HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B54 of 2020

B E T W E E N:

MINERALOGY PTY LTD (ACN 010 582 680)
First Plaintiff

INTERNATIONAL MINERALS PTY LTD (ACN 058 341 638)
10 Second Plaintiff

AND

STATE OF WESTERN AUSTRALIA
Defendant

20

DEFENDANT'S SUBMISSIONS

Date of Document: 21 May 2021

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PART I PUBLICATION

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

PART II ISSUES

2. The plaintiffs challenge the constitutional validity of the whole of, or identified provisions of, the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA) (the "**Amending Act**") which amended the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA) (the "**Act**").

3. This is essentially due to the following nine issues:

(i) **Ch III and Judicial Power Grounds** (**Common Issue 1**) – the plaintiffs contend that the Amending Act is contrary to the Commonwealth *Constitution* as it involves a usurpation of the judicial power of Ch III Courts, or it impairs the institutional integrity of such courts;

(ii) **Invalid Indemnity Provisions** (**Common Issue 2**) – the plaintiffs contend that the particular provisions of the Act which impose indemnities upon the plaintiffs and Mr Palmer in favour of the defendant are: (i) repugnant to judicial power; (ii) outside the legislative powers of the State in so far as they relate to claims against the Commonwealth; and (iii) contrary to section 115 of the *Constitution*;

(iii) **Lack of State Legislative Power to affect Interstate Proceedings** (**Common Issue 3**) – the plaintiffs argue that the WA Parliament lacked legislative power to enact particular provisions of the Act which affect or purport to govern proceedings in other States;

(iv) **Failure to Give Full Faith and Credit** (**Common Issue 4**) – the plaintiffs argue that the Amending Act fails to give full faith and credit (within the meaning of section 118 of the *Constitution*) to the legislation of other States which enacted the uniform *Commercial Arbitration Acts*;

(v) **Inconsistencies with Commonwealth Law** (**Common Issue 5**) – the plaintiffs argue that there is an inconsistency for the purposes of section 109 of the *Constitution* or section 79 of the *Judiciary Act 1903* (Cth) ("***Judiciary Act***") between various provisions of the Act and federal legislation;

(vi) **Rule of Law Reasons** (**Common Issue 6**) – the plaintiffs claim that the Act is inconsistent with the rule of law and "unwritten principles deeply rooted in the common law";

(vii) **Failure to Comply with Manner and Form Provisions** (**Common Issue 7**) – the plaintiffs allege that the Amending Act is invalid as it was not enacted in accordance

with applicable manner and form requirements;

(viii) **Invalid Delegation or Abdication of Legislative Power** (**Common Issue 8**) – the plaintiffs allege that sections 30 and 31 of the Act involve an invalid delegation or abdication of legislative power; and

(ix) **Severance** (**Common Issue 9**) – the plaintiffs argue that provisions of the Amending Act which purport to sever any invalid provisions of the Act do so in an impermissible manner.

B52 of 2020

4. There are related proceedings in B52 of 2020, brought by Mr Palmer personally. The nine issues set out above also arise in those proceedings, as well as certain additional issues raised only by Mr Palmer.

5. Questions of manner and form (Common Issue 7), invalid delegation or abdication of legislative power (Common Issue 8), and severance (Common Issue 9) are addressed at the end of the submissions in B52 of 2020. These are procedural-type grounds. The State relies upon the submissions made here and in B52 of 2020.

PART III NOTICE UNDER SECTION 78B

6. The plaintiffs have given sufficient notice under section 78B of the *Judiciary Act*.

PART IV FACTS

7. The State relies on the facts as set out in the Special Case ("**SC**"). It adds the following by way of introductory summary.

The Act, the Amending Act and the State Agreement

8. The Act received the Royal Assent and commenced on 24 September 2002: SC [16].

9. The State Agreement is a schedule to the Act. Prior to the Act being passed, the State Agreement was made as a contractual agreement on 5 December 2001: SC [12].

10. Part 3 of the Act was introduced by the Amending Act. The Bill for the Amending Act was introduced into the WA Parliament on 11 August 2020, and it received the Royal Assent on 13 August 2020: SC [43]-[44].

11. The Amending Act contains matters that are substantive law and are not procedural in nature: section 8(7).

Various Proceedings

12. An application for the appointment of an arbitrator was made by the plaintiffs to the WA Supreme Court on 2 August 2018 in respect of a pending dispute (see below), but the parties

ultimately agreed to the appointment of the Hon M H McHugh AC QC ("**Arbitrator**"). Consequently, this application was never pursued, but it has not been formally terminated. See SC [41]-[42].

13. On 8 July 2020, the Arbitrator was again consensually appointed to hear and determine claims by Mineralogy and International Minerals for damages. This arbitration was set down for hearing to commence on 30 November 2020, but did not proceed due to the Amending Act. See SC [39]-[40].

14. On 12 August 2020, while the Amending Act was still before the WA Parliament, Mineralogy Pty Ltd and International Minerals Pty Ltd applied to the Federal Court of Australia seeking certain relief in respect of the Bill for the Amending Act. No substantive orders have been made by the Federal Court, and the Federal Court proceedings are adjourned pending the outcome of the present proceedings. See SC [45]-[46].

PART V ARGUMENT

INTRODUCTION - OPERATION OF ACT, AMENDING ACT AND STATE AGREEMENT

15. The Act ratifies, and authorises the implementation of, the State Agreement (as varied) annexed to the Act.

16. The State Agreement defines the rights and obligations between the State, Mineralogy and six Co-Proponents (including International Minerals). It is only concerned with their rights and obligations. Consequently, the Act itself is not legislation of general application, and may be described as "ad hominem" in the sense that it is directed at particular parties.

17. The State Agreement provides a contractual mechanism for approval of projects to come within the scope of its operation. The State agreed to accept obligations to assist the establishment of such projects for the purpose of "promoting employment opportunity and industrial development in Western Australia": State Agreement, recital (d). Clause 6(1) of the State Agreement provides for Mineralogy, either alone or with a Co-Proponent, to submit project proposals to the responsible Minister. Clause 7(1) provides that the Minister shall approve of a proposal; defer consideration of or decision upon the same in certain circumstances; or require as a condition precedent to the giving of approval to the proposal that certain alterations occur or that certain conditions be satisfied.

18. When the State Agreement was signed on 5 December 2001, prior to the Act being passed on 24 September 2002, the State Agreement only had contractual effect and provided that it had no substantive operation until the Act was enacted: State Agreement, clause 4(1). Unless the Act was passed by a specified date, the Agreement would "cease and determine". Upon the Act becoming law, the Agreement provided that it would "operate and take effect according

to its terms notwithstanding the provisions of any Act or law of Western Australia". See State Agreement, clauses 4(2)-(3).

19. Once the Act commenced on 24 September 2002, section 4(1) of the Act provided that the State Agreement was ratified. Section 4(2) provided that the implementation of the State Agreement was authorised. Section 4(3) provided that, without limiting or otherwise affecting the application of the *Government Agreements Act 1979* (WA), the State Agreement operates and takes effect despite any other Act or law. Section 4(3) was necessary because the State Agreement exempts Mineralogy from complying with the requirements of other State legislation. For example, clause 10(3) of the State Agreement provides that during the term of the Statement Agreement, Mineralogy is not required to comply with the expenditure conditions imposed by or under the *Mining Act 1978* (WA) in regard to the mining leases. Section 6 is in similar terms in respect of the variation agreement executed on 14 November 2008 (which is also a schedule to the Act).

20. There is no legislative provision which provides that the State Agreement has the force of law or is to operate and take effect as if it was enacted in the Act (cf, eg, *Iron Ore (Rhodes Ride) Agreement Authorisation Act 1972* (WA), section 3; *Iron Ore (McCamey's Monster) Agreement Authorisation Act 1972* (WA), section 3). However, section 5 of the Act expressly confers statutory power upon the State, by reference to clause 27 of the State Agreement, to take land for a project under Parts 9 and 10 of the *Land Administration Act 1997* (WA) and the *Public Works Act 1902* (WA).

21. In these circumstances, the terms of the Act giving effect to the State Agreement do not generally invest it with statutory force. Rather, the covering Act clears any legislative obstacle out of the path of the contractual agreement taking full effect. See ***Re Michael; Ex parte WMC Resources Ltd*** [2003] WASCA 288; (2003) 27 WAR 574, [21]–[30] (Parker J, Templeman and Miller JJ agreeing); ***Commissioner of State Revenue v OZ Minerals Ltd*** [2013] WASCA 239; (2013) 46 WAR 156, [179]–[183] (Buss JA, Newnes JA agreeing, Murphy JA agreeing on this point); ***Western Australia v Graham*** [2016] FCAFC 47; (2016) 242 FCR 231, [25]–[41] (Jagot J, Mansfield and Dowsett JJ agreeing).

The Operation of the Amending Act

22. As explained below, the Amending Act:

(a) alters the rights and obligations between certain parties to the State Agreement. The rights and obligations which are altered are connected with "disputed matters" (as defined in section 7(1)); and

(b) prevents the plaintiffs suing the State or State agents in respect of the decision to

enact the Amending Act. The decision to enact the Amending Act, and the implementation of that decision, have been described as "protected matters" (as defined in section 7(1)).

23. In so far as the Amending Act alters the contractual rights and obligations of the parties to the State Agreement, it is not legislation of general application. That is unremarkable given that the Act itself was never legislation of general application. That is equally true in so far as the Amending Act relates to "protected matters" and protects the State from the consequences of making and implementing a decision to amend the contractual rights of the parties to the State Agreement. The Amending Act is necessarily "ad hominem" legislation, as the Act which it amends was such legislation. It was designed to avoid a claim against the State of approximately AUD $30 billion: WA Parliament Hansard (12/8/2020, p 4783-4787).

"Disputed Matters"

24. The Amending Act was passed in the context of four specific disputes (which were part of a broader dispute) between certain parties to the State Agreement.

25. Two of the disputes had been arbitrated. The making of an award in a private arbitration does not involve any exercise of judicial power. The authority of an arbitrator to make an award stems from the agreement of the parties. See ***TCL Air Conditioner (Zhonghsan) Co Ltd v Judges of the Federal Court*** [2013] HCA 5; (2013) 251 CLR 533, [31]-[32] (French CJ and Gageler J), [75], [101], [103]-[104] (Hayne, Crennan, Kiefel and Bell JJ).

26. Section 35 of the *Commercial Arbitration Acts* (enacted in each State) does not automatically invest an arbitral award with the force or effect of a curial judgment. An arbitral award is not the product of the exercise of any judicial power: ***TCL***, [31] (French CJ and Gageler J), [75], [101] (Hayne, Crennan, Kiefel and Bell JJ). It is the order for enforcement of the arbitral award, following an application to a court, which invests the award with the effect of a curial judgment: [24] (French CJ and Gageler J), [104] (Hayne, Crennan, Kiefel and Bell JJ). Prior to any enforcement order, what is recognised by section 35 of the *Commercial Arbitration Acts* is an award which has been made between the parties with contractual effect, and which replaces the disputed rights and liabilities between the parties by a process of accord and satisfaction: ***TCL***, [78] (Hayne, Crennan, Kiefel and Bell JJ). The rights and liabilities which are disputed do not continue to exist after the award is made: ***TCL***, [80] (Hayne, Crennan, Kiefel and Bell JJ).

