HIGH COURT OF AUSTRALIA

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN: **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

SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

PARTS I, II AND III — CERTIFICATION AND INTERVENTION

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

2. The Attorney-General of the Commonwealth (**Commonwealth**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) (**Judiciary Act**).

PART IV — ARGUMENT

A SUMMARY

3. The questions stated for the Court concern the validity of the whole or part of Pt 3 of the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA) (**Agreement Act**), as inserted by the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA) (**Amendment Act**). The Agreement Act ratifies an agreement between the State of Western Australia and (among others) the Plaintiffs, which provides for a process by which the Plaintiffs will develop projects for the mining, concentration and processing of iron ore in the Pilbara region (**Agreement**). Part 3 of the Agreement Act deals with the legal consequences that are to flow from the way in which the Western Australian Premier dealt with a particular proposal under the Agreement known as the "Balmoral South" proposal, which was first submitted to the Premier in August 2012, and the consequences that are to flow from certain related subsequent events.

4. Among other things, Pt 3 of the Agreement Act:

   4.1. provides that neither the "first Balmoral South proposal" nor the "second Balmoral South proposal" has any contractual or other legal effect under the Agreement or otherwise (s 9);

4.2. provides for the termination of any "relevant arbitration" on foot as at commencement and any "relevant arbitration arrangement" (s 10(1) and (2));

4.3. declares that two particular arbitral awards are of no effect and declares that the arbitration agreements applicable to those awards are invalid (s 10(4)-(7));

4.4. declares that, on or after commencement, the State has no liability connected with "disputed matters" and "protected matters" (ss 11(1) and 19(1)); and

4.5. extinguishes any such liability that existed before commencement (ss 11(2) and 19(2)).

5. The Commonwealth intervenes to contend that the provisions summarised above (the **determinative provisions**) do not infringe any constitutional limitation identified by the Plaintiffs.

6. There are many other provisions in Pt 3 of the Agreement Act that are also the subject of challenge. However, the Commonwealth submits that it is unnecessary or inappropriate for the Court to determine the validity of those other provisions in this proceeding, because:

6.1. the validity of the determinative provisions is not affected by the validity of any of the other provisions;

6.2. for a number of the other provisions, no occasion will ever arise for their application;

6.3. for others, no occasion has yet arisen for their application and such an occasion may never arise (rendering any consideration of the validity of those provisions premature).

7. These submissions are structured in the following way:

7.1. *First*, they introduce the constitutional provisions or principles said to affect the validity of Pt 3, being: s 118 of the Constitution; Ch III of the Constitution (including the *Kable* principle, the separation of powers and the rule of law); and the *Melbourne Corporation* principle.

7.2. *Second,* they address the key arguments made by the Plaintiffs about the constitutional validity of the determinative provisions, and one of the indemnity provisions (s 14(4)), in the context of the relevant facts in the Special Case.

7.3. *Third*, they address the arguments made by the Plaintiffs about the application (or otherwise) of the determinative provisions in federal jurisdiction.

7.4. *Fourth*, they address the appropriate approach to resolving the proceeding, in light of the validity of the determinative provisions and the abstract or hypothetical nature of the challenge to the other provisions.

8. To the extent that the Court considers it necessary or appropriate to consider the constitutional arguments based on the "violation of unwritten principles", "manner and form", and "impermissible delegation of legislative power", the Commonwealth adopts the submissions of Western Australia addressing those arguments.

B INTRODUCTION TO RELEVANT CONSTITUTIONAL PROVISIONS

B.1 Section 118 of the Constitution

9. The Plaintiffs' argument regarding s 118 involves three steps: *first*, s 118 is said to provide a rule for resolving an inconsistency between legislation enacted by different States; *second*, the application of that rule is said to result in the invalidity of the legislation of one of the States; and *third*, the content of the rule is said to be that the legislation enacted later in time is invalid. The Plaintiffs do not advance any "developed submissions"[1] as to why any of those three steps should be accepted.

10. As to the first and second steps, they amount, in substance, to an argument that s 118 is a provision designed to deal with the possibility of inconsistency between State laws, somewhat akin to the role of s 109 of the Constitution with respect to inconsistency between State and Commonwealth laws. That proposition is not supported by the terms of s 118, which require that "[f]ull faith and credit … be given … to the laws … of every State". That language differs substantially from that used in s 109,[2] in particular by giving no indication as to how a conflict between State laws should be resolved or the effect of any such conflict. Further, although the authorities regarding the effect of s 118 are unsettled, the clearest substantive effect of s 118 is that it precludes the courts of one State — having determined that the applicable law is the law of another State — from declining to apply that other State's law on public policy grounds.[3] Given that operation, the

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1 See *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at [70] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

2 *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at [15] (Gleeson CJ), see also at [108] (Kirby J); *Port MacDonnell Professional Fishermen's Association Inc v South Australia* (1989) 168 CLR 340 at 374 (the Court).

3 See *Merwin Pastoral Co Pty Ltd v Moolpa Pastoral Co Pty Ltd* (1933) 48 CLR 565 at 577 (Rich and Dixon JJ), 587-588 (Evatt JJ); *Breavington v Godleman* (1988) 169 CLR 41 at 81 (Mason CJ), 96-97 (Wilson and Gaudron JJ), 116 (Brennan J), 136-137 (Deane J), 150 (Dawson J).

Plaintiffs do not provide any reason why the Court need give s 118 any additional substantive operation, let alone a substantive operation of the kind suggested (see also **WA/B54 [167]**).

11. As to the third step, the Plaintiffs do not expressly identify any "adequate constitutional criterion … which would resolve inconsistency between the laws of two or more States".[4] It is implicit, however, that they contend that an earlier-in-time enactment must prevail (for they would not succeed on any other approach). Such an approach finds no support in the authorities[5] or the extensive academic commentary.[6] It can be noted, for example, that if the rules governing conflicts between laws of the same legislature were to be adopted (which is one approach that has been suggested), the application of those rules would lead to the opposite outcome: "the general might be expected to give way to the particular and, in the extreme case of equal particularity, the earlier to the later".[7] But, as has been observed of that outcome: "That another State has spoken more specifically or more recently on the subject are rather fortuitous factors".[8] The same is true of the Plaintiffs' proposal: it is a test that turns on the arbitrary factor of which State statute happened to be enacted first. Even as a rule of last resort, such a rule would be unattractive. Yet the Plaintiffs advance it as a proposed first response for the case of inconsistent State statutes.

