HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY

No. B54 of 2020

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

INTERVENER'S SUBMISSIONS

(ATTORNEY-GENERAL FOR THE NORTHERN TERRITORY OF AUSTRALIA)

Part I: Certification

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

Part II: Intervention

2. The Attorney-General for the Northern Territory of Australia (**Territory**) intervenes pursuant to s 78A(1) of the *Judiciary Act 1903* (Cth) in support of the Defendant.

Part III: Argument

A SUMMARY

3. These proceedings concern the validity of the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA) (**Amending Act**). The Territory adopts the written submissions of the Defendant on all issues. In these submissions, it contends:

(a) The Amending Act is not invalid by reason of its asserted inconsistency with the rule of law (**Rule of Law Issue**).

(b) Secondly, the Amending Act is not invalid by reason of its asserted inconsistency with "unwritten principles deeply rooted in the common law" (**Common Law Issue**).

(c) Thirdly, the declaratory provisions of the Amending Act do not substantially impair the institutional integrity of State courts (***Kable* Issue**).

B RULE OF LAW ISSUE

4. *Summary*: The Plaintiffs say the Amending Act is invalid because it contravenes what they describe as a "core requirement" of the rule of law, being that citizens must have access to impartial courts in which to vindicate their legal entitlements (**PS[69]-[75]**). This limitation on State legislative power does not exist, and if it did, would not result in the invalidity of the Amending Act.

The "core requirement" is not a standalone criterion of invalidity

5. The Plaintiffs identify no proper constitutional basis for the asserted limitation on State legislative power. The starting point for the Plaintiffs' argument is the statement, by Dixon J in the *Australian Communist Party v Commonwealth* (***Communist Party Case***), that the rule of law forms an "assumption" on which

the Commonwealth Constitution is based[1]. This assumption does not support the existence of any standalone criterion of invalidity.

6. The Plaintiffs' submission conflates a constitutional assumption with a constitutional implication. After setting out the now accepted test for the recognition of constitutional implications with normative effect[2], Mason CJ explained in *Australian Capital Television Pty Ltd v Commonwealth* (***ACTV***)[3]:

> It is essential to keep steadily in mind the critical difference between an implication and an unexpressed assumption upon which the framers proceeded in drafting the Constitution. The former is a term or concept which inheres in the instrument and as such operates as part of the instrument, whereas an assumption stands outside the instrument.

7. It is only an implication which has direct normative force. Because the ultimate foundation for the Constitution is the acceptance of its text and structure by the Australian people[4], any implied limitation it imposes must be "inherent"[5] and "securely based"[6] in that text and structure[7]. An unexpressed assumption which stands outside the text or structure does not bear that quality[8].

8. That coheres with Dixon J's remarks in the *Communist Party Case*. In that passage, Dixon J was concerned with the scope of the incidental power in s 51(xxxix) of the Constitution and, in particular, whether the recitals in the *Communist Party Dissolution Act 1950* (Cth) were sufficient to bring the Act within that head of power. His Honour noted at 192 that the power was an "incidental or ancillary power, not a power defined according to subject matter". In the case of the latter, "the legislature is at large in the course it takes...provided

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[1] (1951) 83 CLR 1 at 193 per Dixon J. The observations by Gleeson CJ and Heydon J in *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 (***APLA***) at [30] go no further than to say that Ch III, by conferring and denying judicial power, gives practical effect to the assumption.

[2] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 134-5; *Gerner v Victoria* (2020) 95 ALJR 107 (***Gerner***) at [14] *per curiam*.

[3] (1992) 177 CLR 106 at 135.

[4] *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601 at [83] per Kirby J.

[5] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (***Lange***) at 567 *per curiam*.

[6] *ACTV* at 134-5 per Mason CJ; *APLA* at [389] per Hayne J; *McCloy v New South Wales* (2015) 257 CLR 178 at [318] per Gordon J.

[7] *Gerner* at [14] *per curiam*.

[8] The Plaintiffs do not explain why an unexpressed constitutional assumption should be given normative force, cf (**PS[69]-[70]**).

it observes the restrictions arising from specific constitutional provisions, such as s 55, Ch III, ss 92, 99 and 116". However, because s 51(xxxix) is not defined by any such subject matter, his Honour said the inquiry was, as confirmed by its text, whether the law "is ancillary or incidental to sustaining and carrying on government" (emphasis added).