27. The four particular disputes which existed when the Amending Act was passed (which were part of a wider dispute generally about the Balmoral South project) were the following:

    (a) the first dispute was about whether the "**first Balmoral South proposal**",

purportedly submitted pursuant to clause 6 of the State Agreement, was a valid "proposal" which the Minister had to consider under clause 7. This dispute was determined by the Arbitrator in the First Award made on 20 May 2014: SC [28]. The Arbitrator determined that there was a breach of the State Agreement (the "**first breach**"): SC [30]. This determination was contractually binding due to the terms of the arbitration contract, not because of any exercise of judicial power. There is no valid judicial order to enforce the First Award. Whilst the Queensland Supreme Court (No 8766 of 2020) made an enforcement order (after the Bill for the Amending Act was introduced into the WA Parliament but before the Amending Act was passed), it was later set aside, although this is pending an appeal;

(b) the second dispute was about whether the Minister could validly impose 46 conditions precedent upon the implementation of the first Balmoral South proposal: SC [32], [39]. The plaintiffs allege that this was also a breach of the State Agreement (the "**second alleged breach**"). This dispute had not been determined when the Amending Act came into effect, and was the subject of the pending arbitration before the Arbitrator;

(c) the third dispute was about whether the plaintiffs could pursue damages for the first breach and the second alleged breach, or were prevented from doing so by reason of estoppel and inordinate delay. The Arbitrator determined that the plaintiffs could pursue damages, and made the Second Award to that effect on 11 October 2019: SC [36]. Again, that resolved the dispute contractually. No valid order to enforce the Second Award has been made (although the observations about the Queensland Supreme Court enforcement proceedings at (a) above apply here also); and

(d) the fourth dispute concerned the quantum of damages caused by the first breach and the second alleged breach. This dispute was not determined when the Amending Act came into effect, and was the subject of the pending arbitration before the Arbitrator along with the second dispute.

28. Mineralogy and International Minerals also submitted a slightly different proposal for development on or around 21 June 2013, which has been described as the "**second Balmoral South proposal**". This second proposal was never pursued. See SC [24]-[25], and definition of "second Balmoral South Proposal" in the Act, section 7.

29. In the context of the four disputes outlined above, a "disputed matter" is defined in section 7 of the Act. Effectively, it is any conduct of the State or a State agent which occurred before section 7 commenced on 13 August 2020, and which is connected with the Balmoral South Iron Ore Project. This includes the Minister's refusal to accept or consider the first or second

Balmoral South proposals; and the imposition of the 46 conditions precedent in respect of approval of the first proposal. A "disputed matter" can also extend to conduct of the State or a State agent which occurred or arose before, on or after commencement of section 7 on 13 August 2020, which is otherwise "connected with" a disputed matter. It can also extend to "pre-agreement State conduct" connected with the making of the State Agreement or the 2008 variation agreement.

"Protected Matters"

30. The definition of a "protected matter" in section 7 of the Act has, as its core concept, the consideration of courses of action for resolving, addressing or otherwise dealing with a "disputed matter", or any connected liabilities or proceedings. This effectively includes preparing, drafting, taking instructions for and promoting the Bill for the Amending Act and preparing, drafting, taking instructions for and promoting any subsidiary legislation made under the provisions introduced by the Amending Act. It also extends to any matter or thing "connected with" a protected matter.

31. The provisions regarding "protected matters" serve to protect against ancillary litigation directed to the process of the Amending Act itself. The need for provisions of this kind, which deliver finality of a particular kind, arises from cases where there have been attempts to make persons involved in the enactment of legislation liable for compensation or contempt, or subject to compulsory court processes to provide information. Eg, ***Dagi v The Broken Hill Company Proprietary Ltd*** (unreported, Supreme Court of Victoria, No 5782 of 1994, 25 September 1995) (appeal allowed on questions of standing in ***BHP v Dagi*** [1996] 2 VR 117); ***Re Bell Group NV (No 2)*** [2017] FCA 927; (2017) 122 ACSR 418.

32. The declaration of no liability for "protected matters" (section 19(1)-(2)) is similar to section 7 of the *Local Government (Morayfield Shopping Centre Zoning) Act 1996* (Qld) considered in ***H A Bachrach Pty Ltd v Queensland*** [1998] HCA 54; (1998) 195 CLR 547, which provided "Compensation is not payable by the State or the council merely because of – (a) the enactment or operation of this Act; or (b) anything done to carry out or give effect to this Act".

Nature of Substantive Provisions in Part 3 (introduced by the Amending Act)

33. Part 3 contains a number of different types of substantive provisions. For the purposes of analysis, the substance of these provisions is summarised below.

34. **First**, there are "Declaratory Provisions" which declare the legal consequences of particular matters or things. These are the following:

    (a) provisions which declare that the State Agreement has not been repudiated, and that

it continues to operate, subject to Part 3: section 8(2)-(3);

(b) provisions which declare that certain specified documents, agreements or arrangements (such as the first and second Balmoral South proposals, the First and Second Awards and the arbitration agreements under which those Awards were made) have no legal effect: sections 9, 10, 27; and

(c) provisions which declare that no protected matter has certain legal effects: section 18(1)-(3) (which should be read with section 8(2)-(3)).

35. **Second**, there is a "No Offence" provision which (similar to the first category) declares that "any conduct of the State" that is connected with a protected matter does not constitute a criminal offence: section 20(8).

36. **Third**, there are "No Liability" provisions. These are:

(a) provisions which declare that the State has no liability in respect of anything the subject of a claim in a relevant arbitration, including costs: section 11(1)(a), (2), (8). A "relevant arbitration" is defined in section 7(1) as an arbitration which begins before commencement of the Amending Act, that concerns a disputed matter and to which the State and the plaintiffs are parties; and

(b) provisions which declare that the State has no liability in respect of anything connected with a disputed matter or protected matter: sections 11(1)(b)-(c), (2), 19(1)(a)-(b), (2).

37. **Fourth**, there are "Administrative Law Provisions" preventing appeals, judicial review and administrative law remedies. These are:

(a) provisions which declare that any conduct of the State connected with a disputed matter or protected matter cannot be the subject of review or appeal (sections 12(1), 20(1)). This is subject to an exception where jurisdictional error is established: section 26(6);

(b) provisions which declare that the rules of natural justice do not apply to "any conduct of the State" connected with a disputed matter or protected matter: sections 12(2), 20(2); and

(c) provisions which disapply the State's freedom of information legislation to a document connected with a disputed matter or protected matter, and which extinguish a pending application under that legislation: sections 13(1)-(3), 21(1)-(3).

38. **Fifth**, there are "No Proceeding" provisions. These are:

(a) provisions which provide that no proceedings in respect of the declarations in paragraphs [34], [36]-[37] above can be brought; maintained (if they are already commenced); or the basis of relief (if they are already completed). These are "**Post-Commencement Proceeding Provisions**" (sections 11(3), 13(4), 19(3), 21(4)), "**Incomplete Proceeding Provisions**" (sections 11(4), 12(4), 13(5), 19(4), 20(4), 21(5)) and "**Interim Proceeding Provisions**" (sections 11(5)-(6), 12(5)-(6), 13(6)-(7), 19(5)-(6), 20(5)-(6), 21(6)-(7)); and

(b) provisions which provide that the State has no costs liability in respect of Incomplete Proceedings and Interim Proceedings (sections 11(7), 12(7), 13(8), 19(7), 20(7), 21(8)).

39. **Sixth**, there are "Admissibility and Discovery Provisions" which provide that documents and oral testimony connected with a protected matter are not admissible in any proceedings, and no person can be compelled to discover such documents or give such testimony: section 18(5)-(7).

40. **Seventh**, there are "Remedial Provisions". These prevent money being charged to, or paid out of, the Consolidated Account, or assets being taken to satisfy any liability: sections 17, 25.

41. **Eighth**, there are "Indemnity Provisions", which impose a liability upon Mr Palmer and associated entities to indemnify the State against any amount which may be recovered from the State or the Commonwealth in respect of a disputed or protected matter: sections 14-16, 22-24.

42. **Ninth**, there are provisions (of the kind known as "Henry VIII clauses") which allow the Executive to make subsidiary legislation to perfect the intention of Part 3 and fill in any inadvertent gaps in the operation of the provisions referred to above: sections 30-31.

ISSUE 1 - CH III AND JUDICIAL POWER CONSIDERATIONS

43. The plaintiffs raise Ch III and judicial power considerations in relation to all categories of provision set out above (except the Henry VIII clauses). It is convenient to deal with all challenges to Indemnity Provisions and Henry VIII clauses separately.

44. To deal with the remaining challenges, the submissions below:

(a) set out general principles about Ch III and judicial power;

(b) respond to the general challenges to the Amending Act based upon Ch III and judicial power considerations; and

(c) address the specific challenges based upon Ch III and judicial power in relation to various types of provision, ie Declaratory Provisions, the No Offence Provision, No

Liability Provisions, Administrative Law Provisions, No Proceeding Provisions, Admissibility and Discovery Provisions and Remedial Provisions.

Usurpation / Institutional Integrity - Federal and State Courts

45. The plaintiffs refer to a distinction between legislative provisions which usurp judicial power and those which compromise or impair the institutional integrity of a court. Usurpation occurs when the legislature has exercised judicial power on its own behalf, while the institutional integrity of a court may be impaired by legislative provisions which interfere with, and direct the outcome of the exercise of, judicial power by the court: ***Nicholas v The Queen*** [1998] HCA 9; (1998) 193 CLR 173, [112] (McHugh J). See also ***Polyukhovich v The Commonwealth*** (1991) 172 CLR 501, 608 (Deane J).

Federal Courts

46. The Commonwealth Parliament only has legislative power to vest federal jurisdiction in Ch III courts in accordance with sections 76 and 77 of the *Constitution*, and to regulate the exercise of federal jurisdiction by reason of the incidental power contained in section 51(xxxix) of the *Constitution*: ***Re Wakim; Ex parte McNally*** [1999] HCA 27; (1999) 198 CLR 511, [23]-[24] (Gleeson CJ), [52] (McHugh J), [111], [118]-[119] (Gummow and Hayne JJ); ***Rizeq v Western Australia*** [2017] HCA 23; (2017) 262 CLR 1, [59] (Bell, Gageler, Keane, Nettle and Gordon JJ); ***Falzon v Minister for Immigration*** [2018] HCA 2; (2018) 262 CLR 333, [80] (Gageler and Gordon JJ).

47. The Commonwealth Parliament has no other legislative power in respect of federal jurisdiction: ***Re Wakim***, [57] (McHugh J), [111] (Gummow and Hayne JJ); ***Rizeq***, [59] (Bell, Gageler, Keane, Nettle and Gordon JJ); ***Falzon***, [80] (Gageler and Gordon JJ).

48. The critical reason why a usurpation of judicial power by the Commonwealth Parliament is unconstitutional is because the *Constitution* vests federal judicial power solely in Ch III courts. The judicial power of the Commonwealth is to be exercised by courts constituted or invested with jurisdiction under Ch III and not otherwise: ***Leeth v The Commonwealth*** (1992) 174 CLR 455, 469 (Mason CJ, Dawson and McHugh JJ). See also ***Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*** (1996) 189 CLR 1, 11-12 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

49. This separation of powers means that Commonwealth legislation also cannot impair the institutional integrity of a federal court by interfering with the exercise of federal judicial power.

50. One example of permissible regulation of judicial power by the Commonwealth Parliament is the use of evidentiary provisions which reverse the onus of proof. In ***Williamson v Ah On***

(1926) 39 CLR 95 at 122, Higgins J said that the argument, that it is a usurpation of the judicial power of the Commonwealth for Parliament to prescribe what evidence may or may not be used in legal proceedings as to offences created or provisions made by Parliament under its legitimate powers, was destitute of foundation. In ***The Commonwealth v Melbourne Harbour Trust Commissioners*** (1922) 31 CLR 1 at 12, Knox CJ, Gavan Duffy and Starke JJ said that a law does not usurp judicial power because it regulates the method or burden of proving facts. These sentiments have been re-iterated in subsequent cases such as ***Sorby v The Commonwealth*** (1983) 152 CLR 281, 298-299 (Gibbs CJ); ***Nicholas v The Queen***, [24] (Brennan CJ); and ***CEO of Customs v Labrador Liquor Wholesale Pty Ltd*** [2003] HCA 49; (2003) 216 CLR 161.