12. Further, the Plaintiffs' submissions necessarily rule out (without any explanation) the possibility that s 51(xxv) or s 51(xxxvii) of the Constitution may allow for a considered

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4 *Sweedman v Transport Accident Commission* (2006) 226 CLR 362 at [52] (Gleeson CJ, Gummow, Kirby and Hayne JJ).

5 Even Deane J, whose view was that s 118 had a role in the resolution of conflicts between the laws of different States, did not suggest those conflicts should be resolved in the way contended for by the Plaintiffs: see *Breavington* (1988) 169 CLR 41 at 129 at 135; *McKain v RW Miller & Co (South Australia) Pty Ltd* (1991) 174 CLR 1 at 53.

6 See in particular: Detmold, *The Australian Commonwealth* (1985) Ch 8; Kirk, "Conflicts and Choice of Law within the Australian Constitutional Context" (2003) 31 *Federal Law Review* 247; Gageler, "Private Intra-national Law: Choice or Conflict, Common Law or Constitution?" (2003) 23 *Australian Bar Review* 184; Selway, "The Australian 'Single Law Area'" (2003) 29 *Monash University Law Review* 30; Foley, "The Australian Constitution's Influence on the Common Law" (2003) 31 *Federal Law Review* 131; Hill, "Resolving a True Conflict Between State Laws: A Minimalist Approach" (2005) 29 *Melbourne University Law Review* 39; Lindell and Mason, "The Resolution of Inconsistent State and Territory Legislation" (2010) 38 *Federal Law Review* 390; Leeming, *Resolving Conflicts of Laws* (2011) Ch 6.

7 See Gageler, "Private Intra-national Law: Choice or Conflict, Common Law or Constitution?" (2003) 23 *Australian Bar Review* 184 at 188.

8 Kirk, "Conflicts and Choice of Law within the Australian Constitutional Context" (2003) 31 *Federal Law Review* 247 at 286-287. See also Lindell and Mason, "The Resolution of Inconsistent State and Territory Legislation" (2010) 38 *Federal Law Review* 390 at 402.

legislative solution to the problem of conflicting State statutes.[9] "[A] century has passed with so few suggestions of inconsistency between the laws of the Australian States"[10] that there has been little call for the Commonwealth Parliament to attend to the topic. Were that to change, the competing interests that would need to be balanced and reconciled may suggest that a carefully calibrated, national legislative solution would be the most suitable method for addressing the issue. The "precipitate intervention"[11] invited by the plaintiffs would lay down a mandatory and blunt constitutional solution that would preclude any such possibility or, indeed, the possibility of legislative contribution at all.

B.2 Chapter III

13. The Plaintiffs advance several distinct arguments that depend upon, or relate to, Ch III of the Constitution, being their arguments concerning: the *Kable* principle (**MS [50]-[54]**); the separation of judicial power (**MS [60]-[65]**); and the "rule of law" (**MS [69]-[74]**).

B.2.1 Kable

14. The *Kable* principle operates to invalidate State laws that <u>confer</u> upon 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".[12]

15. Given the focus of the *Kable* principle, courts have rejected *Kable* challenges to State laws that alter the underlying rights and liabilities of persons, even in cases where those rights and liabilities have been the subject of an administrative decision[13] or are the subject of pending litigation.[14] The failure of such challenges reflects the "well settled" position, in relation to both State and Commonwealth legislation, that "a statute which alters substantive rights does not involve an interference with judicial power contrary to Ch III of the Constitution even if those rights are in issue in pending litigation."[15]

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9 See *Breavington* (1988) 169 CLR 41 at 83 (Mason CJ); Lindell and Mason, "The Resolution of Inconsistent State and Territory Legislation" (2010) 38 *Federal Law Review* 390 at 408-410.

10 *Mobil Oil* (2002) 211 CLR 1 at [131]; see also [139] (Kirby J).

11 *Mobil Oil* (2002) 211 CLR 1 at [131] (Kirby J).

12 *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ). See also *Vella v Commissioner of Police (NSW)* (2019) 93 ALJR 1236 at [55] (Bell, Keane, Nettle and Edelman JJ), [138] (Gageler J).

13 *Duncan v Independent Commission Against Corruption* (2015) 256 CLR 83 (***Duncan v ICAC***).

14 *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547; *Lazarus v Independent Commission Against Corruption* (2017) 94 NSWLR 36.

15 *Duncan v ICAC* (2015) 256 CLR 83 at [26] (French CJ, Kiefel, Bell and Keane JJ). See also *R v Humby; Ex parte Rooney* (1973) 129 CLR 231 at 250 (Mason J).

16. Similarly, courts have rejected *Kable* challenges to State laws that attach "new legal consequences and a new legal status to things done which otherwise would not have had such legal consequences or status",[16] including as to substantive rights and liabilities of persons. The constitutional validity of that long-standing drafting technique has been repeatedly affirmed.[17] The *Kable* principle operates consistently with the authorities upholding that technique, upon which Australian legislatures have long relied.

17. The *Kable* principle shares a common foundation with the *Kirk* principle, in that both derive from the text and structure of Ch III. However, each has a distinct operation. To date, the *Kable* principle has been applied, on a number of occasions, to invalidate State laws that purported to confer functions and powers upon State (and Territory) courts that would impermissibly have impaired the courts' institutional integrity. By contrast, the *Kirk* principle has been applied to invalidate a State law that purported to remove a particular power of a State Supreme Court, and thus to deny a "defining" characteristic of that Court (its supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power). No further defining characteristics have yet been identified, and it has been correctly observed that any expansion of the *Kirk* principle "should be undertaken with caution".[18]

B.2.2 Separation of judicial power

18. It is well settled that the separation of judicial power mandated by Ch III does not apply in terms to the States, and no equivalent separation is implied in the constitutions of the States.[19] The Plaintiffs invite the Court to depart from that orthodox position. It is, however, unnecessary for the Court to embark on any consideration of whether there is a constitutional prohibition on the Western Australian Parliament exercising State judicial power,[20] because Pt 3 of the Agreement Act cannot be characterised as an exercise of judicial power. It does not contain a "legislative determination of breach … of some

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16 *Duncan v ICAC* (2015) 256 CLR 83 at [25] (French CJ, Kiefel, Bell and Keane JJ), see also at [45]-[46] (Nettle and Gordon JJ).

