UNSW SYDNEY

UNSW Australian Human Rights Institute

Legal analysis

Mount Pleasant Mine Bill 2026 (NSW)

Australian Climate Accountability Project

November 2026

About the Australian Climate Accountability Project

The Australian Climate Accountability Project is a world-first research project tackling Australia's fossil fuel exports, our biggest contribution by far to the climate crisis. Housed at the UNSW Australian Human Rights Institute, a global leader in applied human rights research, the Australian Climate Accountability Project has a track record of driving high-impact multidisciplinary research to hold governments and corporations accountable for climate harms.

Contact Us

Australian Human Rights Institute:

https://www.humanrights.unsw.edu.au/

humanrights@unsw.edu.au

Australian Climate Accountability Project:

https://www.humanrights.unsw.edu.au/research/australian-climate-accountability-project

acapteam@unsw.edu.au

The Australian Climate Accountability Project is located on the unceded territory of the traditional owners, the Bidjigal people.

Mount Pleasant Mine Bill 2026 (NSW)

Henry VIII and privative clauses

At least in the Commonwealth sphere, there is a constitutional argument that that a Henry VIII clause is not a proper exercise of legislative power. The basis for the argument goes back to a statement by Latham CJ in *Commonwealth v Grunseit* (1943) 67 CLR 58 at 82, that "the general distinction between legislation and the execution of legislation is that legislation determines the content of a law as a rule of conduct or a declaration as to power, right or duty, whereas executive authority applies the law in particular cases." In *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at [102], the joint reasons suggested that this language defined "the hallmark" of legislative power which could restrict the power of the Commonwealth Parliament to confer an open-ended discretionary power on a minister, informed only by non-binding guidelines, as to which aliens can and cannot enter Australia.

This is a good description of the effect of s 17 of the Mount Pleasant Mine Bill 2026, which states:

> **17 Application of Acts and instruments to authorised development**
>
> (1) Regulations may be made to apply, disapply or modify the application or operation of an Act or instrument to the authorised development.
>
> (2) The Minister must not recommend to the Governor the making of a regulation under this section in relation to the planning legislation without first obtaining the concurrence of the Minister administering the Planning Act.
>
> (2) In this section— ***instrument*** has the same meaning as in the *Interpretation Act 1987*.

The term "authorised development" in s 17(1) refers to the development authorised by s 5, which applies to "land described in Appendix 1 of the statutory conditions". The only limitation on the scope of the power appears to be the description of the land, which is not publicly available. The Minister could in theory vary any provision of the Bill itself (once it is "an Act"), disapply occupational work safety laws, release the miner from the operation of the Crimes Act 1900, etc.

There are no doubt problems in applying the *Grunseit* principle to State constitutional power to legislate where there is no "strict" separation of powers. That said, there is no absolute separation of powers under the federal Constitution, which allows delegated legislation etc. There is room for an argument that some degree of separation exists under the State Constitution, given its structure and the underlying principles of representative and responsible government. Further, both Commonwealth and State courts must be able to identify the legal effect of any Act to determine whether it falls within the limited Constitutional competence of a State Parliament. It is also an essential characteristic of a State Supreme Court to be able to exercise judicial review of the legality of the exercise of

executive power. Executive power includes the making of regulations. A regulation-making power which is not controlled by the statute under which it is created may therefore be invalid.

Finally, there is a privative clause in the following terms:

> **8 No proceedings against authorisation or Mount Pleasant consent**
>
> (1) No proceedings may be brought to review or challenge the authorisation of development by section 5 or the authorisation being taken to be development consent under section 6, including proceedings—
>
> (a) under the Planning Act or another Act, and
> (b) at common law or in equity.
>
> (2) The Planning Act, Part 8 does not apply to the Mount Pleasant consent.

The phrase "no proceedings may be brought" is similar to one very recently considered by the High Court in *Minister for Planning v IGA Retail Services Pty Ltd* [2026] HCA 43 (11 November 2026), where the Victorian Planning Act, s 39(8) provided:

> Except for an application under this section, a person cannot bring an action in respect of a failure to comply with Division 1 or 2 or this Division or Part 8 in relation to an amendment which has not been approved.

The joint reasons stated at [40]:

> On one view, consistently with the longstanding understanding of a legislative requirement that an action "shall not be brought", s 39(8) purports to do no more than establish a defence to any action that is brought in respect of the relevant failures to comply affecting amendments which have not been approved. But if s 39(8) purported to go further and to exclude a person even from seeking relief for jurisdictional error, then it would face the insurmountable obstacle that a provision of State legislation may not withdraw, negate or diminish a person with sufficient standing from invoking a State Supreme Court's entrenched judicial review jurisdiction for jurisdictional error with a non-colourable claim. Such a provision would be inconsistent with the principles laid down in *Plaintiff S157/2002 v The Commonwealth* and *Kirk*. Hence, it was common ground that a plaintiff could not be precluded from commencing a proceeding seeking relief for jurisdictional error from the Supreme Court as the IGA parties did in this case. Further it was also common ground that, consistent with the entrenched judicial review jurisdiction of this Court and State Supreme Courts, s 39 of the PE Act could not bar a claim of conscious maladministration or bad faith in respect of Divs 1-3 of Pt 3 or Pt 8 of the Act being raised in the Supreme Court.

Whether s 8 of the Bill would be read down, or held to be invalid in its present form is unclear. The possibility that the Minister could amend it by regulations indicates the fragility of this ill-thought through Bill.



UNSW
SYDNEY



UNSW
Australian
Human Rights
Institute