State Courts

51. States have no legislative power to add to or detract from, or to regulate or to govern, federal jurisdiction due to the exclusory operation of Ch III of the *Constitution*: ***Rizeq***, [60]-[61], [84], [89] (Bell, Gageler, Keane, Nettle and Gordon JJ).

52. No strict doctrine of separation of powers applies to State legislatures in relation to State courts. See ***South Australia v Totani*** [2010] HCA 39; (2010) 242 CLR 1 [2010] HCA 39, [66] (French CJ), ***Condon v Pompano Pty Ltd*** [2013] HCA 7; (2013) 252 CLR 38, [22] (French CJ); and regarding the WA Parliament (***S (a child) v R*** (1995) 12 WAR 392; ***Nicholas v Western Australia*** [1972] WAR 168. There can be no direct and immediate application of what has been said in the context of federal courts about the usurpation of judicial power: ***Kuczborski v Queensland*** [2014] HCA 46; (2014) 254 CLR 51, [104] (Hayne J). See also ***Minister for Home Affairs v Benbrika*** [2021] HCA 4; (2021) 95 ALJR 166, [82] (Gageler J), [137] (Gordon J).

53. The ability of a State Parliament to exercise judicial power (subject to not impairing the institutional integrity of a court) was acknowledged in ***Kable v DPP (NSW)*** (1996) 189 CLR 51, 65 (Brennan CJ), 77-78 (Dawson J), 93-94 (Toohey J), 109 (McHugh J). What was regarded as an ad hominem legislative direction to a State court, an exercise of judicial power, was held to be effective in the "***NSW BLF Case***" (***Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations*** (1986) 7 NSWLR 372).

54. The plaintiffs attempt to rely upon ***Kirk v Industrial Court of NSW*** [2010] HCA 1; (2010) 239 CLR 531 to say that there is a constitutional implication to the effect that a State Parliament cannot exercise judicial power: plaintiffs' submissions ("**PS**") [64]. However, such an implication is inconsistent with authority that there is no strict separation of powers at the State level. Additionally, the ***Kirk*** principle is concerned with the integrated court system and

ensuring jurisdictional error is not beyond judicial review. The case was not concerned with exercises of judicial power by State legislatures. Any limits on State legislative power are enforced by judicial review of State legislation for constitutional validity.

55. Nevertheless, State legislation cannot impair the institutional integrity of a State court in a way which makes it unsuitable to exercise federal judicial power. That is the basis of the four decisions of this Court striking down legislation in ***Kable***, ***International Finance Trust Co Ltd v NSW Crime Commission*** [2009] HCA 49; (2009) 240 CLR 319, ***Totani*** and ***Wainohu v New South Wales*** [2011] HCA 24; (2011) 243 CLR 181.

56. The ***Kable*** principle has been stated in terms which do not refer to usurpation expressly. The principle has recently been described by French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ as follows: "The principle for which *Kable* stands is that because the *Constitution* establishes an integrated court system, and contemplates the exercise of federal jurisdiction by State Supreme Courts, State legislation which purports to confer upon such a 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": ***Attorney-General (NT) v Emmerson*** [2014] HCA 13; (2014) 253 CLR 393, [40]. See also the statement of principle in ***Australia Education Union v Fair Work Australia*** [2012] HCA 19; (2012) 246 CLR 117, [48] (French CJ, Crennan and Kiefel JJ) ("***AEU***"); ***Benbrika***, [158] (Gordon J).

57. It is not possible to state exhaustively what features of legislation may be regarded as impermissibly impairing a court's institutional integrity: eg ***Forge v ASIC*** [2006] HCA 44; (2006) 228 CLR 45, [63]-[64] (Gummow, Hayne and Crennan JJ). It is a matter of examining the substantive effect of the totality of the legislation in each particular case: eg ***Kuczborski***, [106] (Hayne J); ***Condon***, [137] (Hayne, Crennan, Kiefel and Bell JJ).

58. If State legislation had been a Commonwealth law, and it would not have been contrary to Ch III, then the *Kable* Principle will certainly not invalidate it: ***Bachrach***, [14] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); ***Duncan v Independent Commission Against Corruption*** [2015] HCA 32; (2015) 256 CLR 83, [17]-[18] (French CJ, Kiefel, Bell and Keane JJ); ***Benbrika***, [82] (Gageler J), [158] (Gordon J).

Application of State Legislation in Federal Jurisdiction and to other States

59. (a) A State Parliament has no power to govern or regulate the exercise of federal jurisdiction, for example by laws relating to procedure, evidence and the competency of witnesses. Consequently, section 79(1) of the *Judiciary Act* provides that the laws of the State governing the exercise of State jurisdiction are binding on all courts exercising federal jurisdiction in that State. That is subject to it being otherwise provided for by the

Constitution or a federal law. Section 79 thus fills the "gap in the law governing the exercise of federal jurisdiction which exists absent other applicable Commonwealth law by reason of the absence of State legislative power to govern what a court does in the exercise of federal jurisdiction": ***Rizeq***, [90] (Bell, Gageler, Keane, Nettle and Gordon JJ).

(b) Section 79 of the *Judiciary Act* will have no operation in respect of a State law which declares the rights and liabilities of the State and a party, as opposed to a State law which purports to regulate or govern the exercise of jurisdiction.

(c) Section 64 of the *Judiciary Act* provides that in any suit to which the Commonwealth or a State is a party, the rights of the parties shall (as nearly as possible) be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject.

(d) Section 64 will not operate:

(i) if the nature of the suit between a party and the Commonwealth or State is not of a type which could exist between a subject and subject, such as judicial review proceedings or where (as here) there is a State Agreement, which could never be the subject of an agreement between two subjects. Compare ***The Commonwealth v Western Australia (The Mining Act Case)*** [1999] HCA 5; (1999) 196 CLR 392, [248] (Hayne J); or

(ii) if there is some principle of public law which means that the rights of a party as against the Commonwealth or State cannot be the same as nearly as possible as between a subject and subject, such as a principle designed to protect State finances (***Auckland Harbour Board v The King*** [1924] AC 318, 326-327), or the existence of the State as contemplated by the *Constitution*: ***Melbourne Corporation v The Commonwealth*** (1947) 74 CLR 31.

(e) This construction of section 64 is consistent with the legislative power of the Commonwealth in respect of States. The Commonwealth Parliament has no power, express or implied, to impose liabilities or confer rights on persons who are parties to a justiciable controversy merely because the adjudication of that controversy is or has come within the purview of Ch III: ***Rizeq,*** [46] (Bell, Gageler, Keane, Nettle and Gordon JJ).

(f) The Act in the present case is peculiarly about the rights and liabilities of the State, the plaintiffs and the Co-Proponents (and other related parties), and gives effect to a State Agreement on the same topic. The Act contains provisions to protect the State from a very large financial claim. It concerns the development of public land for the public

good. It is a combined contractual and legislative regime, which is designed to disapply general statutes (eg environmental and mining regulatory schemes) to fast-track major projects: see generally ***OZ Minerals***, [180]-[181] (Buss JA, Newnes and Murphy JJA agreeing); Warnick, 'State Agreements' (1988) 62 *Australian Law Journal* 878. As a primary planning and implementation instrument, the matters which are the subject of the Act could never be litigated between subject and subject. Consequently, section 64 of the *Judiciary Act* will not operate as a federal law inconsistent with the Act, which may prevent section 79 applying the Act in federal jurisdiction.

60. Where both a State and the Commonwealth have legislative power in respect of a subject matter and enact laws, inconsistencies are resolved by section 109 of the *Constitution*. If there is no inconsistency between an applicable State law and a federal law, the State law will be applied by any State or federal court determining a dispute as and to the extent that the dispute is governed by such a law, according to choice of law principles.

61. The test of inconsistency between State laws (which may be made binding by section 79 of the *Judiciary Act*) and applicable federal law is substantially the same as the test of inconsistency between a State and federal law for the purposes of section 109 of the *Constitution*: ***Masson v Parsons*** [2019] HCA 21; (2019) 266 CLR 554, [43] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ). However, where a State law is inconsistent with a federal law for the purposes of section 79, the result is that the State law will not be picked up and applied by a court exercising federal jurisdiction; the State law will continue to apply to courts not exercising federal jurisdiction: see ***Masson***, [42] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ). On the other hand, where a State law is inconsistent with a federal law for the purposes of section 109, the State law does not operate at all to the extent of the inconsistency.

62. Where two State laws (both being within the power of each State's Parliament) apply to the same subject matter, there may be a need to determine the proper law which is applicable. Once the proper law is determined, any State or federal court must apply the proper law, so determined.

63. In respect of other State courts and federal courts outside WA, the jurisdiction to determine the applicability of provisions which do not declare substantive rights may well depend upon exercising cross-vested jurisdiction under section 11(1) of the uniform *Jurisdiction of Courts (Cross-Vesting) Acts 1987*. The phrase "right of action arising under a written law of another State or Territory" in that provision includes an action in which the defence (against a common law liability or obligation) depends upon the operation of a written law of Western Australia which provides an alleged immunity: ***David Syme & Co Ltd v Grey*** (1992) 38 FCR

303, 316 (Gummow J), applying comments about whether a matter arises under federal law in ***LNC Industries Ltd v BMW (Australia) Ltd*** (1983) 151 CLR 575, 581 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ).

General Challenges to Amending Act

64. **Ad Hominem Nature of Legislation Irrelevant** - The ad hominem nature of the provisions is irrelevant in the context of this particular legislation, which was always limited to the rights and liabilities of the parties to the State Agreement. While there may be some circumstances in which the party-specific nature of legislation can indicate a tendency to interfere with the exercise of judicial power, legislation can be specific to particular individuals or corporations: ***Minogue v Victoria*** [2019] HCA 31; (2019) 93 ALJR 1031, [23] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ); ***Knight v Victoria*** [2017] HCA 29; (2017) 261 CLR 306, [26] (the Court); "***Commonwealth BLF Case***" (***Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth*** (1986) 161 CLR 88). Party-specific legislation has been considered and upheld on a number of occasions, including in respect of declared rights and liabilities: ***Commonwealth BLF Case***; ***Bachrach***.

65. **The *Kirk* Principle Does Not Apply** - There is no basis for the submission that somehow the ***Kirk*** principle (as extended by the plaintiffs) has been contravened: PS [62]-[65]. The plaintiffs say that there is a constitutional implication to the effect that a State Parliament cannot exercise judicial power: PS [64]. As to this see [54] above.

66. In any event, a legislature does not exercise or interfere with judicial power by declaring rights and liabilities not to exist. Such a declaration operates prior to any question of whether a breach of those rights and liabilities has occurred. There has never been any difficulty, for Ch III purposes, with Commonwealth legislation declaring the non-existence of relevant rights and liabilities. This is what validly occurred in ***AEU***, [48]-[49] (French CJ, Crennan and Kiefel JJ), [78] (Gummow, Hayne and Bell JJ); ***Commonwealth BLF Case***, 96 (the Court); ***Nelungaloo Pty Ltd v The Commonwealth*** (1948) 75 CLR 495, 579-580 (Dixon J); ***R v Humby; Ex parte Rooney*** (1973) 129 CLR 231, 250 (Mason J).

67. **No Inalienable Judicial Function to Determine Breach of Contract Cases Without a Change in the Law** - The plaintiffs contend that it is an exclusive and inalienable judicial function to determine actions for breach of contract and for civil wrongs: PS [68], referencing ***Bachrach***, [15]. However, ***Bachrach*** manifestly does not say that the legislature cannot define the rights of the parties that are to be determined in a pending trial of an action for breach of contract. Further, many arbitrations determine the existence of contractual breaches, which does not contravene any principle that courts have the exclusive and inalienable function of determining such cases by the exercise of judicial power.