17 See, eg, *R v Humby* (1973) 129 CLR 231 at 243-244 (Stephen J); *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at [107]-[111] (McHugh J); *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 at [38], [53] (French CJ, Crennan and Kiefel JJ).

18 *Kaldas v Barbour* (2017) 350 ALR 292 at [361] (Basten JA).

19 See, eg, *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at [125] (Hayne, Crennan, Kiefel and Bell JJ).

20 *Crump v New South Wales* (2012) 247 CLR 1 at [33] (French CJ).

antecedent standard of conduct".[21] The determinative provisions simply alter the applicable law. That does not bespeak judicial power.

19. If the Court considers it necessary to consider that question, the Plaintiffs' submission that the reasoning underlying the *Kable* principle — including specifically that concerning the "integrated national judicial system" (**MS [60]**) — warrants the implication of a strict separation of judicial power at the State level should be rejected. As explained by Gummow J — who was member of the majority in *Kable* and who employed the language of "an integrated national court system" in that case[22] — it is "fundamental for an understanding of *Kable*" that the principle "does not imply into the Constitutions of the States the separation of judicial power mandated for the Commonwealth by Ch III".[23]

B.2.3 Rule of law

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20. The "rule of law" is an assumption that underlies the Constitution and finds expression, in part, in substantive Ch III principles[24] — including the *Kable* principle.[25] "Chapter III of the Constitution, which confers and defines judicial power, in accordance with its express terms and its necessary implications, gives practical effect to that assumption".[26] The Constitution does not, however, provide that the "rule of law", or the values that comprise it, are to be given "an immediate normative operation in applying the Constitution."[27] Any substantive principle or implication said to flow from the rule of law must both derive from and conform to the text and structure of the Constitution. Further, any such implications must be "securely based",[28] and cannot be drawn merely because some may consider it "reasonable".[29] For those reasons, limitations cannot be drawn from the Constitution based on a freestanding implication derived from the rule of law.[30]

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21 *Duncan v New South Wales* (2015) 255 CLR 388 at [43] (the Court).

22 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 138, cited at **MS [60]**.

23 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [86] (Gummow J), quoted in *Pollentine v Bleijie* (2014) 253 CLR 629 at [42] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ). See also *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at [137] (Gordon J).

24 *Thomas v Mowbray* (2007) 233 CLR 307 at [61] (Gummow and Crennan JJ).

25 See *South Australia v Totani* (2010) 242 CLR 1 at [4], [61] (French CJ), [131] (Gummow J), [232]-[233] (Hayne J), [423]-[425] (Crennan and Bell JJ).

26 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at [30] (Gleeson CJ and Heydon J).

27 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at [72] (McHugh and Gummow JJ).

28 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 134 (Mason CJ); *APLA* (2005) 224 CLR 322 at [389] (Hayne J).

29 *APLA* (2005) 225 CLR 322 at [389] (Hayne J), [469]-[470] (Callinan J).

30 See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 566-7 (the Court); *McGinty v*

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21. The Plaintiffs' submissions make no attempt to relate what they identify as "three conceptions of the rule of law" (**MS [74]**) to the text and structure of the Constitution. Given the paucity of the Plaintiffs' submissions on this subject, and the lack of any textual or structural support for their argument, they should be peremptorily rejected.

B.3 The *Melbourne Corporation* principle

22. The Plaintiffs contend that Pt 3 invalidly interferes with the functions of other States and Territories in two ways.

23. *First*, drawing on what was said in *Re Tracey; Ex parte Ryan*,[31] the Plaintiffs assert that s 106 of the Constitution precludes the law of State A from "prohibiting" the court of State B from exercising its functions (including the exercise of jurisdiction in matters arising under the law of State B) (**MS [80]-[81]**).[32]

24. *Second*, they rely on the principle derived from *Melbourne Corporation v Commonwealth*[33] as extending to operate between States (as opposed to between the States and the Commonwealth) (**MS [84]**). It can be accepted that that principle "is founded upon an implication which also has significance in relation to an exercise of State legislative power which destroys or weakens the legislative authority of another State or its capacity to function as a government".[34] That follows because the implication rests on the proposition that the "constitutional conception of the Commonwealth and the States as constituent entities of the federal compact having a continuing existence reflected in a central

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Western Australia (1996) 186 CLR 140 at 168 (Brennan CJ), 182-183 (Dawson J), 231 (McHugh J), 284-285 (Gummow J); *Gerner v Victoria* (2020) 95 ALJR 107 at [14]-[15] (the Court).

[31] (1989) 166 CLR 518 at 547 (Mason CJ, Wilson and Dawson JJ), 575 (Brennan and Toohey JJ). See also *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188 at 229 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

[32] The Plaintiffs, quite correctly, do not suggest that the regulation by one polity of aspects of the exercise of jurisdiction by the courts of a different polity would infringe the *Melbourne Corporation* principle. The permissibility of such regulation is illustrated by the *Foreign Evidence Act 1994* (Cth), which regulates the obtaining and reception of foreign evidence in all Australian courts (whether or not exercising federal jurisdiction). See also, for example, the *Crimes at Sea Act 2000* (Cth) sch 1, clause 7.

[33] (1947) 74 CLR 31.

