by a State Parliament bears a similarity to the constitutionally impermissible role imposed on the South Australian Magistrates Court in *Totani v South Australia*\(^2\). There the High Court found the SA legislation invalid for authorising “the executive to enlist the Magistrates Court to implement decisions of the executive in a manner incompatible with that Court’s institutional integrity.” This might well be the case where judicial enforcement of a legislative judgment is sought.

Further support for this approach may be found in Justice Gageler’s recent dissent in *North Australian Aboriginal Justice Agency v Northern Territory*\(^2\) where his Honour found the detention legislation in that case invalid for undermining the institutional integrity of Territory courts which were made “support players” in a punitive executive detention scheme.

A less extreme example is where a State statute transfers jurisdiction for a category of criminal offences from that States’ courts to a House of the State Parliament. Might this tend to undermine the institutional integrity of those State courts? Is Parliament indicating that it lacks confidence in its own courts? If the exercise of criminal jurisdiction by non-judicial bodies leads to an undermining of public confidence, might this impact adversely on the institutional integrity of the courts as well? In other words, does the exercise of judicial power other than by courts, at some point, impact on the institutional integrity of the integrated Australian judicial system?

In extreme cases where a State Parliament is exercising actual judicial power, the absence of the traditional protections of the judicial process, in particular, the denial of procedural fairness and the lack of any judicial review thereof, creates a situation which is repugnant to the rule of law. Surely, for any court to enforce such a State “law” against a citizen of the Commonwealth, must be repugnant to the judicial process protected by Ch III.

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\(^2\) [2015] HCA 41 at [134].
What is striking is the fact that as Commonwealth citizens we enjoy immunity from detention at the hands of the Cth Parliament and Executive, and yet remain vulnerable at the State level. As the joint judgment of Brennan, Deane and Dawson JJ in Lim’s case observed:

[T]he citizens of this country enjoy, at least in times of peace, a constitutional immunity from being imprisoned by Commonwealth authority except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth. 30

Comforting this may seem, it does not address the position under State law. If State Parliaments possess the capacity to exercise State judicial power, we as Commonwealth citizens remain vulnerable to arrest by a State Executive for any reason authorised by State statute.

A parliamentary privilege argument

Finally, a common reference in the submissions is to “[NSW] Parliament’s lack of inherent power to punish for contempt” 31, or to the other State “Parliaments” having this power. This, of course, is misleading. The power being referred to is that of each House, not that of the Parliament. Such an argument contributes little to the issue and should be avoided.

Conclusion

To some extent this issue of State Parliaments exercising judicial power is more theoretical than real. Such cases are rare. None appears reported in Australia, and according to NuCoal’s submissions in Duncan v NSW, there are only four US Supreme Court cases where legislation was struck down as a bill of attainder. 32 Bicameral legislatures also make this more unlikely. Nonetheless it seems most unlikely that State Parliaments will be denied, as the Commonwealth Parliament is, a general capacity to exercise judicial power. This is because any exercise of judicial power by a State Parliament must still survive Ch III by not piercing its protective cloak of institutional integrity.

30 Ibid at [24].
31 Para 24
**Impermissible interference in the State judicial process: Duncan v ICAC**

More common is where State Parliament, instead of taking matters into its own hands, tries to achieve its objective indirectly by interfering in the judicial process. Since *Kable*, this can be challenged under Ch III as an impermissible interference in the judicial process. State Parliaments cannot interfere in the judicial process by either a specific direction in specific proceedings, or by requiring the courts to exercise their jurisdiction in a manner inconsistent with the essential character of a court or with the nature of judicial power. In this respect, the States are in the same position as the Commonwealth.

Successful challenges to State law demonstrate, however, that it is the second aspect of this restriction which has more impact – invalidating laws requiring courts to exercise their jurisdiction in a manner inconsistent with the essential character of a court or with the nature of judicial power. The first aspect – a specific direction in specific proceedings - is far more difficult to establish. This is due to the distinction drawn between a direct interference and a mere change in the substantive law in pending proceedings. The latter is permissible. Much depends on careful drafting.

This was the issue in *Duncan v ICAC*[^33] which involved a challenge to an amendment to the ICAC Act to reverse the effect of the High Court decision in *ICAC v Cunneen*[^34], which had found that ICAC had no authority to investigate or find “corrupt conduct” on the basis of conduct which affected the efficacy of public administration. Probity not efficacy was required. The purpose of the amendment was to validate retrospectively ICAC’s activities in so far as they relied on efficacy prior to the *Cunneen* decision on 15 April 2015. The principal Clause 35(1) provided:

> Anything done or purporting to have been done by the Commission before 15 April 2015 that would have been validly done if corrupt conduct for the purposes of this Act included relevant conduct is taken to have been, and always to have been, validly done.