68. The plaintiffs' challenges to specific provisions of the Amending Act are addressed below.

Declaratory Provisions (sections 8(2)-(3), 9, 10, 18(1)-(3), 27)

69. The Act declares that, subject to Part 3, the State Agreement "continues to operate in accordance with its provisions and as provided for under Part 2": section 8(2). Section 8(3) provides that the State Agreement "is taken not to have been, and never to have been, repudiated by any conduct of the State, or a State agent, occurring or arising on or before commencement" of the Amending Act.

70. The Act declares that neither the first nor the second Balmoral South proposal "has, nor can have, any contractual or other legal effect under the Agreement or otherwise": section 9(1).

71. The Act further provides that:

(a) only proposals submitted after the commencement of the Amending Act can be proposals for the purposes of the State Agreement: section 9(2)(a); and

(b) the State "has, and can have, no liability, and is taken never to have had any liability, to any person to pay damages, compensation or any other type of amount connected with" considering or not considering a proposal, if this occurs after the Amending Act is introduced into Parliament: section 27.

72. In relation to each arbitration and arbitral award, which are only binding as a result of the contractual agreements made by the parties, the Act declares that:

(a) each of the First and Second Awards "is of no effect and is taken never to have had any effect": section 10(4), (6);

(b) the arbitration agreement applicable to each arbitration "is not valid, and is taken never to have been valid, to the extent that, apart from this subsection, the arbitration agreement would underpin, confer jurisdiction to make, authorise or otherwise allow the making of the arbitral award": section 10(5), (7);

(c) any relevant arbitration that is in progress, or otherwise not completed, immediately before commencement of the Amending Act is terminated: section 10(1); and

(d) any arbitration agreement applicable to that relevant arbitration is terminated: section 10(2).

73. Section 18(1) expressly provides that a "protected matter" shall not have certain legal effects. These generally relate to effects upon an "arrangement", which is defined widely in section 7(1) but includes the State Agreement, a relevant arbitration arrangement, a relevant mediation arrangement, any other contract, deed, agreement or other instrument or an understanding.

74. The effects which section 18(1) states that a "protected matter" shall not have are the following: causing or giving rise to the commission of a civil wrong by the State; placing the State in breach of an arrangement or causing or giving rise to the repudiation of an arrangement by the State; giving rise to a right or remedy against the State that is a right or remedy of a party to an arrangement, or of any other person connected with an arrangement; causing or permitting the termination of an arrangement; causing or permitting the exercise of rights of a party to an arrangement (other than the rights of the State); being, or causing or giving rise to, any event of default under an arrangement; causing an arrangement to be void or otherwise unenforceable; or releasing, or allowing the release of, any person (other than the State) who is a surety, or other obligee, under an arrangement from the whole or a part of an obligation of the arrangement. Section 18(2) gives section 18(1) retrospective operation.

The Plaintiffs' Arguments

75. The plaintiffs' submissions contend that various of the Declaratory Provisions are contrary to Ch III as:

(a) generally, they give effect to a fiction: PS [13], [16];

(b) sections 8-11 dictate the answer "to quintessentially judicial questions": PS [56];

(c) sections 8(3), 9(1), 10(4)-(7) quell a controversy and prevent future judicial determination of past civil liability: PS [67] (fn 57), [68].

Submissions

76. A provision which declares the legal effect of certain matters or things is, in terms of its constitutional character, materially the same as the following legislation which has been held valid:

(a) legislation which declared the legal effect of an executive order and the authorising regulation whatever the true legal position (section 11 of the *Wheat Industry Stabilization Act (No 2) 1946* (Cth) considered in ***Nelungaloo***);

(b) legislation which declared the force and effect of a proceeding, matter, decree, act or thing purportedly made or done under the *Matrimonial Causes Act 1959* (Cth) which it was accepted was made or done without jurisdiction (section 5 of the *Matrimonial Causes Act 1971* (Cth) considered in ***Humby***);

(c) legislation which declared the cancellation of the registration of a particular organisation (section 3 of the *Builders Labourers' Federation (Cancellation of Registration) Act 1986* (Cth) considered in the ***Commonwealth BLF Case***);

(d) legislation which declared the zoning of particular land, and the effects of such zoning, (*Local Government (Morayfield Shopping Centre Zoning) Act 1996* (Qld)

considered in ***Bachrach***);

(e) legislation which declared the validity of registration for organisations which had not complied with certain rules (section 26A of the *Fair Work (Registered Organisations) Act 2009* (Cth) considered in ***AEU***); and

(f) legislation which effectively declared certain past conduct to be "corrupt conduct" (sections 34 and 35 of the *Independent Commission Against Corruption Amendment (Validation) Act 2015* (NSW) considered in ***Duncan v ICAC***).

77. The conceptual reason why a declaration of rights and liabilities of parties in respect of anticipated or pending litigation does not infringe Ch III is because constitutional considerations concern the function of a court, rather than the law which a court is to apply in the exercise of its function: ***Leeth***, 469 (Mason CJ, Dawson and McHugh JJ). Where legislation declares rights and liabilities, "new norms of conduct are created by the legislature anterior to the performance of the judicial function": ***Kuczborski***, [225] (Crennan, Kiefel, Gageler and Keane JJ). See also ***Deputy Commissioner of Taxation v Richard Walter Pty Ltd*** (1995) 183 CLR 168, 184-185 (Mason CJ).

78. The legislative declaration of rights and liabilities does not affect the function of a court, but specifies the rights and liabilities which the court is to apply in the exercise of its function. Harsh outcomes, even disproportionately harsh outcomes, do not demonstrate constitutional invalidity: ***Kuczborski***, [217] (Crennan, Kiefel, Gageler and Keane JJ).

79. Legislation can declare rights and liabilities to be applied by a court based upon any trigger or factum. As Gageler J said in ***Duncan v ICAC***, at [42], citing ***Baker v The Queen*** [2004] HCA 45; (2004) 223 CLR 513, [43]: "There is no novelty in the proposition that 'in general, a legislature can select whatever factum it wishes as the 'trigger' of a particular legislative consequence'". As ***Humby*** illustrates, this may include court orders made without jurisdiction and with no legal effect. It is of no constitutional significance to assert that the matters declared by legislation are a "fiction" as compared with the status quo ante.

80. In ***City of Collingwood v Victoria (No 2)*** [1994] 1 VR 652, 664, 666-667, the Victorian Court of Appeal (Brooking J, Southwell and Teague JJ agreeing) considered that an Act which extinguished, created or varied contractual rights contained in a lease agreement declared the substantive law and did not interfere with judicial process itself, even when measured by reference to a strict separation of powers.

No Offence Provision (section 20(8))

81. There is a declaration that any conduct of the State "that is, or is connected with, a protected matter" does not constitute an offence and is taken never to have constituted an offence:

section 20(8). This provision is not specifically addressed in the plaintiffs' submissions in B54 of 2020 in relation to Ch III considerations. In B52 of 2020, Mr Palmer asserts that this provision must be an exercise of judicial power: PS [45] (B52/2020).

82. It is well established that Parliament can change the law, including the criminal law, retrospectively so as to attach different legal consequences to past acts, provided it does not impermissibly interfere with the judicial process for applying the altered law. See ***Polyukhovich***, 536 (Mason CJ), 643-644 (Dawson J), 689 (Toohey J), 717, 721 (McHugh J); ***R v Kidman*** (1915) 20 CLR 425. The situation in ***Polyukhovich*** was in fact opposite to, and more egregious, than the present case. There, conduct which was not an offence against Australian law when it occurred was changed, by legislation, so that it carried the consequences of becoming an offence.

No Liability Provisions (sections 11(1)-(2), (8), 19(1)-(2))

83. By section 11(1)-(2), the Act declares that the State has, and can have, no liability ("**State Liability**") to any person, which is or would be:

(a) in respect of any loss, or any matter or thing, that is the subject of a claim, order, finding or declaration made against the State in a relevant arbitration;

(b) in respect of any other loss, or other matter or thing, that is, or is connected with, a disputed matter (whether the loss, or other matter or thing, occurs or arises before, on or after commencement); or

(c) in any other way connected with a disputed matter;

and that any such liability existing prior to commencement of the Amending Act is extinguished. Section 11(8) deals specifically with State Liability for legal costs connected with a relevant arbitration.

84. Section 19(1)-(2) is similar to section 11(1)-(2), but concerns a protected matter, rather than a disputed matter. Further, the State Liability referred to in section 19(1) is defined in narrower terms compared to section 11(1), and does not relate to a liability in a relevant arbitration. The liabilities in this provision are liabilities to a person that are or would be:

(a) in respect of any loss, or other matter or thing, that is, or is connected with, a protected matter; or

(b) in any other way connected with a protected matter.

Plaintiffs' Arguments

85. The plaintiffs' submissions contend that various of the No Liability Provisions are contrary to Ch III as:

(a) sections 8-11 "dictate the answer to quintessentially judicial questions": PS [56];

(b) sections 11(1)-(2) and 19(1)-(2) quell a dispute by determining the existence of accrued rights or liabilities: PS [67] (fn 57, 58), see also [68].

Submissions

86. The No Liability Provisions are constitutionally valid for the same reasons as the Declaratory Provisions. The No Liability Provisions declare the legal consequences which follow from a claim, order, finding or declaration made against the State in a relevant arbitration, or any loss, matter or thing connected with the existence of a "disputed matter".

87. The factum which triggers the operation of these provisions is the existence of:

(a) a claim, order, finding or declaration made against the State in a relevant arbitration; or

(b) any loss, matter or thing connected with the existence of a "disputed matter" or "protected matter".

88. The legal consequence which is declared if any of these trigger points exists is that the State has no liability in respect of the underlying claim. Most of the trigger points (such as the making of a claim or the existence of a loss caused by a disputed or protected matter) do not involve any determination of the existence of any liability.

89. However, even in respect of those triggers which are an "order, finding or declaration" made in a relevant arbitration, there is no impermissible interference with judicial power. In ***AEU***, French CJ, Crennan and Kiefel JJ said at [53] that there is no impermissible interference with judicial power "if Parliament enacts legislation which attaches new legal consequences to an act or event which the court has held, on the previous state of the law, not to attract such consequences." That is what occurred in ***Humby***. The principle applies *a fortiori* to an act or event determined contractually by an arbitrator. See also ***Residual Assco Group Ltd v Spalvins*** [2000] HCA 33; (2000) 202 CLR 629, [21] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); ***Re Macks; ex parte Saint*** [2000] HCA 62; (2000) 204 CLR 158, [25] (Gleeson CJ).

90. It is therefore not correct to submit that the no liability provisions are essentially legislative exercises of judicial power which dictate the answer to quintessentially judicial questions or determine the existence of accrued rights and liabilities. The No Liability Provisions are orthodox applications of the High Court cases referred to above, such as ***Nelungaloo***, ***Humby***, the ***Commonwealth BLF Case***, ***AEU*** and ***Bachrach***.

Administrative Law Provisions (sections 12(1)-(2), 13(1)-(3), 20(1)-(2), 21(1)-(3), 26(6))

91. The contractual setting of the State Agreement means that it is not easy to contemplate how

"any conduct of the State" might be appealed against, reviewed, challenged, quashed, called into question or the subject of remedies such as an injunction, declaration, prohibition, mandamus or certiorari. However, if this occurs, sections 12(1) and 20(1), when read with section 26(6), exclude "any conduct of the State" connected with a disputed matter or protected matter from review except for jurisdictional error.

92. The reference to "any conduct of the State" means that the provisions do not operate in respect of an appeal from an arbitral determination or like appeal. Such an appeal would be governed by the legislative declarations in section 11.

93. By sections 12(2) and 20(2), the rules of natural justice are declared not to apply to, or in relation to, any conduct of the State that is, or is connected with, a disputed matter or protected matter, subject to section 26(6).