[34] *Mobil Oil* (2002) 211 CLR 1 at [15] (Gleeson CJ). It can be accepted that the courts of the States are an "essential branch of the governments of the States": see *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 at [91] (Gummow J), see also at [179] (Hayne J); *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272 at [1], [32] (French CJ); *Fortescue Metals Group Ltd v Commonwealth* (2013) 250 CLR 548 at [130] (Hayne, Bell and Keane JJ).

government and separately organized State governments".[35]

25. While the Plaintiffs rely upon s 106 and the *Melbourne Corporation* principle as if they are separate arguments, in fact the arguments are one and the same. Section 106 is one of the provisions of the Constitution that is "predicated upon and embodie[s] … an assumption of the continued existence of the States as viable political entities", and therefore forms an important part of the textual foundation for the *Melbourne Corporation* principle (cf **MS [83]**). It does not, however, have the freestanding operation the Plaintiffs attribute to it.

26. The determinative provisions alter substantive rights by changing the underlying law, and are not directed to the constitutional functions of States. For that reason, those provisions do not intersect with the area of operation of the *Melbourne Corporation* principle, which simply is not relevant to the validity of the determinative provisions. Indeed, the Plaintiffs do not submit otherwise.[36] For that reason, the Commonwealth makes no further submissions about that principle.

C ARBITRATION PROVISIONS — SECTIONS 10(1)-(2) AND (4)-(7)

C.1 Factual context for the operation of the provisions

27. Clause 42(1) of the Agreement provides that a dispute or difference between the parties arising out of or in connection with the Agreement, its construction or as to the rights, duties or liabilities of the parties or under the Agreement shall be referred to and settled by arbitration under the provisions of the *Commercial Arbitration Act 1985* (WA).[37] In that way, the Agreement expressly contemplates that disputes or differences between the parties arising out of or in connection with the Agreement will not be resolved through the exercise of judicial power (save to the extent that the result of any arbitration may be enforced under that Act).

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[35] *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192 at 218 (Mason J), quoted in *Austin v Commonwealth* (2003) 215 CLR 185 at [24] (Gleeson CJ). See also *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 at 82 (Dixon J).

[36] The Plaintiffs seemingly rely on the *Melbourne Corporation* principle (and s 106) only in respect of their challenge to ss 11(3)-(4), 12(1) and (4), 19(3)-(4) and 20(1) and (4): see **MS [82], [85]** (although note that those paragraphs of Mineralogy's submissions do not exactly align with its Particulars: see at [9(b)], picking up [7(b)] (SCB 461-462)).

[37] SCB 205.

28. On 20 May 2014, the Hon M H McHugh AC QC made the First Award.[38] That award declared that the "first Balmoral South proposal"[39] was "a proposal submitted pursuant to clause 6 of the State Agreement with which the Minister was required to deal under clause 7(1) of the Agreement".[40] Two provisions of the Agreement Act operate by reference to those facts:

    28.1. by s 10(4), the First Award "is of no effect and is taken never to have had any effect"; and

    28.2. by s 10(5), the relevant arbitration agreement "is not valid, and is taken never to have been valid, to the extent that, apart from [s 10(5)], the arbitration agreement would underpin, confer jurisdiction to make, authorise or otherwise allow the making of [the First Award]".

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29. On 11 October 2019, Mr McHugh made the Second Award.[41] That award declared that the Plaintiffs' right to recover damages was not heard and determined by the First Award and that the Plaintiffs were "not foreclosed from further pursuing claims for damages arising from any breach or breaches of the State Agreement".[42] Two provisions of the Agreement Act operate by reference to those facts:

    29.1. by s 10(6), the Second Award "is of no effect and is taken never to have had any effect"; and

    29.2. by s 10(7), the relevant arbitration agreement "is not valid, and is taken never to have been valid, to the extent that, apart from [s 10(7)], the arbitration agreement would underpin, confer jurisdiction to make, authorise or otherwise allow the making of [the Second Award]".

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30. A third arbitration in respect of the Plaintiffs' claims for damages was to be heard by Mr McHugh on 30 November 2020.[43] Two provisions of the Agreement Act are relevant:

    30.1. s 10(1) provides for the termination of that arbitration; and

    30.2. s 10(2) provides for the termination of the relevant arbitration agreement.

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[38] SC [28] (SCB 127), Annexure B (SCB 255).

30 [39] See SC [23] (SCB 126) and Agreement Act, s 7 (definition of "first Balmoral South proposal").

[40] SC [31] (SCB 128).

[41] SC [34] (SCB 128), Annexure D (SCB 382).

[42] SC [36] (SCB 129).

[43] SC [40] (SCB 130).

C.2 Section 118 of the Constitution

31. The Plaintiffs submit that ss 10(1) and 10(4)-(7) are invalid by the operation of s 118 of the Constitution. That submission rests on two propositions:

    31.1. ss 10(1) and 10(4)-(7) conflict with s 35(1) of the *Commercial Arbitration Act* enacted in each State (**MS [132]**); and

    31.2. by reason of that conflict, s 118 of the Constitution operates to invalidate ss 10(1) and 10(4)-(7) (**MS [126]**).

32. As to the second proposition, the Commonwealth refers to its submissions in paragraphs 9 to 12 above about the effect of s 118. Section 118 simply does not have the effect alleged.

33. As to the first proposition, the asserted conflict for present purposes[44] is between s 35(1) of the *Commercial Arbitration Acts* and ss 10(1)[45] or (4)-(7) of the Agreement Act. The Plaintiffs' broad proposition is that the *Commercial Arbitration Acts* require recognition of the First and Second Awards, whereas the identified provisions of the Agreement Act require that they not be recognised.

34. That argument overlooks that s 35(1) of the *Commercial Arbitration Acts* is subject to s 36. The effect of the relationship between ss 35 and 36 is that neither the obligation to recognise an "arbitral award", nor the obligation to enforce it, is absolute. Most relevantly, a basis for refusing to recognise or enforce an award is that the arbitration agreement is "not valid under the law to which the parties have subjected it".[46] Here, the Agreement is governed by Western Australian law,[47] which now includes s 10 of the Agreement Act. Therefore, on any application to enforce the relevant awards,[48] or in any proceeding where the issue of recognition arose for consideration:

    34.1. Western Australia may resist enforcement or recognition on the basis that, by reason of s 10 of the Agreement Act, the arbitration agreement is invalid under Western Australian law in its operation in respect of the First and Second Awards; and

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[44] The relationship between s 35(1) of the *Commercial Arbitration Acts* and s 11 of Agreement Act is considered in paragraph 42 below.