[^33]: [2015] HCA 32.
[^34]: [2015] HCA 14.
“Relevant conduct” was defined as conduct adversely affecting the efficacy of official functions.

The effect of this Amendment Act was to defeat a pending claim in the NSW Supreme Court brought by Mr Duncan challenging ICAC findings of corrupt conduct against him, based only the effect of his conduct on the efficacy of public administration. Consequently, he challenged the validity of the Amendment Act as in breach of Ch III for undermining the institutional integrity of the NSW Supreme Court.

The High Court rejected this challenge, holding that the NSW Parliament merely changed the substantive law to be applied by the Supreme Court. The joint judgment of French CJ, Kiefel, Bell and Keane JJ (with whom Gageler J, and Nettle and Gordon JJ agreed) found that the legislation was “a retrospective alteration of the substantive law which is to be applied by the courts in accordance with their ordinary processes”35; and that the relevant provisions “attach new legal consequences and a new legal status to things done which otherwise would not have had such legal consequences or status”.36 The joint judgment articulated the well-established principle:

> It is now well settled that a statute which alters substantive rights does not involve an interference with judicial power contrary to Ch III of the Constitution even if those rights are in issue in pending litigation.37

_Duncan v ICAC_ reaffirms a line of authority (including the _Cth BLF_ case) which enables both the Cth and State Parliaments to avoid an adverse judicial outcome, without infringing Ch III, by carefully drafting their legislation to ensure that all it does is to change the substantive law which the court applies in the ordinary way. This remains so even if the legislation applies retrospectively to target pending proceedings. Crucial is that the legislation does not dictate or direct the court to decide any issue in a particular way. Merely declaring the law, leaves the court free to apply it in the ordinary course of its jurisdiction.

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35 Ibid at [28].
36 [2015] HCA 32 at [25].
37 Ibid at [26].
Where does this leave the NSW BLF case?

The NSW Solicitor-General in *Duncan v ICAC* indicated in both his written and oral submissions that the NSW BLF legislation may not amount to an impermissible direction to the court, since it did “not deal with any aspect of the judicial process”. He saw little to distinguish that case from the Cth BLF case or *Bachrach*.

One might try to distinguish the NSW BLF case from *Duncan v ICAC* on the ground that the BLF legislation targeted all of the specific issues pending before the NSW Court of Appeal ie a tailor-made fit to dispose of the entire case:

- “The registration [of the BLF] … shall, for all purposes, be taken to have been cancelled on 2 January 1985 by … [the Act].” s 3(1)
- “ … the action of the Minister … in giving the certificate … shall (to the extent, if any, that that action was invalid) be treated, for all purposes, as having been valid …” s 3(2)
- “… and the certificate shall correspondingly be treated, for all purposes, as having been validly given from the time it was given …” s 3(2)

And further, that s 3(4) in directing that the costs of the proceedings shall be borne by the parties and “shall not be the subject of any contrary order of any court”, directly interferes in the judicial process.

On the other hand, cl 35(1) of the NSW Act in *Duncan v ICAC* merely addressed one issue by enlarging the jurisdiction of ICAC to what had been thought to be its scope before the High Court rejected that view in *Cunneen*. This provision did not dispose of all the issues in the pending proceedings. The Court still had to decide whether ICAC had acted within this expanded jurisdiction. Such was not the case in the NSW BLF case where the court had nothing left to decide.

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38 Para 13; and High Court Transcript at p 35.
In the end, I would argue that the NSW BLF case remains an example of an impermissible interference in the judicial process, distinguishable from Duncan v ICAC, and so a violation of Ch III.  

Conclusion

Both Duncan v NSW and Duncan v ICAC raise important issues in relation to the application of Ch III at the State level. The former leaves for another day the issue whether State Parliaments can exercise judicial power. Most likely, such an exercise of power will continue to be recognised - subject now to the overarching principle of institutional integrity of Ch III. Hopefully, that principle can afford relief when needed.

Duncan v ICAC confirms that State Parliaments are in the same position as the Commonwealth, neither can, consistent with Ch III, directly interfere in the judicial process in specific proceedings. However, careful legislative drafting avoids this fate by merely changing the substantive law. Form appears to trump substance. As public lawyers, we are immediately wary of any principle which puts form above substance. Where to draw the line between permissible and impermissible interference in pending proceedings needs further exploration. Such interference encroaches on the integrity of both the Federal and State judicial process.

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