94. Sections 13(1)-(3) and 21(1)-(3) disapply the *Freedom of Information Act 1992* (WA), so that it cannot be used to obtain documents from the State connected with a disputed matter or protected matter.

Plaintiffs' Arguments

95. The plaintiffs' submissions contend that various of the Administrative Law Provisions are contrary to Ch III as:

(a) section 12(1) (together with sections 12(4) and 17(5)) requires courts to implement government policy without following ordinary judicial process: PS [58];

(b) section 12 precludes the future determination by a court of past civil liability: PS [67] (fn 57);

(c) sections 12(1) and 20(1) direct courts as to the manner and exercise of federal jurisdiction and/or purport to limit or impair that jurisdiction, cannot apply of their own force and (by reason of section 64 of the *Judiciary Act* or Ch III of the *Constitution*) cannot be picked up by section 79 of the *Judiciary Act*: PS [118] (fn 123 and 124, by reference to Third Further Amended Statement of Claim ("**3FASOC**") [64]), PS [122], [124].

Submissions

96. Properly construed, sections 12(1) and 20(1) only apply to conduct of the State connected with a disputed matter or protected matter. That is, broadly speaking, conduct of the State connected with considering the first and second Balmoral South proposals, and in enacting the Amending Act, may not be subject to appeal or review, save where jurisdictional error is established. As well, it is no basis to challenge conduct of the State making decisions in relation to the first and second Balmoral South proposals, and in enacting the Amending Act, to say that the plaintiffs were not accorded natural justice or procedural fairness. This may be

significant, as the plaintiffs were not consulted about the terms of Part 3.

97. Privative clauses which bar review except in the case of jurisdictional error are valid, and have been well-accepted: ***Kirk***. Provisions which disapply the rules of procedural fairness are also valid and, provided they are sufficiently clear, effective: ***Saeed v Minister for Immigration and Citizenship*** [2010] HCA 23; (2010) 241 CLR 252, [14] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

98. In response to the particular arguments raised by the plaintiffs:

(a) the effect of sections 12(1) and 20(1) is to make conduct of the State connected with considering the first and second Balmoral South proposals and in enacting the Amending Act unreviewable, save as to where jurisdictional error is established. That is consistent with the express legislative policy of Part 3 that the State has no liability for these matters;

(b) the effect of the No Liability Provisions is to remove any past civil liability. The Administrative Law Provisions are consistent with that legislative policy, and their operation must be regarded in the context of the No Liability Provisions;

(c) the Administrative Law Provisions are within the legislative power of the State Parliament, as they concern matters connected with the peace, order and good government of WA, are not contrary to Ch III of the *Constitution* (for reasons which have been elaborated), and there is no suggestion of any other inconsistent State or federal law. They will apply as the proper law to resolution of any dispute. Section 64 of the *Judiciary Act* is irrelevant to proceedings for judicial review, as there is no prospect of an equivalent suit between subject and subject. As well, section 64 does not subject parties to a suit to new rights and obligations: ***Rizeq***, [46]. The Administrative Law Provisions are declaratory of rights and obligations: generally see [59] above.

No Proceeding Provisions (sections 11(3)-(7), 12(4)-(7), 13(4)-(8), 19(3)-(7), 20(4)-(7), 21(4)-(8))

99. Section 11(3)(a) provides that no proceedings can be brought after commencement of the Amending Act for the purpose of establishing, quantifying or enforcing a State Liability which does not exist or has been extinguished by section 11(1). Section 11(3)(b) provides that no proceedings can otherwise be brought post-commencement in respect of any matter connected with a State Liability (which does not exist by reason of section 11(1)). These provisions may be collectively described as "**Post-Commencement Provisions**".

100. The scope of section 11(3) should be construed as aligning with the operation of section 11(1). That is, section 11(3) is a provision which prevents proceedings which are for the purpose of

establishing, quantifying or enforcing a liability of the type described in section 11(1) (subsection (a)); or otherwise in respect of such a liability (subsection (b)). This construction is evident from the fact that subsections (1) and (3) are in the same provision, but one relates to substantive matters while the other relates to proceedings in respect of substantive matters. As well, subsection (3)(a) directly refers to subsection (1), and subsection 3(b)(i)-(iii) directly corresponds to the elements of subsection (1)(a)-(c). This is for obvious grammatical drafting reasons, as the introductory words of section 11(3)(b)(iii) differ from the introductory words of section 11(3)(b)(i)-(ii).

101. Section 11(4) terminates any incomplete proceedings in respect of a non-existent State Liability ("**Incomplete Proceeding Provision**"). Section 11(5)-(6) extinguishes any relief granted in proceedings connected with a State Liability which were commenced after the Bill for the Amending Act was introduced, but completed before the end of the day on which the Bill was passed ("**Interim Proceeding Provision**"). The State is not liable for the legal costs of any such proceedings in respect of a non-existent State Liability: section 11(7) ("**No Costs Provision**").

102. Importantly, in the case of both section 11(3) and 11(4) (and other equivalent provisions in the Act), the court retains the role of construing those provisions, determining whether a particular proceeding falls within them, and, if so, making appropriate orders (which may be either to dismiss or permanently stay the proceeding). The court is not instructed to reach any view on those questions and goes about construing and applying those provisions in accordance with ordinary judicial process.

103. Having declared the non-existence of rights in respect of the "disputed matters" connected with the first (and second) Balmoral South proposal, the Act provides that there can be no proceedings to review any conduct of the State connected with these disputed matters, and any proceedings to do so are terminated: section 12(4)-(7). Section 13(4)-(8) prevents proceedings to obtain documents in respect of these disputed matters. These sections both contain provisions which may be described as Post-Commencement Provisions (section 13(4)), Incomplete Proceeding Provisions (sections 12(4), 13(5)), Interim Proceeding Provisions (sections 12(5)-(6), 13(6)-(7)) and No Costs Provisions (sections 12(7), 13(8)).

104. The constitutional validity of the Interim Proceeding Provisions does not arise for consideration, as the plaintiffs have not identified any proceedings within the scope of these sections, and none can now arise. Further, there are no incomplete proceedings or interim proceedings in respect of the operation of section 13 or 21, with the consequence that the constitutional validity of section 13(5)-(8) and section 21(5)-(8) will never arise.

105. The scheme of sections 19-21 in relation to "protected matters" largely runs parallel to

sections 11-13 referred to above in respect of "disputed matters", save for the narrower concept of what constitutes a State Liability in section 19.

Plaintiffs' Arguments

106. The plaintiffs' submissions argue that the No Proceeding Provisions are constitutionally invalid for the following reasons related to Ch III and judicial power:

(a) section 12(4) requires courts to implement government policy without following ordinary judicial process: PS [58];

(b) the following provisions direct courts as to the manner and exercise of their jurisdiction and/or limit or impair that jurisdiction, cannot apply of their own force in federal jurisdiction and (by reason of section 64 of the *Judiciary Act* or Ch III of the *Constitution*) cannot be picked up by section 79 of the *Judiciary Act*: PS [118] (fn 123 and 124, by reference to 3FASOC [61], [63], [65]), PS [122], [124]:

(i) Interim Proceeding Provisions: sections 11(5)-(6), 12(5)-(6), 13(6)-(7), 19(5)-(6), 20(5)-(6), 21(6)-(7). See 3FASOC [61];

(ii) No Costs Provisions: sections 11(7), 12(7), 13(8), 19(7), 20(7), 21(8). See 3FASOC [63];

(iii) Post-Commencement and Incomplete Proceeding Provisions: sections 11(3)-(4), 12(4), 13(4)-(5), 19(3)-(4), 20(4), 21(4)-(5). See 3FASOC [59], [60], [65] (see also PS [27]);

(c) in their application to courts of other States and Territories, sections 11(3)-(4), 12(4), 19(3)-(4) and 20(4), and also sections 13 and 21, are invalid: PS [82], [85], [86]; see also PS [27]. This is due to sections 106 and 109 of the *Constitution* and the principle in ***Melbourne Corporation***. This argument is addressed at [159]-[161] below.

Submissions

107. The No Proceeding Provisions are secondary or derivative, in that they prevent proceedings being brought or maintained. The Declaratory Provisions and the No Liability Provisions operate to remove the primary rights, which would otherwise be litigated in the proceedings. The No Proceeding Provisions prevent an abuse of the court's processes, which would occur by plaintiffs bringing proceedings to litigate non-existent rights and liabilities.

108. There is no case in which the Commonwealth or a State legislature has declared the non-existence of primary rights and liabilities, and then also proceeded to prohibit, or declare the termination of, proceedings to litigate those rights or the extinguishment of any remedies granted. However, there is no difficulty in constitutional principle in so doing. In ***Werrin v The Commonwealth*** (1938) 59 CLR 150 at 165, Dixon J said: "There is, I think, no constitutional provision preventing the Parliament from extinguishing a cause of action

against the Commonwealth, unless implications be discovered in sec 75 which do so." In that case, the majority held that the Commonwealth legislation validly extinguished a cause of action against the Commonwealth to recover a refund of sales tax.

109. As a matter of principle, the No Proceeding Provisions declare that the secondary enforcement rights of a party to bring proceedings do not exist. This is a further, express declaration of a legal consequence related to the valid declarations of legal consequence contained in the Declaratory Provisions, the No Liability Provisions and the Administrative Law Provisions. Thus the No Proceeding Provisions are valid according to the principles in cases such as ***Nelungaloo***, ***Humby***, the ***Commonwealth BLF Case***, ***AEU*** and ***Bachrach***.

110. Further, where primary rights have been declared not to exist by force of legislation, it ought to be open to the legislature to bring additional finality to matters by also preventing proceedings to enforce those rights. Where primary rights and liabilities are declared not to exist by legislation:

(a) a declaration about the non-existence of secondary enforcement rights expressly provides for what is otherwise necessarily implied, that is the primary rights cannot be litigated;

(b) the No Proceeding Provisions prevent an abuse of the court's processes by preventing proceedings which litigate non-existent primary rights. Other legislative provisions exist to prevent abuses of court processes, for example vexatious litigants are prevented by legislation from accessing the court (*Federal Court of Australia Act 1976* (Cth) section 37AQ; *Vexatious Proceedings Restriction Act 2002* (WA) sections 5, 8), there are provisions about the use which may be made of discovered material (*Uniform Civil Procedure Rules 2005* (NSW) rule 21.7) and provisions which concern the issue of subpoenas for a proper forensic purpose (*Uniform Civil Procedure Rules 2005* (NSW) rule 21.10);

(c) the basis for the pre-existing claim is removed and there is no longer scope for any dispute between the parties based on that claim;

(d) a declaration of the non-existence of secondary rights does not represent any direction to a court about how to exercise its jurisdiction to determine the nominal dispute concerning the primary rights;

(e) there can be no suggestion that there has been any attempt to enlist the judiciary to give its imprimatur to the prevention or termination of the plaintiffs' actions. These actions concern rights declared by the legislature not to exist in any event; and

(f) any ongoing dispute between the parties would necessarily be governed by the law as declared by the legislation (including the legislative declaration as to the status

of particular proceedings). To the extent that any such disputes are agitated, the courts retain a role to quell such disputes, including to dismiss or permanently stay proceedings of the relevant kind where they are found to be precluded or terminated by force of these provisions. In other words, if the No Proceeding Provisions apply to a claim (properly construed) the claim is of no legal effect. However, a court must still make an order giving effect to its determination that the No Proceeding Provisions apply. This may be by way of dismissal, permanent stay or some other form of declaratory relief.

111. The plaintiffs' argument that the No Proceeding Provisions direct courts as to the manner and exercise of their jurisdiction, and/or limit or impair that jurisdiction, should be rejected. They declare a legal consequence of removing the primary rights, by the Declaratory Provisions, No Liability Provisions and Administrative Law Provisions.