9. Against that background, his Honour said at 193 (emphasis added):

> …it is a government under the Constitution and that is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as, for example, in separating the judicial power from other functions of government, others of which are simply assumed. Among these I think it would fairly be said that the rule of law forms an assumption. In such a system I think it would be impossible to say of a law of the character described, which depends for its supposed connection with the power upon a conclusion of the legislature concerning the doings and the designs of the bodies or person to be affected and affords no objective test of the applicability of the power, that it is a law upon a matter incidental to the execution and maintenance of the Constitution and the laws of the Commonwealth.

10. Three things may be drawn from that passage.

11. *First*, it is consistent with the distinction drawn by Mason CJ in *ACTV* between implications and assumptions. Dixon J recognised the Constitution is "framed in accordance with many traditional conceptions", to only "some of which it gives [legal] effect". In that category, his Honour placed the separation of judicial power, which finds textual and structural support in the division of powers between Chs I, II and III of the Constitution and which has the normative effect of preventing the vesting of the judicial power of the Commonwealth in a body other than a Ch III court. His Honour then contrasted this normative conception with others which are "simply assumed". Into that category, Dixon J placed the rule of law.

12. So understood, his Honour's reasons are in harmony with the criticism he expressed earlier in *Australian National Airways v Commonwealth* of an argument which confused "the unexpressed assumptions upon which the framers [of the

Constitution] supposedly proceeded with the express meaning of the power"[9]. The same criticism has been made by other members of this Court to deny normative effect to "unexpressed assumptions" on which the Constitution was based[10].

13. *Secondly*, Dixon J's comments were directed to the construction of s 51(xxxix)[11]. It is uncontroversial that the Court may have regard to the historic context underlying the Constitution "for the purpose of identifying the contemporary meaning of the language used, the subject to which that language was directed and the nature and objectives of the movement towards federation"[12]. However, that does not elevate those assumptions to constitutional implications.

14. *Thirdly*, it is implicit in his Honour's mode of reasoning that he did not adopt the rule of law as a standalone criterion of invalidity. As Callinan J observed in *Western Australia v Ward*[13] (emphasis added):

> …the statement of Dixon J in [the *Communist Party Case*] at 193 that the rule of law was an assumption in accordance with which the Constitution was framed meant no more than that the Parliament could not decide the limits of its constitutional power. It simply expresses the notion encapsulated in the saying "The stream cannot rise above its source." Fairly interpreted, it provides no support for the notion that judges are empowered to strike down legislation on the basis that it infringes some unwritten aspect of the rule of law.

15. The Plaintiffs have pointed to no case which has identified and applied the limitation which they assert[14]. In fact, in *Re Minister for Immigration and*

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[9] (1945) 71 CLR 29 at 81.

[10] See *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at [419] per Kiefel J; *New South Wales v Commonwealth* (1990) 169 CLR 482 at 513 per Deane J; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 (***Theophanous***) at 171 per Deane J (in respect of an "unexpressed intention") and 195 per McHugh J; *McGinty v Western Australia* (1996) 186 CLR 140 at 184 per Dawson J; *Carr v Western Australia* (2007) 232 CLR 138 at [12] per Gleeson CJ; *Bennett v Commonwealth* (2007) 231 CLR 91 at [130] per Kirby J.

[11] G Lindell, "Recent Developments in the Judicial Interpretation of the Australian Constitution" in G Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 1 at 21.

[12] *Cole v Whitfield* (1988) 165 CLR 360 at 385 *per curiam*; *Theophanous* at 143-144 per Brennan J.

[13] (2002) 213 CLR 1 at [963], fn 1091.

[14] The statements of the rule of law in the writings by Sir Victor Windeyer, Justice Gordon and The Hon Kenneth Hayne AC (**PS[72]-[73]**) were not made on the basis that they arose out of the Constitution or represented constitutional norms. Further, The Hon Kenneth Hayne AC refers to "the supremacy of statute

Multicultural and Indigenous Affairs; Ex parte Lam (2003) 214 CLR 1 at [72], McHugh and Gummow JJ said:

> In Australia, the observance by decision-makers of the limits within which they are constrained by the Constitution and by statutes and subsidiary laws validly made is an aspect of the rule of law under the Constitution. It may be said that the rule of law reflects values concerned in general terms with abuse of power by the executive and legislative branches of government. But it would be going much further to give those values an immediate normative operation in applying the Constitution.