[45] While the Plaintiffs include s 10(1) in this argument, the basis upon which it is said that that subsection intersects with s 35(1) of the *Commercial Arbitration Acts* is opaque.

[46] See, eg, *Commercial Arbitration Act 2013* (Qld), s 36(1)(a)(i).

[47] Agreement, cl 46 (SCB 207).

[48] The facts in the Special Case do not include any facts about applications to enforce either award.

34.2. if that occurred, s 118 would prevent the court of another State from refusing to recognise the effect of s 10 of the Agreement Act on public policy grounds,[49] with the probable[50] (perhaps inevitable) consequence that the court would refuse to recognise or enforce the First and Second Awards under s 36(1)(a)(i).

35. In those circumstances, it is only in the (unlikely) event that a court purported to recognise or enforce the First and Second Awards despite s 36(1)(a)(i) of the *Commercial Arbitration Acts* that there would be a "real question of any relevant inconsistency"[51] between the operation of ss 10(1) or (4)-(7) of the Agreement Act and s 35 of the *Commercial Arbitration Acts*. In the absence of facts establishing that this has occurred (and without knowing the court's reasons for proceeding in that way), there is no factual foundation for a central premise of the s 118 challenge to s 10(1) and (4)-(7) of the Agreement Act (being the alleged operational or other inconsistency between the laws of two States).

C.3 Ch III of the Constitution

36. To conclude that a particular arbitral award is final and conclusive "does no more than reflect the consequences of the parties having agreed to submit a dispute of the relevant kind to arbitration".[52] The impugned provisions of s 10 are provisions that regulate the effect to be given to particular agreements made between Western Australia and the Plaintiffs. They do not confer a function or power on a court. They do not deny any defining characteristic (or, indeed, any characteristic) of a State Supreme Court. Nor do they otherwise involve any interference in the judicial process or any exercise of judicial power. There is therefore no basis to conclude that they infringe any limitation derived from Ch III (see also **WA/B54 [76]-[80]**).

D LIABILITY PROVISIONS — SECTIONS 9(1), 9(2), 11(1), 11(2), 19(1) AND 19(2)

37. The next set of impugned provisions (the **liability provisions**) regulate the effect to be given to the first and second Balmoral South proposals and deny or extinguish Western Australia's liability in connection with what the Agreement Act calls "disputed matters" and "protected matters". Broadly, s 7 defines the expression "disputed matter" to cover

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[49] See the cases cited in n 3 above.

[50] See *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of Pakistan* [2011] 1 AC 763 at [67]-[68] (Lord Mance JSC), [127]-[128] (Lord Collins JSC).

[51] *Port MacDonnell* (1989) 168 CLR 340 at 374 (the Court).

[52] *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 at [108] (Hayne, Crennan, Kiefel and Bell JJ).

Western Australia's conduct in connection to the Balmoral South Iron Ore Project (such as its rejection of the first proposal and the stipulation of conditions for any subsequent proposal) and it defines the expression "protected matter" to cover the State's conduct connected with the enactment of the Amendment Act.

38. Section 9(1) provides that, on and after commencement, neither the first nor the second Balmoral South proposal "has, nor can have, any contractual or other legal effect under the Agreement or otherwise", while s 9(2) provides that, for the Balmoral South Iron Ore Project, "only proposals submitted … on and after commencement can be proposals for the purposes of the Agreement".

39. Under ss 11(1) and 19(1), on and after commencement, the State has, and can have, no liability to any person that is or would be:

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39.1. in respect of any loss or other matter or thing, that is the subject of a claim, order, finding or declaration against the State in a "relevant arbitration"[53] (s 11(1)(a)); or

39.2. in respect of any other loss, or other matter or thing, that is, or is connected with, a disputed matter (s 11(1)(b)) or a protected matter (s 19(1)(a)), whether the loss, or other matter or thing, occurs or arises before, on or after commencement; or

39.3. in any other way connected with a disputed matter (s 11(1)(c)) or a protected matter (s 19(1)(b)).

40. Under ss 11(2) and 19(2), any liability of the type described in ss 11(1) or 19(1) that the State has to any person before commencement is extinguished.

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D.1 Section 118 of the Constitution

41. For the reasons given in paragraphs 9 to 12 above, s 118 does not provide a rule for resolving conflicts between the statutes of different States that would invalidate the later-in-time statute.

42. Further, for the reasons given in paragraph 34 to 35 above, if the effect of s 10 is held to be that the relevant arbitration agreements are invalid, then it is probable[54] (perhaps inevitable) that a court of another State would refuse to enforce the First and Second Awards under s 36(1)(a)(i) of the *Commercial Arbitration Act*. If that occurred, there would

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[53] Defined in s 7 in terms that include the arbitrations that led to the First and Second Awards.

[54] See *Dallah* [2011] 1 AC 763 at [67]-[68] (Lord Mance JSC), [127]-[128] (Lord Collins JSC).

be no conflict between s 35 and ss 9(1)-(2) and 11(1)-(2), and therefore the premise for the challenge to those provisions under s 118 could not be established.

D.2 Chapter III of the Constitution.

43. For the reasons given above in paragraph 36, the liability provisions do not infringe any limitation deriving from Ch III of the Constitution. They are provisions that modify substantive rights and liabilities, and are thus of a kind that have consistently survived constitutional challenges based on Ch III (see paragraph 15 above , and also **WA/B54 [90]**). They operate "once and for all as a final measure terminating" and "extinguish[ing]" any cause of action against Western Australia in respect of "liability" of the kinds described.[55]

E INDEMNITY – SECTION 14(4)

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44. Section 14(4) provides that every "relevant person" — which includes the Plaintiffs and Mr Palmer[56] — must "indemnify, and must keep indemnified" the State against any "protected proceedings"[57] (para (a)); any loss, or liability to any person, connected with a disputed matter (para (b)); and, relevantly, any legal costs of the State connected with any protected proceedings (para (c)(i)).