112. The contention that the No Proceeding Provisions require a court to implement government policy goes no further than that a court is obliged to apply a legislative standard enacted by a Parliament. This is not a ground of constitutional invalidity. It goes no further than the same argument in respect of the Administrative Law Provision contained in section 12(1). As submitted above, the court will be required to construe and apply the No Proceedings Provisions in accordance with ordinary judicial process.

113. The No Proceeding Provisions, as declarations of rights and liabilities, should be applied by a court exercising federal jurisdiction and other State courts, as a matter of substantive law. There are no inconsistent federal laws for reasons outlined below in relation to the plaintiffs' inconsistent laws ground (Common Issue 5) and in the defendant's submissions in B52/2020. The operation of sections 64 and 79 of the *Judiciary Act* is irrelevant for these reasons.

114. If that analysis is not accepted, because the No Proceeding Provisions are regarded as directing courts as to the manner and exercise of their jurisdiction and therefore outside the legislative power of the Parliament of WA to regulate federal jurisdiction or another State's jurisdiction, there is a question whether the No Proceeding Provisions should be applied by courts exercising such jurisdiction.

115. In respect of a court exercising federal jurisdiction in WA, this raises the question of the operation of section 79 of the *Judiciary Act*. Even if Ch III of the *Constitution* or a law of the Commonwealth "otherwise provides", due to an inconsistent federal law (contrary to the defendant's submissions on Common Issue 5 and in B52/2020) or because there is an impermissible regulation of jurisdiction (even though the provision simply prevents litigation of a non-existent dispute to stop an abuse of court processes), the result would simply be that the No Proceeding Provisions would not be picked up and applied in a proceeding in federal

jurisdiction. The provisions would not be invalid and would continue to apply to courts exercising WA State jurisdiction.

116. In respect of other State courts and federal courts outside WA, the jurisdiction to determine the applicability of the No Liability Provisions (if raised by the State) may well depend upon exercising cross-vested jurisdiction under section 11(1) of the uniform *Jurisdiction of Courts (Cross-Vesting) Acts 1987* (if the primary claim against the State does not raise federal issues). In these circumstances, the court shall apply the written law of WA: section 11(1)(b).

Admissibility and Discovery Provisions (section 18(5)-(7))

117. Section 18(5)-(7) concerns evidence (oral or documentary) which is "connected with a protected matter". These provisions provide that such evidence is not admissible in certain circumstances and that production of such evidence cannot be compelled.

118. These provisions are confined in their operation to evidence and documents connected with a protected matter, ie connected with the decision to enact and implement the Amending Act or the operation of the Amending Act. They should be regarded as only extending as far as preventing evidence being admitted or compelled to establish civil liability contrary to the No Liability provision in section 19(1); or to establish criminal liability contrary to the No Offence Provision in section 20(8). Section 18(5)-(7) is contained in a provision which prescribes that there shall be no legal effect (ie no civil or criminal liability) for "protected matters".

Plaintiffs' Arguments

119. The plaintiffs' submissions contend that:

(a) section 18(5) requires a court to adopt a procedure that is unfair: PS [57];

(b) section 18(5)-(6) direct courts as to the manner and exercise of their jurisdiction and/or limit or impair that jurisdiction, cannot apply of their own force and cannot (by reason of section 64 of the *Judiciary Act* and Ch III of the *Constitution*) be picked up by section 79: PS [118] (fn 123, by reference to 3FASOC [65]), PS [122], [124].

Submissions

120. The effect of section 18(5) is that certain evidence is inadmissible and cannot be used in a way that is against the interests of the State in respect of a dispute over non-existent rights. As submitted at [50] above, even in respect of Commonwealth legislation it is well established that it is not an impermissible interference with judicial power to prescribe rules of evidence.

121. Insofar as section 18(6)-(7) is concerned, there is nothing unfair in a procedure which prevents

compulsory processes being used to compel production of evidence in aid of a non-existent civil or criminal liability. In fact, it would be unfair to allow the opposite to occur, and to permit evidence to be gathered to prove a liability which does not exist.

122. There is no impermissible interference with, or direction of, a court's jurisdiction, where a legislative provision prevents an abuse of the court's compulsory processes, to stop these being used for a purpose which can never establish any liability to be determined by the court.

123. A legislative provision which prevents abuses of court processes will apply in WA State jurisdiction. It may also be applied by section 79 of the *Judiciary Act* in respect of a court exercising federal jurisdiction in WA. Section 64 does not alter the operation of section 79 of the *Judiciary Act* in applying provisions of bespoke State legislation. There is no analogue between the rights of the parties in a suit between subject and subject where such legislation is concerned.

Remedial Provisions (sections 17 and 25)

124. Sections 17 and 25 prevent the State from meeting any liability of the State connected with a disputed or protected matter by paying money out of the Consolidated Account or by borrowing money; and also provide that no execution is available against any asset, right or entitlement of the State to enforce such a liability.

Plaintiffs' Arguments

125. The plaintiffs' submissions contend that:

(a) section 17(5) requires courts to implement government policy without following ordinary judicial process: PS [58];

(b) section 17(5) cannot apply to courts of other States or Territories: PS [82], [85], [86];

(c) sections 17(4)-(5) and 25(4)-(5) direct courts as to the manner and exercise of federal jurisdiction and/or impair or limit that jurisdiction, cannot apply of their own force and cannot (by reason of section 64 of the *Judiciary Act* or Ch III of the *Constitution*) be picked up by section 79 of the *Judiciary Act*: PS [118] (fn 123 and 124, by reference to 3FASOC [61]), PS [122], [124].

Submissions

126. Leaving aside federal jurisdiction, the State rendered itself amenable to a judgment by legislation (*Crown Suits Act 1947* (WA) section 10), which is a complete code for suing the Crown: ***R v Dalgety and Co Ltd*** (1944) 69 CLR 18, 34 (Latham CJ), 37 (Rich J), 42 (Starke J), 45 (McTiernan J), 49 (Williams J). It may exempt itself from the effects of such legislation by further legislative provisions.

127. In federal jurisdiction, section 64 of the *Judiciary Act* does not overcome or disapply the fundamental constitutional principle laid down in ***Auckland Harbour Board***, 326-327, which prohibits the Executive government from spending public funds except under legislative authority. See ***British American Tobacco v Western Australia*** [2003] HCA 47; (2003) 217 CLR 30, [82]-[83] (McHugh, Gummow and Hayne JJ), [172] (Callinan J agreeing), approving ***Commonwealth v Burns*** [1971] VR 825, 830 (Newton J). Sections 65 and 66 of the *Judiciary Act* prevent execution or attachment, or similar process, being issued by a court against the property or revenues of a State. All that can occur is that the court may issue a certificate to the party who obtains judgment, and the relevant officer of the State "shall satisfy the judgment out of moneys legally available".

128. There are at least two possible and cognate reasons why sections 64-66 of the *Judiciary Act* do not alter the fundamental constitutional principle in ***Auckland Harbour Board***. First, the ***Auckland Harbour Board*** principle is a substantive rule of public law. The intention of section 64 was only to make a State subject to judgment "as nearly as possible" as in a suit between subjects. However, that did not amount to an intention to alter substantive rules of public law designed to protect the States or the Commonwealth, particularly financial provisions which in constitutional theory must be subject to parliamentary control: ***South Australia v The Commonwealth*** (1962) 108 CLR 130, 140 (Dixon CJ). Put another way, in terms of section 66 of the *Judiciary Act*, there will be no "moneys legally available" to satisfy a judgment, unless there has been an appropriation.

129. Secondly, the Commonwealth has no legislative power to enact a legislative provision which removes from a State the substantive protection of a rule of public law designed to ensure the proper functioning of the State, by protecting its revenue from unauthorised judgments. The power of the Commonwealth to enact section 64 is based upon the incidental power of section 51(xxxix) of the *Constitution* and the jurisdiction conferred by Ch III, and, particularly, section 78. However, the Commonwealth Parliament "has no power, express or implied, to impose liabilities or confer rights on persons who are parties to a justiciable controversy merely because the adjudication of that controversy is or has come within the purview of Ch III": ***Rizeq***, [46] (Bell, Gageler, Keane, Nettle and Gordon JJ). Acknowledging and giving effect to the "fundamental constitutional principle" in ***Auckland Harbour Board*** is consistent with the broader constitutional imperative accepted in ***Melbourne Corporation*** to protect the capacity of States to function. See particularly ***Clarke v Federal Commissioner of Taxation*** [2009] HCA 33; (2009) 240 CLR 272, [64] (Gummow, Heydon, Kiefel and Bell JJ) in respect of States being able to maintain control of their own funds. In the present case, the purpose of the Amending Act is squarely within the ***Melbourne Corporation*** principle, to prevent

payment of a massive claim out of the State's revenue equal to approximately the State's annual budget (Hansard, 12/8/20, p 4817).

130. The general response to the plaintiffs' argument about the court being required to implement government policy without following ordinary judicial process has been given previously at [112] above. This argument should be rejected.

131. Sections 17(5) and 25(5) provide that no Court can issue any process in the nature of execution against the State of WA. No State or federal court has jurisdiction to issue such a remedy against the Crown in right of WA, unless section 64 of the *Judiciary Act* applies. It does not for the reasons in [128]-[129] above.

10 132. The plaintiffs' argument based upon section 79 of the *Judiciary Act* overlooks the operation of sections 64-66 of the *Judiciary Act* referred to above. This argument cannot succeed.

ISSUE 2 – INDEMNITY PROVISIONS

133. Section 14(4) prescribes an indemnity to be provided to the State. The obligation to provide an indemnity applies to "every relevant person". That term is defined in section 14(2) to mean Mineralogy, International Minerals, Mr Palmer, and a transferee or former transferee of rights.

134. The provision requires that "every relevant person" must indemnify, and keep indemnified, the State against:

(a) any "protected proceedings", which is a term defined to mean proceedings brought,
20 made or begun, or purportedly brought, made or begun, and connected with a disputed matter: section 14(1);

(b) any "loss", or liability to any person, connected with a disputed matter; and

(c) the legal costs of the State connected with any protected proceedings, or other loss of the State connected with a stated intention or threat by any person to bring protected proceedings.

135. The State has notified the plaintiffs by letter dated 9 December 2020 that it proposes to rely upon the indemnity in section 14(4) in respect of the legal costs of certain proceedings in the Queensland Supreme Court (No 8766 of 2020): SC [47].

136. The liability of relevant persons to pay the indemnity is joint and several: section 14(5). There
30 are limitations upon this liability except in relation to Mineralogy, International Minerals or Mr Palmer: section 14(6). The State may enforce the indemnity without first having made a payment: section 14(7).

137. Section 15(2) extends the indemnity against "protected proceedings" and the State's liability to pay legal costs, to every "relevant person". The term "relevant person" is defined more

broadly than section 14. Section 14 relates to the plaintiffs, Mr Palmer, and persons who have or had obtained certain rights through them (by way of a "transfer", as defined, or because the right was created out of a right held by the plaintiffs or Mr Palmer). Section 15 relates to persons who have or had a right in, or in respect of, proceedings or liabilities of the State connected with a disputed matter, or their subject matter, other than as a "relevant transferee" (as defined in section 14) of the plaintiffs or Mr Palmer. Section 15 would apply in the event that there are, unbeknownst to the State, parties other than the plaintiffs and Mr Palmer who might have independent claims against the State connected with disputed matters, for instance other Co-Proponents named in the State Agreement. Section 15(3) provides a further indemnity to the effect that every relevant person in relation to a liability of the State connected with a disputed matter must indemnify, and must keep indemnified, the State against the liability. Otherwise, section 15 contains similar provisions to section 14.