16. Four further points may be made.

17. *First*, the inability to precisely state the content of the rule of law as a concept makes it unsuitable to be recognised as a standalone criterion of invalidity. The rule of law has been described as a "cluster of principles" the content of which has "been debated by thinkers over hundreds, and even thousands, of years"[15]. As the Plaintiffs accept, its content is presently "hotly disputed" (**PS[71], fn 68**), as is most obviously demonstrated by the ongoing competition between "thick" and "thin" conceptions of the rule of law[16]. An implication that is inherently vague or of unclear reach and effect should not readily be accepted[17].

18. *Secondly*, by reason of this imprecision, the rule of law, like a federation, is not a "one size fits all" proposition[18]. In particular, the Constitution gives textual or structural effect to only some aspects of the rule of law[19]. That points against any broader implication. It is well settled that an implication cannot extend beyond

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law" (at 185) and that subject to restraints recognised in the Constitution, it is "the political branches which must choose whether to promote or diminish the rule of law" (at 188).

[15] J Gleeson and C Winnett, 'The Rule of Law and the Crown' in M Hinton and J Williams (eds), *The Crown: Essays on its manifestations, power and accountability* (University of Adelaide Press, 2018) 121, 122

[16] C Saunder and K Le Roy, 'Perspectives on the Rule of Law' in C Saunder and K Le Roy (eds), *The Rule of Law* (Federation Press, 2003) 1, 5-6. See also *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17 at [91] per Gordon and Steward JJ.

[17] J Kirk, *Constitutional Implications (I): Nature, Legitimacy, Classification, Examples* (2000) 24(3) *MULR* 645 at 656 and the authorities referred to therein.

[18] *Gerner* at [14] *per curiam*.

[19] See, e.g. *APLA* at [30] per Gleeson CJ and Heydon J; *Thomas v Mowbray* (2007) 233 CLR 307 at [61] per Gummow and Crennan JJ; *South Australia v Totani* (2010) 242 CLR 1 at [61] per French CJ, [131] per Gummow J, [233] per Hayne J and [423] per Crennan and Bell JJ; *Momcilovic v The Queen* (2011) 245 CLR 1 at [593] per Crennan and Kiefel JJ.

what is necessary to give effect to the textual and structural features which support it[20]. The question is therefore not "what does the rule of law require?", but rather, "what do the terms and structure of the Constitution prohibit, authorise or require?"[21] That is the subject of some of the Plaintiffs' other grounds of challenge.

19. *Thirdly*, the rule of law is effectuated through the courts applying laws passed by democratically elected legislatures within their sphere of competence. It is adherence to that overarching constitutional framework which is the guarantee of public confidence in the integrity of the judicial process and the protection of the courts' repute as the administrator of justice[22]. The passage of the Amending Act, and the courts' application of it, exemplify that rule of law[23].

20. *Fourthly*, the substance of the Plaintiffs' complaint in respect of the "core requirement", in truth, reduces to a complaint about the Amending Act being retrospective, *ad hominem,* using 'statutory fictions' and preventing the commencement of proceedings (**PS[75]**). The Plaintiffs make no attempt at demonstrating how such restrictions on legislative power arise out of the text or structure of the Constitution.

21. For those reasons, the rule of law as formulated by the Plaintiffs does not operate as a stand-alone criterion of invalidity, divorced from the constitutional text or structure.

The Amending Act does not offend the rule of law established by the Constitution

22. In any event, the aspects of the Amending Act relied on by the Plaintiffs are not inconsistent with the rule of law as reflected in the accepted doctrine of this Court.

23. The Plaintiffs say the rule of law requires "the identification, application and enforcement of previously ascertainable norms of conduct" (**PS[72]**). But there is nothing constitutionally impermissible about the retrospective application of laws[24], including those which retrospectively impose criminal sanction[25]. The

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[20] *Gerner* at [14] *per curiam*, and the authorities cited in fn 11.

[21] Ibid, citing *Lange* at 566-7 *per curiam*.

[22] *Nicholas v The Queen* (1998) 193 CLR 173 at [37] per Brennan CJ (Hayne J agreeing at [242]).

[23] *Baker v The Queen* (2004) 223 CLR 513 at [6] per Gleeson CJ.