45. The Plaintiffs challenge the validity of s 14(4) on the basis of: (a) Ch III; and (b) s 115 of the Constitution. Unlike the other similar indemnity provisions that the Plaintiffs purport to challenge,[58] the validity of s 14(4) properly arises because Western Australia has put the Plaintiffs on notice that it "intends to rely on the indemnity in s 14(4) of the 2020 Act in connection with its legal costs of a proceeding" in the Supreme Court of Queensland.[59]

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46. In their written submissions the Plaintiffs advance, as part of their rule of law argument, a contention that the operation of s 14(4) should be characterised as "punitive" (**MS [75]**). The rule of law argument is addressed at paragraphs 20 to 21 above. If the argument includes a distinct judicial power argument, that argument should be rejected for the reasons set out at paragraphs 18 to 19 and 36 above, as well as the reasons set out in the

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[55] See, by analogy, s 44 of the *Safety, Rehabilitation and Compensation Act 1988* (Cth), considered in *Commonwealth v Mewett* (1997) 191 CLR 471 at 557 (Gummow and Kirby JJ), quoting *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 307 (Mason CJ, Deane and Gaudron JJ), 310 (Brennan J).

[56] Section 14(2).

30 [57] Defined as "proceedings brought, made or begun, or purportedly brought, made or begun, and connected with a disputed matter": s 14(1).

[58] See paragraph 61 below.

[59] SC [47] (SCB 131).

Commonwealth's written submissions filed in B52 of 2020 at paragraphs 13 to 15. Section 14(4) alters the rights and liabilities of relevant persons by rendering them responsible for particular costs, losses and liabilities of the State. That alteration has nothing to do with the characteristics of State Courts and does not involve any exercise of, or interference with, judicial power. Nor is the operation of s 14(4) "bizarre" (**MS [34]**); it reflects the operation of a familiar type of contractual indemnity (see **WA/B54 [142]**).[60]

47. In response to the s 115 argument (**MS [139]-[140]**), the Commonwealth adopts the submissions of Western Australia (**WA/B54 [155]-[158]**).

F FEDERAL JURISDICTION

48. The questions stated for the Full Court in this case are whether the whole of Pt 3 of the Agreement Act, or specified parts or provisions of it, are "invalid or inoperative". To answer those questions, it is neither necessary nor appropriate for the Court to consider whether various provisions of Pt 3 would apply of their own force to proceedings in federal jurisdiction or, to the extent that they purport to regulate the manner or exercise of federal jurisdiction, whether they would be "picked up" by s 79(1) of the Judiciary Act (cf **MS [120]**). That is for two reasons.

49. *First*, the questions stated for the Full Court do not raise those issues.[61] The identification of the law to be applied by a court exercising federal jurisdiction, or whether s 79(1) would pick up any particular provision of Pt 3, or as to the effect of s 64 of the Judiciary Act, are proceeding-specific. Further, and more importantly for present purposes, those issues do not concern the validity of any provisions within Pt 3, but only their applicability in federal jurisdiction.[62] For that reason, those issues are not relevant to the questions stated.

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[60] See, eg, *Qantas Airways Ltd v Aravco Ltd* (1996) 185 CLR 43 at 46-47 (Brennan CJ, Gaudron, McHugh and Gummow JJ).

[61] The same is true of the prayer for relief (SCB 454-455), where all of the declarations sought are declarations of invalidity of the whole of the Amending Act or particular provisions of the Amending Act.

[62] It is clear that State legislation cannot apply of its own force to regulate the manner or exercise of federal jurisdiction: see *Rizeq v Western Australia* (2017) 262 CLR 1 at [15] (Kiefel CJ), [58]-[63] (Bell, Gageler, Keane, Nettle and Gordon JJ). State legislation that is expressed in general terms as regulating the manner or exercise of the jurisdiction of State courts is construed as not purporting to have that effect with respect to matters in federal jurisdiction, which is why no question of the validity of such laws arises notwithstanding that they might appear to enter an area of exclusive Commonwealth power. Indeed, it is principally laws of that kind that are picked up by s 79 of the Judiciary Act: see, eg, *Rizeq v Western Australia* (2017) 262 CLR 1 at [15] (Kiefel CJ), [81] (Bell, Gageler, Keane, Nettle and Gordon JJ); *Commissioner of Stamp Duties (NSW) v Owens* (1953) 88 CLR 168 at 169 (the Court).

50. *Second*, by its terms, s 79(1) operates to apply the laws of each State or Territory to all courts exercising federal jurisdiction in that State or Territory. In its terms, s 79(1) clearly does not apply Western Australian law to any court exercising federal jurisdiction in any State or Territory except Western Australia. Accordingly, the interaction of s 79(1) of the Judiciary Act with Pt 3 of the Agreement Act would arise in a concrete way only if there is a proceeding pending in a court in Western Australia which is exercising federal jurisdiction.[63] On the facts in the Special Case, there is no basis to conclude that there is any such proceeding. Accordingly, it would be to engage in a hypothetical exercise to consider which provisions (if any) of Pt 3 would be "picked up" and applied by s 79(1) if such a proceeding were ever to be commenced.

G UTILITY OF DECIDING THE VALIDITY OF OTHER PROVISIONS OF PT 3

G.1 General Approach

51. It is not the practice of the Court to "investigate and decide constitutional questions unless there exists a state of facts which makes it necessary to decide such a question in order to do justice in the given case and to determine the rights of the parties".[64] It follows that "it is ordinarily inappropriate for the Court to be drawn into a consideration of whether a legislative provision would have an invalid operation in circumstances which have not arisen and which may never arise if the provision, if invalid in that operation, would be severable and otherwise valid".[65]

52. Here, there can be no doubt that, if any provision of Pt 3 of Agreement Act has any invalid operation, that operation will be severable from the remainder of Pt 3. That is the effect of ss 8(4) and (5). Specifically, a provision of Pt 3 does not apply to a matter or thing to the extent (if any) that is necessary to avoid the provision or any part of the provision applying to the matter or thing not being valid for any reason (s 8(4)(b)). Further, to the extent a provision (or part thereof) nonetheless applies to a matter or thing such that it is invalid, the rest of Pt 3 "is to be regarded as divisible from, and capable of operating independently

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[63] This limitation is acknowledged in **WA/B54 at [115]**, where it is said: "In respect of a court exercising federal jurisdiction in WA, this raises a question…".