138. Section 16 operates to extend the indemnities under sections 14(4) and 15(2)-(3), in a particular situation which is described in section 16(2). This situation arises if proceedings are brought, made or begun against the Commonwealth or the Commonwealth incurs a liability to any person or a loss; and the proceedings, liability or loss are connected with a disputed matter. In these circumstances, without limiting the scope of the indemnities mentioned, they apply (by reason of section 16(3)) as if the proceedings against the Commonwealth were brought, made or begun against the State, or the liability or loss were incurred by the State; and the State may enforce each indemnity accordingly. However, the State is not obliged to pay any amount recovered upon an indemnity to the Commonwealth: section 16(4). Section 16(5) provides that the State may assign to the Commonwealth the State's right to receive a particular amount owed to the State under an indemnity; or any other right the State has under or connected with an indemnity.

139. In effect, this means that if the Commonwealth is sued, for example by Zeph Investments Pte Ltd (a Singaporean company which is indirectly owned by Mr Palmer: SC [8]-[10]) pursuant to the Singapore Australia Free Trade Agreement, as a result of the Amending Act, any amount which that company is entitled to recover, or actually recovers, from the Commonwealth will be owed to the State pursuant to the indemnities in section 16. As well, the State can assign the relevant indemnities to the Commonwealth, to prevent the Commonwealth having to pay any amount to the company suing it.

140. Additionally, if the Commonwealth is sued, and consequently reduces funding to the State by the amount for which it may become liable, the State may claim the reduction in funding as a "loss", against which the State is to be indemnified under section 14. See the definition of "loss" in section 14(1).

141. Sections 22-24 are in materially similar form to sections 14-16, except they relate to proceedings brought, made or begun, or purportedly brought, made or begun, and connected with a "protected matter", not a "disputed matter". See the definition of "protected proceedings" in section 22(1).

142. The legislative policy of the Indemnity Provisions is entirely consistent with the Declaratory, No Liability and No Proceeding Provisions. It is the legislative obverse of the exemption provisions contained in the Declaratory, No Liability and No Proceeding Provisions. Such indemnities are well-known contractually. A particular type of contractual indemnity clause operates to release the liability of the indemnified party to the indemnifying party. Clauses of this type are effectively said to be "the obverse of exempting clauses": ***Smith v South Wales Switchgear Co Ltd*** [1978] 1 WLR 165, 168 (Viscount Dilhorne). The purpose of such clauses, as with exemption clauses, is to prevent a contracting party from becoming liable for loss which he or she has caused to the other contracting party. Such clauses are sometimes described as "reflexive indemnities": ***Westina Corp Pty Ltd v BGC Contracting Pty Ltd*** [2009] WASCA 213; (2009) 41 WAR 263, [51] (Buss JA, Wheeler and Newnes JJA agreeing).

Grounds

143. The plaintiffs allege that the indemnity provisions in sections 14 and 22 are repugnant to justice and incompatible with the exercise by Australian courts of judicial power as they make the plaintiffs and Mr Palmer liable to pay the indemnity to the State, where they would not otherwise be so liable or the State would be liable to one or more of them: 3FASOC [84].

144. As well, the plaintiffs allege that the extension of the indemnities to the State in respect of liabilities owed by a person to the Commonwealth, by reason of sections 16(3) and 24(3), is outside the legislative powers of the State as this extension purports to add terms and conditions to the invocation of federal jurisdiction, and to alter the consequences of actions and conduct of the Commonwealth and those acting for it: 3FASOC [91A]-[91C].

145. These indemnity provisions are also challenged as unconstitutional as contrary to section 115 of the *Constitution*: 3FASOC [84A]-[84BB]. This is upon the basis that it is alleged that, due to the set-off provisions relating to the indemnities, these provisions make something other than gold or silver legal tender for payment of a debt.

The Repugnancy Ground

146. The plaintiffs submit that the indemnity provisions are calculated to punish the plaintiffs for seeking to vindicate their legal rights against the State, without any regard to the merits of their claims: PS [75].

147. As explained, it is a well-accepted principle, and within legislative power, for legislation to alter the rights and liabilities of a party to pending litigation. It is unnecessary, and legally unhelpful, to characterise such provisions as having a punitive effect. They are not contrary to Ch III of the *Constitution*, and therefore not repugnant to justice or incompatible with an Australian court exercising judicial power.

148. If, for some reason, the provisions which seek to remove the plaintiffs' primary and secondary rights are legally ineffective, the commercial effect of the indemnity provisions achieves the same result. Whether that is desirable is a matter of political judgment. There is no legal basis for the contention that civil litigants, such as the plaintiffs, have some irreducible rights to bring contractual and other disputes before an arbitrator or a court, based upon pre-existing rights unchanged by legislative intervention.

The Conditional Federal Jurisdiction Argument

149. Apart from the effect upon federal jurisdiction, there is no suggestion that the State cannot pass legislation imposing an impost upon the plaintiffs, to whatever extent the State considers appropriate. As well, subject to specific constitutional prohibitions (eg sections 92 and 117), the State may select any factual basis to trigger the imposition of such an impost.

150. The argument that sections 16 and 24 purport to add a condition to invoking federal jurisdiction should not be accepted. The plaintiffs can invoke federal jurisdiction as freely as if sections 16 and 24 did not exist. There is no legal impediment to doing so. The Act does not purport to affect any legal right of the plaintiffs to sue the Commonwealth. There may be adverse commercial consequences for the plaintiffs if they decide to invoke federal jurisdiction, but that is no different from many decisions which plaintiffs must make before deciding to commence proceedings.

151. The plaintiffs claim that the provisions of sections 16 and 24 effect a direct and obviously deliberate interference with the exercise of Commonwealth judicial and executive power: PS [138]. That submission is without foundation.

152. The indemnities do not affect the plaintiffs' access to the jurisdiction of federal courts. Even if the State does assign its indemnity, the plaintiffs still have to establish their primary case. There is no interference with federal judicial power in assessing the plaintiffs' case.

153. If the State chooses, it may assign its indemnity to the Commonwealth, but it is not obliged to do so. The Commonwealth may choose not to request an assignment. There is no interference with Commonwealth executive power, by the potential of the indemnity being assigned to the Commonwealth. In such a case, the State is protected by the indemnity from any reduction in funding to the State from the Commonwealth, due to the Commonwealth having to pay a liability to the plaintiffs.

154. The reciprocal structural implication referred to in ***Spence v Queensland*** [2019] HCA 15; (2019) 93 ALJR 643, [107]-[108] (Kiefel CJ, Gageler, Bell and Keane JJ), [309] (Edelman J) is not relevant here, contrary to PS [138]. The State has not affected any of the Commonwealth's powers.

Section 115 and Legal Tender Argument

155. The plaintiffs submit that the various set-off provisions contained in sections 14(7)(b), 15(5)(b) and 22(7)(b) of the Act contravene section 115 of the *Constitution* "by purporting to create a new form of legal tender and compelling the plaintiffs to accept it in payment of a debt": PS [140].

156. No case suggests that section 115 prevents a State from legislating a set-off. In principle, a set-off does not involve coining any money. As well, a set-off does not represent legal tender produced in "payment" of a debt. Although there are different forms of set-off (eg common law, equitable and insolvency), the essence of a set-off is that it reduces the amount of a debt which must be paid by one party to another, by balancing the two amounts owed by each party against the other. It is the setting of money cross-claims against each other to produce a balance: Derham, *The Law of Set Off* (Oxford, 4th ed, 2010) [1.01].

157. The amount of the set-off does not represent a "payment" of the debt, but the balancing of two amounts owed in opposite directions. The whole purpose of a set-off is to avoid the need for two payments. A set-off operates (albeit in slightly different ways) as a defence to a demand for payment or a claim for a failure to pay: ***Stehar Knitting Mills Pty Ltd v Southern Textile Converters Pty Ltd*** [1980] 2 NSWLR 514, 519-520 (Hutley JA), 523-524 (Glass JA); ***Roadshow Entertainment v (ACN 053 006 269) Pty Ltd Receiver & Manager Appointed*** (1997) 42 NSWLR 462, 481 (Gleeson CJ, Handley JA and Brownie AJA). In the case of insolvency set-off, it operates automatically to produce a balance on the basis of which the administration is to proceed: ***Gye v McIntyre*** (1991) 171 CLR 609, 622 (the Court).

158. As the prohibition in section 115 is against making "anything other than gold and silver coin a legal tender in payment of debts", this provision has no operation in respect of set-offs.

ISSUE 3 – LACK OF STATE LEGISLATIVE POWER TO AFFECT INTERSTATE PROCEEDINGS

159. The plaintiffs allege that the WA Parliament could not enact Part 3 of the Act in so far as it purports to govern the course and conduct of proceedings in courts of another State or Territory and to provide for consequences attendant upon the judgments and orders of such courts. This is due to three limitations upon State legislative power derived from section 106 of the *Constitution*; the ***Melbourne Corporation*** doctrine and the impermissible interference with functions of a State or Territory; and repugnancy to Ch III of the *Constitution*: 3FASOC

[90]; PS [78]-[86].

160. These grounds are hypothetical as there are no interstate proceedings upon which reliance is placed.

161. Each of the three limitations upon which the plaintiffs rely is based upon the proposition that provisions of the Amending Act seek to direct the exercise of jurisdiction by the courts of another State or by a federal court. However, for reasons outlined at [68]-[132] above, the relevant provisions of the Amending Act declare substantive law and that secondary enforcement rights do not exist based upon the removal of the primary rights. They do not direct the exercise of judicial power of another State or a federal court. Consequently, the operation of the three limitations upon which the plaintiffs rely never arises for consideration.

ISSUE 4 – SECTION 118 AND FULL FAITH AND CREDIT ARGUMENT

162. The plaintiffs contend that sections 9(1)-(2), 10(4)-(7) and 11(1)-(4) do not give full faith and credit, in terms of section 118 of the *Constitution*, to section 35 of the uniform *Commercial Arbitration Acts* in other jurisdictions and are therefore constitutionally invalid: 3FASOC [40], [42], [46]; PS [129]. The plaintiffs' separate reliance upon sections 5 and 143 of the *Evidence Act 1995* (Cth) is not developed further than this: PS, fn 138.

163. There are a number of steps in the plaintiffs' argument on section 118 of the *Constitution*, which are summarised at PS [132]:

(a) the first step is that: "When enacting the 2020 [Amending] Act, Western Australia was required to give full faith and credit to s. 35 of the [*Commercial Arbitration Acts*], which recognised as binding the First and Second Awards throughout Australia". See also PS [129];

(b) the second step is that: "Plainly, [the Amending Act] did not do so in light of the provisions of ss. 10(1) and 10(4)-(7), which extinguish the Awards and the arbitration agreements that underpinned the making of them, and ss. 11(1)-(4), which purport to re-determine or ventilate matters that were the subject of the Awards and related to rights that had been extinguished on the making of the arbitral awards";

(c) the third step is that: "The binding nature of the Awards, recognised throughout the other States and Territories, was disregarded". The plaintiffs contend that, as a consequence the provisions of the Amending Act that did not give full faith and credit to the operation of section 35 "are invalid": PS [129].

164. There are critical flaws in each of these steps. However, a fundamental constitutional flaw which underpins the conclusion in the third step is that section 118 imposes a limit on the

legislative power of a State, and thus provides a basis for invalidating the Amending Act (either wholly or in part). That is unsound for the reasons outlined below.

165. **Section 118 is not a Legislative Limit** - Section 118 does not impose any relevant limit on the power of a State to enact laws, including laws that deal with the status of arbitral awards and the rights of parties relating to such awards. The fact that there are existing laws of other States touching upon that subject matter (here, in the form of the *Commercial Arbitration Acts*) does not, through the operation of section 118, remove the power of the WA Parliament to pass laws with respect to that same subject matter.