[24] *R v Kidman* (1915) 20 CLR 425 at 432 per Griffith CJ, 441-443 per Isaacs J, 451-4 per Higgins J, 462 per Powers J and 546 per Gavan Duffy and Rich JJ.

resistance of the law to retrospectivity in legislation is reflected in the rule that, save where the legislature makes its intention clear, a statute ought not be given retrospective operation where to do so would be to attach new legal consequences to facts or events which occurred before its commencement[26]. That presumption is not a limitation on legislative power[27]; it is simply a "working hypothesis"[28].

24. Relatedly, the Plaintiffs contend ss 8-10 offend the rule of law by "erecting fictions denying the reality of past events" (**PS[75]**). Even assuming the correctness of that label, the use of a statutory fiction is perfectly proper. If the statute otherwise operates within a field of legislative power conferred on the Parliament, it is immaterial that its operation depends in part on the creation of a statutory fiction[29].

25. The Plaintiffs assert that the rule of law requires the application of a system of "general rules" (**P[73]**). As is demonstrated by a number of decisions of this Court, Parliaments may pass legislation *ad hominem* in conformity with Ch III of the Constitution[30].

26. As to excluding the State's liability for costs (**PS[75]**), the Crown was historically exempt by its prerogative from the payment of costs in any judicial proceeding[31]. Further, the power to award costs is entirely a creature of statute[32].

27. Finally, the Plaintiffs claim the Amending Act offends the rule of law because it limits the bringing or continuation of proceedings against the State and denies the review of certain matters (**P[72]-[73]**). There is nothing constitutionally impermissible about the use of a privative clause provided (as s 26(6) of the

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[25] *Polyukovich v Commonwealth* (1991) 172 CLR 501 at 536 per Mason CJ, 643-644 per Dawson J, 690 per Toohey J and 715 per McHugh J.

[26] Ibid at 642 per Dawson J.

[27] *South Australia v Totani* (2010) 242 CLR 1 at [31] per French CJ.

[28] *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at [21] per Gleeson CJ.

[29] *Northern Land Council v Commonwealth* (1986) 161 CLR 1 at 5-6 per Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ; *University of Wollongong v Metwally* (1984) 158 CLR 447 at 465 per Mason J.

[30] See the authorities in footnote 67 below.

[31] *Affleck v The Queen* (1906) 3 CLR 608 at 630-631 per Griffith CJ for the Court; *Attorney-General for Queensland v Holland* (1912) 15 CLR 46 at 49 per Griffith CJ; *Perkins v County Court of Victoria* (2000) 2 VR 246 at [25] per Phillips JA (Charles and Buchanan JJA agreeing at [42] and [70]).

[32] *Northern Territory of Australia v Sangare* (2019) 265 CLR 164 at [12] *per curiam*; *Bell Lawyers Pty Ltd v Pentelow* (2019) 93 ALJR 1007 at [33] per Kiefel CJ, Bell, Keane and Gordon JJ.

Amending Act does) it does not oust the entrenched jurisdiction to review administrative action for jurisdictional error or to determine whether the Amending Act itself is valid[33]. Further, the Plaintiffs' submission is inconsistent with the established rule of construction that legislation does not deprive a citizen of access to the courts other than to the extent expressly stated or necessarily implied[34].

C COMMON LAW ISSUE

28. *Summary*: The Plaintiffs argue that State legislative power is limited by rights deeply rooted in our democratic system of government and the common law and, further, that this limit is engaged by legislation which gives rise to "gross contraventions of the norms of a civilised, modern society" (**[PS[76]-[77]**). The Plaintiffs do not identify any text or structure within the Constitution as the source of either of these propositions. Further, they are contrary to existing authority.

Preliminary observations

29. *First*, like the argument unanimously dismissed by this Court in *Durham Holdings Pty Ltd v New South Wales* (***Durham Holdings***), the Plaintiffs make no attempt to tie either of their propositions to the text or structure of the Commonwealth Constitution[35]. Instead, the argument appears to rest on a limitation which inheres in the grant of legislative power itself.

30. *Secondly*, the concept of "gross contraventions of the norms of a civilised, modern society" is so vague and value laden that it should not be accepted as a constitutional norm. The Plaintiffs' submissions are entirely silent on the content of the several components of this expression.

31. *Thirdly*, the Plaintiffs do not explain whether their propositions are said to arise out of our democratic system of government or out of the common law. The heading suggests the latter, but they have not identified a single case recognising entrenched common law rights.