[64] *Lambert v Weichelt* (1954) 28 ALJ 282 at 283 (Dixon CJ), quoted in *Knight v Victoria* (2017) 261 CLR 306 at [32] (the Court). See also *Clubb v Edwards* (2019) 267 CLR 171 at [32] (Kiefel CJ, Bell and Keane JJ), [135] (Gageler J), [230] (Nettle J), [332] (Gordon J); *Zhang v Commissioner of the Australian Federal Police* (2021) 95 ALJR 432 16 at [21]-[25] (the Court).

[65] *Knight* (2017) 261 CLR 306 at [33] (the Court). See also *Clubb* (2019) 267 CLR 171 at [33]-[36] (Kiefel CJ, Bell and Keane JJ), [143]-[148] (Gageler J), [230] (Nettle J), [329]-[340] (Gordon J), [443] (Edelman J).

of, the provision, or the part of a provision, that is not valid" (s 8(5)). Sections 8(4) and (5) thus supplant the operation of the severance provision in s 7 of the *Interpretation Act 1984* (WA). Unlike that provision, their operation cannot be displaced by any "contrary intention" (cf **MS [141]-[144]**).[66]

53. Accordingly, if the circumstances are such that any allegedly invalid operation of any provision of Pt 3 has not yet arisen, and may never arise, the Court should follow its ordinary practice and decline to determine whether the provision has that invalid operation. This is not a case where there exist "unusual features" or "good reasons" that might warrant the Court departing from that ordinary practice.[67] This is not a proceeding where, for example, the Court following that ordinary practice "would add to a longstanding constitutional controversy which has repeatedly been thrown up as a practical problem … and which would likely continue to be a practical problem unless and until resolved by definitive judicial pronouncement".[68] To the contrary, for the Court to resolve all of constitutional questions addressed by the parties' pleadings and submissions only because the Court's "analysis might reveal the potential for invalidity in the application of the statute to the circumstances of some other real or imagined case" would be to require the Court to engage in "laborious and fraught work of supererogation".[69]

54. It is only if the Court is satisfied that there are facts that actually raise an allegedly invalid operation of a provision of Pt 3 that it should go on to consider the validity of that operation of the provision by reference to the facts and documents contained in the Special Case, together with "any inference, whether of fact or law, which might have been drawn from them if proved at a trial".[70]

G.2 Utility in this case

55. If the determinative provisions are valid, then:

    55.1. neither the first Balmoral South proposal nor the second Balmoral South proposal has, nor can have, any contractual or other legal effect under the Agreement or otherwise (s 9(1));

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[66] See *Interpretation Act 1984* (WA), s 3(1); *Clubb* (2019) 267 CLR 171 at [339]-[341] (Gordon J).

[67] See *Clubb* (2019) 267 CLR 171 at [36]-[40] (Kiefel CJ, Bell and Keane JJ); *Private R v Cowen* (2020) 94 ALJR 849 at [158]-[159] (Edelman J).

[68] See *Private R* (2020) 94 ALJR 849 at [107] (Gageler J), see also at [160]-[162] (Edelman J).

[69] *Clubb* (2019) 267 CLR 171 at [146] (Gageler J).

[70] *High Court Rules 2004* (Cth), r 27.08.5. See further *Plaintiff M47/2018 v Minister for Home Affairs* (2019) 265 CLR 285 at [10] n 18 (Kiefel CJ, Keane, Nettle and Edelman JJ).

55.2. arbitration agreements underlying the First Award and the Second Award are invalid to the extent that they purported to empower the making of those awards, and the awards are of no effect (s 10);

55.3. the State has no liability in respect of any loss that is, or is connected with, a disputed matter or a protected matter, and any previously existing liability of that kind has been extinguished (ss 11(1)-(2), 19(1)-(2)).

56. In substance, to reach the above conclusions would determine the rights and liabilities of the parties.

57. Beyond the determinative provisions, the Plaintiffs challenge the further provisions of Pt 3 identified below. However, for the reasons set out, it is neither necessary nor appropriate for the Court to consider the validity of those other provisions.

58. *First*, ss 11(3), 11(4), 19(3) and 19(4) potentially bar a plaintiff from commencing or continuing particular proceedings. However, the effect of those provisions is not to take away the jurisdiction of any court to hear and determine proceedings of the kind described in them. That follows because, before provisions will be construed to withdraw or limit a conferral of jurisdiction, the implication must appear "clearly and unmistakeably".[71] It does not appear here. These provisions do not limit the authority of any court to decide claims of the identified kinds, but instead provide Western Australia with an available answer to those claims if they are made in a court. In practical terms, they create a defence which Western Australia may, but need not, plead to specific claims in all courts.[72] They are not relevantly distinguishable from s 494AB(1) of the *Migration Act 1958* (Cth),[73] the effect of which was considered in *Minister for Home Affairs v DMA18 as litigation guardian for DLZ18*.[74] Applying the phraseology used in relation to statutes of limitations, they potentially bar the remedy, not the right.[75] Accordingly, unless and until Western Australia pleads reliance on one or more of ss 11(3), 11(4), 19(3) and 19(4) in a particular proceeding, no occasion arises to consider their validity. The position just summarised

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[71] See *Minister for Home Affairs v DMA18 as litigation guardian for DLZ18* (2020) 95 ALJR 14 at [27] (the Court), citing *Shergold v Tanner* (2002) 209 CLR 126 at [34] (the Court).

[72] *DMA18* (2020) 95 ALJR 14 at [31].

[73] Section 494AB(1) provides that specified "proceedings against the Commonwealth may not be instituted or continued in any court".

[74] (2020) 95 ALJR 14.