166. Section 118 requires a State to recognise the laws, public acts and records and judicial proceedings of each other State. It operates in a context where, in any given matter, a court of a State will need to apply choice of law rules to deal with, among other things, potentially conflicting State laws. The choice of law rules are not themselves prescribed by section 118, but fall to be determined by the common law rules of the forum court as varied by the forum legislature: ***John Pfeiffer Pty Ltd v Rogerson*** [2000] HCA 36; (2000) 203 CLR 503, [63] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); ***McKain v RW Miller & Co (SA) Pty Ltd*** (1991) 174 CLR 1, 35-37 (Brennan, Dawson, Toohey and McHugh JJ).

167. The plaintiffs do not attempt to explain how an implied limit on legislative power is to be derived from section 118. The plaintiffs' contend that the Amending Act is invalid because "its provisions do not give full faith and credit to the laws of the other States, namely the uniform *Commercial Arbitration Acts*": PS [126]. This is an appeal to a constitutional standard that does not exist. The argument reduces to a proposition that if another State has passed a law affecting a certain subject matter, each other State can only recognise and give "full faith and credit" to such a law by not passing any law which enters upon the same field. Section 118 cannot be read as having such an extraordinary consequence.

168. Among other things, such a notion is incompatible with the settled principle that section 118 allows the States to alter choice of law rules through laws that govern the circumstances in which the law of another State or Territory shall be applied in their courts: ***McKain***, 35-37 (Brennan, Dawson, Toohey and McHugh JJ). As Brennan J observed in ***Breavington v Godleman*** (1988) 169 CLR 41, at 116-117, to construe section 118 as imposing standard choice of law rules would be to compromise the "mutual legislative independence of the States", including the independence to determine the law to be applied by the courts of that State. The majority in ***McKain*** (at 36) likewise held that to read section 118 as a substantive determinant of choice of law rules would be to deny the States an important legislative power.

169. The plaintiffs proceed in their submissions to refer to the lack of a settled criterion for resolving inconsistency between two State laws: PS [130]-[132]. However, nothing in the

debate surrounding the treatment of inconsistent laws of two States suggests that one State law is to be taken to be invalid, whether by virtue of section 118 of the *Constitution* or otherwise, because it deals with a subject matter touched upon by the law of another State.

170. It is strictly unnecessary, for the purposes of resolving the questions of validity raised in these proceedings, to consider how the respective *Commercial Arbitration Acts* operate in respect of arbitral awards. Nor is it necessary to consider how section 118 would operate upon a State court faced with questions of recognition of another State's *Commercial Arbitration Act* or orders made thereunder by the court of another State. Nevertheless, the State makes the submissions in the next section.

171. **The Flaws in the First and Second Steps** – As explained previously at [25]-[26], when an arbitral award is made, it is the result of a contractual agreement between the parties. It is the enforcement of the arbitral award following an application to a court which invests the award with the effect of a curial judgment. Prior to any enforcement order, what is to be recognised by section 35 of the *Commercial Arbitration Acts* is that there is an award that has been made between the parties and has contractual effect, and which replaces the disputed rights and liabilities between the parties through a process of accord and satisfaction. The rights and liabilities which are disputed do not continue once the award is made. That is because the contractual effect of the award is to be recognised by virtue of section 35 of the *Commercial Arbitration Acts*.

172. It follows that the first and second steps in the plaintiffs' argument:

(a) elide the proposition that an arbitration award is binding on the parties to the arbitration agreement with the question of the particular legal consequences that attach to an award once registered for enforcement with a State court pursuant to the applicable *Commercial Arbitration Act*; and

(b) erroneously suggest that the "recognition" of an arbitral award as "binding" puts the rights and liabilities of the parties beyond the reach of legislative alteration.

173. Nothing in the *Commercial Arbitration Acts* purports to provide that the contractual rights and liabilities between the parties to an arbitration, including as so determined by the arbitral award, cannot be altered. They could be altered consensually, without seeking the consent of any court or even the tribunal. Equally, they may be altered by applicable laws, including Western Australian legislation. Sections 10(4)-(7) and 11(1)-(2) of the Act operate in a context where the First and Second Awards may have had binding contractual effect and may have imposed liabilities, but the effect of the legislation is to declare that no such consequences continue. In any event, section 10 extinguishes the First and Second Awards.

ISSUE 5 – INCONSISTENCIES WITH COMMONWEALTH LAW

174. It is alleged that there is an inconsistency (for the purposes of section 109 of the *Constitution* or section 79 of the *Judiciary Act*) between sections 11(3)-(7), 12(1), 12(4)-(7), 13(4)-(8), 17(4)-(5), 18(5)-(6), 19(3)-(7), 20(1), 20(4)-(7), 21(4)-(8) and 25(4)-(5) and various Commonwealth statutes and rules governing the conduct of proceedings in federal courts or federal jurisdiction (section 73 of the *Constitution*; Ch 2 (Part 2.1), Chapter 3 and section 193 of the *Evidence Act*; Parts III to V of the *Judiciary Act*; Part III, Division 1 of the *Federal Court of Australia Act 1976*; Part VIII and sections 66 and 77M of the *Judiciary Act*; Part 10 and Chapter 5 of the *High Court Rules*; sections 33 and 43 of the *Federal Court of Australia Act*; Part 7 (div 7.3) and Parts 20, 24, 39, 40 and 41 of the *Federal Court Rules 2011*; section 14 of the *Jurisdiction of Courts (Cross-Vesting) Act 1987*; Part 6 of the *Service and Execution of Process Act 1992*).

175. This contention is premised upon an assumption that the relevant provisions of the Act purport to provide a legislative direction about the exercise of a court's jurisdiction, which is inconsistent with the exercise of federal jurisdiction: PS [123]. However, for the reasons already developed in relation to Ch III issues, the provisions of the Act referred to above declare the non-existence of primary rights and liabilities, and secondary enforcement rights. Consequently, the relevant provisions of the Act operate prior to the exercise of any jurisdiction by a federal court. They do not attempt to provide a legislative direction about the exercise of federal jurisdiction which is inconsistent with federal provisions which regulate the exercise of federal jurisdiction. As well, there is no inconsistency between the Remedial Provisions of the Amending Act and sections 64-66 of the *Judiciary Act* for reasons set out previously. In relation to the specific provisions, the State refers to paragraphs [36]-[67] of the submissions in B52 of 2020.

ISSUE 6 – RULE OF LAW REASONS

176. The plaintiffs contend that the provisions of the Act inserted by the Amending Act are invalid because they violate the rule of law in various ways, set out in PS [75], and contravene the norms of a civilised, modern society, as set out in PS [77].

177. The plaintiffs' contention is framed in terms of "the constitutional assumption of the rule of law" and is built upon Dixon J's dictum in the ***Australian Communist Party v Commonwealth*** (1951) 83 CLR 1 at 193 that "the rule of law forms an assumption" of the *Constitution*. It is also framed in terms of the possibility left open in ***Union Steamship Co of Australia v King*** (1988) 166 CLR 1 at 10 that State legislative power may be "subject to some restraints by reference to rights deeply rooted in our democratic system of government and

the common law".

178. Dixon J's reference to the rule of law in the ***Communist Party Case*** should be considered in its full context. Dixon J was drawing a distinction between traditional conceptions to which legal effect is given by the *Constitution* and those which are not. The "rule of law" formed part of the latter. See also ***Western Australia v Ward*** [2002] HCA 28; (2002) 213 CLR 1, 392 (fn 1091); Crawford, *The Rule of Law and the Australian Constitution* (2017, Federation Press) 67-70.

179. In ***Australian Capital Television v Commonwealth*** (1992) 177 CLR 106, Mason CJ (at 135) distinguished between constitutional implications and assumptions. He considered that an implication "inheres in the instrument", whereas an assumption "stands outside the instrument". See also ***APLA Ltd v Legal Services Commissioner (NSW)*** [2005] HCA 44; (2005) 224 CLR 322, [30] (Gleeson CJ and Heydon J).

180. It is well accepted that there is nothing in the "rule of law", as a constitutional implication or imperative, or in the common law's recognition of rights, which requires an implied constraint upon State legislative power to prevent a State Parliament from declaring the rights and liabilities of parties in pending litigation.

ISSUES 7 TO 9 – NON-COMPLIANCE WITH MANNER AND FORM REQUIREMENTS; INVALID DELEGATION OR ABDICATION OF EXECUTIVE POWER; SEVERANCE

181. These issues are addressed in the submissions in B52 of 2020.

PART VI TIME FOR ORAL ARGUMENT

182. The defendant requires 5 to 6.25 hours for the presentation of oral argument across B52 of 2020 and B54 of 2020.

Dated: 21 May 2021

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IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY

No. B54 of 2020

B E T W E E N:

MINERALOGY PTY LTD (ACN 010 582 680)
First Plaintiff

INTERNATIONAL MINERALS PTY LTD (ACN 058 341 638)
Second Plaintiff

AND

STATE OF WESTERN AUSTRALIA
Defendant

ANNEXURE TO DEFENDANT'S SUBMISSIONS

Pursuant to paragraph 3 of Practice Direction No. 1 of 2019, the defendant sets out below a list of the particular constitutional provisions, statutes and statutory instruments referred to in the submissions.

	Description	**Relevant date in force**	**Provision**
1.	*Commonwealth Constitution*	Current	Ch III, ss 51(xxxix), 106, 109, 115 and 118
Statutes			
2.	*Builders Labourers' Federation (Cancellation of Registration) Act 1986* (Cth)	14.04.1986	s 3
3.	*Commercial Arbitration Act 2013* (Qld)	Current	s 35
4.	*Commercial Arbitration Act 2011* (SA)	Current	s 35
5.	*Commercial Arbitration Act 2011* (Tas)	Current	s 35
6.	*Commercial Arbitration Act 2011* (Vic)	Current	s 35
7.	*Commercial Arbitration Act 2010* (NSW)	Current	s 35
8.	*Commercial Arbitration Act 2012* (WA)	Current	s 35
9.	*Crown Suits Act 1947* (WA)	Current	s 10

	Description	Relevant date in force	Provision
10.	*Evidence Act 1995* (Cth)	Current	ss 5, 143, 193, Ch 3
11.	*Fair Work (Registered Organisations) Act 2009* (Cth)	01.07.2009	s 26A
12.	*Federal Court of Australia Act 1976* (Cth)	Current	Part III div 1, ss 33, 37AQ and 43
13.	*Federal Court Rules 2011* (Cth)	Current	Div 7.3, parts 20, 24, 39, 40 and 41
14.	*Freedom of Information Act 1992* (WA)	Current	
15.	*Government Agreements Act 1979* (WA)	Current	
16.	*High Court Rules 2004* (Cth)	Current	Part 10, Ch 5
17.	*Independent Commission Against Corruption Amendment (Validation) Act 2015* (NSW)	06.05.2015	ss 34 and 35
18.	*Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA)	Current	
19.	*Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA)	13.08.2020	
20.	*Iron Ore (Rhodes Ride) Agreement Authorisation Act 1972* (WA)	Current	s 3
21.	*Iron Ore (McCamey's Monster) Agreement Authorisation Act 1972* (WA)	Current	s 3
22.	*Judiciary Act 1903* (Cth)	Current	ss 64, 65, 66, 77M and 79, parts III-V, VIII
23.	*Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth)	Current	s 14
24.	*Land Administration Act 1997* (WA)	Current	Parts 9 and 10
25.	*Local Government (Morayfield Shopping Centre Zoning) Act 1996* (Qld)	30.07.1996	
26.	*Matrimonial Causes Act 1971* (Cth)	17.11.1971	
27.	*Mining Act 1978* (WA)	Current	

	Description	Relevant date in force	Provision
28.	*Public Works Act 1902* (WA)	Current	
29.	*Service and Execution of Process Act 1992* (Cth)	Current	Part 6
30.	*Uniform Civil Procedure Rules 2005* (NSW)	Current	Rules 21.7 and 21.10
31.	*Vexatious Proceedings Restriction Act 2002* (WA)	Current	s 5 and 8
32.	*Wheat Industry Stabilization Act (No 2) 1946* (Cth)	09.08.1946	s 11