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[33] *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531at [100] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at [5] per Gleeson CJ and [81] and [103]-[104] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.

[34] *Eletrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at [19] per Gleeson CJ.

[35] (2001) 205 CLR 399 at [40] per Kirby J. See paragraph [7] above.

32. Fourthly, the Court in *Union Steamship Co of Australia Pty Ltd v King*[36] did not hold that State legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law. No subsequent case of this Court has held that it does.

State legislative power is not limited by common law rights

33. By s 2(1) of the *Constitution Act 1889* (WA), the Parliament of Western Australia is granted the power to make laws for the "peace, order, and good government" of Western Australia. That confers a power unqualified as to subject matter and "as ample and plenary as the power possessed by the Imperial Parliament itself"[37].

34. The text of s 2(1) does not express any limitation by reference to "deeply rooted rights". The words "peace, order, and good government" are words of grant, not limitation[38]. They do not confer any jurisdiction to strike down legislation on the ground that, in the opinion of a court, the legislation does not secure those objectives[39]. The Plaintiffs must read into s 2(1) a limitation not found in its text.

35. Textual matters aside, context and history point against any such implied limitation.

36. In 1865, and in response to Justice Boothby's over-zealous recourse to the English common law to invalidate South Australian legislation[40], the Imperial Parliament passed the *Colonial Laws Validity Act 1865* (Imp) with the express purpose of putting beyond doubt the validity of colonial legislation which might otherwise be repugnant to the English common law[41]. The Privy Council subsequently rejected the suggestion that the Imperial Parliament may have passed that law while leaving colonial legislative power subject to "some vague unspecified law of natural justice" or other "fundamental principles"[42].

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[36] (1988) 166 CLR 1 (***Union Steamship***).

[37] *Durham Holdings* at [9] per Gaudron, McHugh, Gummow and Hayne JJ.

[38] *Eastgate v Rozzoli* (1990) 20 NSWLR 188 at 201-2 per Kirby P and 204 per Priestly and Handley JJA.

[39] *Union Steamship* at 10 *per curiam*. See also *Polyukovich v Commonwealth* (1991) 172 CLR 501 at 529 per Mason CJ, 605-6 per Deane J, 635-6 per Dawson J, 695 per Gaudron J, and 714 per McHugh J.

[40] D Meagher, A Simpson, J Stellios et al, *Hanks' Australian Constitutional Law: Materials and Commentary*, 10th Ed at [1.3.3]-[1.3.4]; *Liyanage v The Queen* [1967] 1 AC 259 at 284-5 per Lord Pearce for the Board.

[41] *Colonial Laws Validity Act 1865* (Imp), ss 2-3.

[42] *Liyanage v The Queen* [1967] 1 AC 259 at 284-5 per Lord Pearce for the Board.

37. The unfettered scope of State legislative power was confirmed by the passage of the *Australia Act 1986* (Cth). Section 2(2) of that legislation provides that the powers of each State Parliament include "all legislative powers that the Parliament of the United Kingdom might have exercised" before the commencement of that Act "for the peace, order and good government" of the State.

38. That confirmation was subject to only a few express limitations. Section 2(2) of the *Australia Act 1986* (Cth) expressly carved out "any capacity that the State did not have immediately before the commencement of [the] Act to engage in relations with countries outside Australia". Further, ss 5 and 6 made those powers subject to the Constitution, the *Statute of Westminster 1931* (Imp) and to certain requirements of "manner and form". Otherwise, the analogy with the legislative competence of the Parliament of the United Kingdom was complete.

39. In the United Kingdom, the courts have emphatically rejected any limitation of the kind suggested by the Plaintiffs attaching to the Parliament of that country[43]. In *Pickin v British Railways Board*, Lord Reid said[44]:

> The idea that a court is entitled to disregard a provision in an Act of Parliament on any ground must seem strange and startling to anyone with any knowledge of the history and law of our constitution… In earlier times many learned lawyers seem to have believed that an Act of Parliament could be disregarded in so far as it was contrary to the law of God or a law of nature or natural justice; but since the supremacy of Parliament was finally demonstrated by the Revolution of 1688 any such idea has become obsolete.

40. Consistent with that position, the courts of this country have also dismissed the notion that common law rights limit State legislative power[45].