[75] *DMA18* (2020) 95 ALJR 14 at [4] (the Court). Compare the operation of the liability provisions: see paragraph 43 above.

aligns with the Crown's common law immunity from suit, which could be "pleaded in an action to recover damages in respect of a common law cause of action".[76] As there is nothing in the Special Case that suggests Western Australia has pleaded reliance on any of these provisions in any pending proceeding, there is no occasion to consider their validity.

59. *Second*, there are provisions in Pt 3 that affect evidence and procedure in proceedings covered by s 19 (s 18). Federal Court proceeding QUD 257/2020[77] may be such a proceeding. But whether those provisions are picked up and applied in that proceeding by s 79(1) of the Judiciary Act is a matter to be determined in that proceeding, rather than in this Court. Further, that question does not arise where the Federal Court proceeding is not in Western Australia.

10 60. *Third*, there are provisions that regulate other kinds of proceedings, some of which will never exist and some of which may never be brought (ss 12, 13, 20, 21). To the extent that those provisions apply to particular kinds of proceedings required to have been pending or completed at the time of the commencement of the Agreement Act, those provisions will <u>never</u> have any operation.[78] To the extent that those provisions apply to possible future proceedings, the possibility of those future proceedings is an insufficient reason for this Court to rule on the validity of those provisions. Take, for example, s 21, which deals (broadly) with proceedings seeking access to documents connected with a protected matter:

60.1. No such proceedings were begun or completed before the commencement of the Agreement Act or the day on which the Amendment Act received the Royal Assent,
20 meaning that ss 21(5)-(8) will never have any operation. To rule on their validity in those circumstances would be to engage in a wholly hypothetical exercise.

60.2. While the bar on bringing such proceedings does have potential future operation, that potential does not make it appropriate for the Court to consider its validity in

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[76] *Blunden v Commonwealth* (2003) 218 CLR 330 at [9] (Gleeson CJ, Gummow, Hayne and Heydon JJ). See also *Mewett* (1997) 191 CLR 471 at 550-551 (Gummow and Kirby JJ); *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30 at [59] (McHugh, Gummow and Hayne JJ). Indeed, it may be that Western Australia's immunity from suit is still operative in courts outside of Western Australia, such that Pt 3 did not actually alter Western Australia's susceptibility to suit in non-federal jurisdiction outside Western
30 Australia: see *Crown Suits Act 1947* (WA); *Fitter International Inc v British Columbia*, 2021 ABCA 54 at [13]-[39] (the Court).

[77] SC [45] (SCB 131), read with Reply [1A(b)(ii)] (SCB 493), Rejoinder [1(c), (d)] (SCB 503). The Special Case does not identify any other proceeding in federal jurisdiction.

[78] Sections 12(5)-(7), 13(6)-(8), 20(5)-(7), 21(6)-(8). See also ss 11(5)-(7), 19(5)-(7).

circumstances where such proceedings may never happen. In any event, the reasoning in support of the validity of ss 11(3) and 19(3) would apply to it.

61. *Fourth*, there are provisions that regulate indemnities (ss 14, 15, 16, 22, 23). On the facts in the Special Case, the State has not indicated an intention to rely on the indemnity provisions in any existing proceeding, beyond that discussed in paragraph 45 above relating to s 14(4). Accordingly, there is no occasion for the Court to consider their validity. That occasion may never arise. If it did, the reasoning discussed above in relation to s 14(4) would be applicable.

62. *Fifth*, there are provisions that regulate the payment and enforcement of liabilities (ss 17, 25). If the liability provisions considered in paragraphs 37 to 43 above are valid, it is difficult to see how an occasion will ever arise for the State to rely on those provisions.[79]

63. *Sixth*, s 30 of the Agreement Act confers a power on the Minister to make an order modifying the operation of Pt 3 (ss 30, 31). The Minister has not exercised that power, there is no basis to suggest that the Minister is intending to exercise that power. There is therefore no factual foundation that would make it necessary or appropriate to determine whether the Western Australian Parliament has impermissibly delegated legislative power to the Executive. As noted at the outset, if the occasion arises to consider that question, the Commonwealth adopts the submissions of Western Australia.

PART V — ESTIMATE OF TIME

64. It is estimated that a combined 1.5 hours will be required for the presentation of the Commonwealth's oral argument in B52/2020 and B54/2020.

Dated: 28 May 2021

Stephen Donaghue
Solicitor-General of the Commonwealth
T: (02) 6141 4139
E: stephen.donaghue@ag.gov.au

Frances Gordon
Owen Dixon Chambers West
T: (03) 9225 6809
E: francesgordon@vicbar.com.au

Thomas Wood
Owen Dixon Chambers West
T: (03) 9225 6078
E: twood@vicbar.com.au

[79] To the extent that Western Australia raises a question about Commonwealth legislative power to enact provisions that require assets, rights or entitlements of a State to be available to satisfy certain liabilities (see **WA/B52 [50]; WA/B54 [129]**), that question does not arise. Sections 65 to 67 of the Judiciary Act do not have that effect, and are consistent with the *Auckland Harbour Board* principle: see *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319 at 389-390 (Starke J); *New South Wales v Commonwealth [No 1]* (1932) 46 CLR 155 at 176-177 (Rich and Dixon JJ).

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN: **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 ATTORNEY-GENERAL OF THE COMMONWEALTH'S SUBMISSIONS

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

No	Description	Version	Provision(s)
1.	Commonwealth Constitution	Current	Ch III, ss 51(xxv), 51(xxxvii), 106, 109, 115, 118
2.	*Judiciary Act 1903* (Cth)	Current	ss 64-67, 79
3.	*Crown Suits Act 1947* (WA)	Current	
4.	Agreement Act		Pt 3
5.	Amendment Act		
6.	*Interpretation Act 1984* (WA)	Current	ss 3(1), 7
7.	*Commercial Arbitration Act 2013* (Qld)	Current	ss 35, 36
8.	*Foreign Evidence Act 1994* (Cth)	Current	
9.	*Crimes at Sea Act 2000* (Cth)	Current	Sch 1 cl 7
10.	*Safety, Rehabilitation and Compensation Act 1988* (Cth)	As at 31 July 1997	s 44
11.	*Migration Act 1958* (Cth)	current	s 494AB(1)