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[43] *Liyanage v The Queen* [1967] 1 AC 259 at 283–286 per Lord Pearce for the Board; *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645 at 723 per Lord Reid, for the Board; *R (Bancoult) v Foreign Secretary (No. 2)* [2009] 1 AC 453 at 486 per Lord Hoffman, 504-505 per Lord Rodger of Earlsferry, and 511 per Lord Carswell.

[44] [1964] AC 765 at 782.

[45] See *Durham Holdings* (2001) 205 CLR 399 at [7] and [14] per Gaudron, McHugh, Gummow and Hayne JJ and [60]-[66] per Kirby J; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 65 per Brennan CJ, 71-76 per Dawson J and 109 per McHugh J; *Levy v Victoria* (1997) 189 CLR 579 at 643 per Kirby J; *Grace Bible Church v Reedman* (1984) 36 SASR 376 at 383-4 per Zelling J, 387 per White J, and 389-90 per Millhouse J; *Building Labourers' Federation v Minister for Industrial Relations* (1986) 7

The place of common law rights and the Australian Constitution

41. The position reflected in those decisions is consistent with Australia's constitutional structure.

42. In embracing federation, the people of Australia eschewed any general Bill of Rights which entrenched those historically recognised by the common law. As Mason CJ explained in *ACTV*[46] (emphasis added and footnotes omitted):

> The adoption by the framers of the Constitution of the principle of responsible government was perhaps the major reason for their disinclination to incorporate in the Constitution comprehensive guarantees of individual rights… They refused to adopt a counterpart to the Fourteenth Amendment to the Constitution of the United States. Sir Owen Dixon said "they were not prepared to place fetters upon legislative action, except and in so far as it might be necessary for the purpose of distributing between the States and the central government the full content of legislative power. The history of their country had not taught them the need of provisions directed to control of the legislature itself." The framers of the Constitution accepted, in accordance with prevailing English thinking, that the citizen's rights were best left to the protection of the common law in association with the doctrine of parliamentary supremacy.

43. As that passage makes clear, the civil liberties recognised by the common law were subject to the will of Parliament. The framers "took the view that constitutional guarantees operate as a fetter upon democratic process and did not consider it necessary to restrict the power of Parliament to regulate those liberties which the common law recognizes and nurtures"[47]. Rather, and consistent with its democratic outlook, the constitutional protection was political[48]: "The great underlying principle is, that the rights of the individual are sufficiently secured by

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NSWLR 372 at 387B-E per Street CJ, 405-6 per Kirby P, 413B-E per Mahoney JA, 421G per Priestley JA; *Wake v Northern Territory of Australia* (1996) 5 NTLR 170 at 178-9 per Martin CJ and Mildren J (Angel J not deciding); *Gargan v Director of Public Prosecutions* (2004) 144 A Crim R 296 at [66] per O'Keefe J, cited with approval in *Wilson v White* [2007] WASCA 87 at [32] per Buss JA (Wheeler and Pullin JJA agreeing) and in *Gargan v Magistrate Dillon* [2005] NSWSC 1106 at [25] per Barrett J; *Barrett-Lennard v Bembridge* [2015] WASC 353 at [22]-[26] per Beech J; *Official Trustee in Bankruptcy v Gargan* [2009] FCA 352 at [4]-[7] per Perram J.

[46] *ACTV* at 135-6.

[47] *Thoephanous* at 193 per Dawson J.

[48] *ACTV* at 136 per Mason CJ.

ensuring, as far as possible, to each a share, and an equal share, in political power".

44. Against that background, Mason CJ said[49]:

> [I]t is difficult, if not impossible, to establish a foundation for the implication of general guarantees of fundamental rights and freedoms. To make such an implication would run counter to the prevailing sentiment of the framers that there was no need to incorporate a comprehensive Bill of Rights in order to protect the rights and freedoms of citizens. That sentiment was one of the unexpressed assumptions on which the Constitution was drafted.

45. In that constitutional context, the common law does not form a "transcendental body of legal doctrine"[50]. The Constitution displaced, or rendered inapplicable, the English common law doctrine of the general competence and supremacy of the legislature[51]. It placed upon the federal judicature the responsibility of deciding the limits of the respective powers of State and Commonwealth governments. The Constitution, the federal, State and territorial laws, and the common law in Australia together constitute the law of Australia and form "one system of jurisprudence"[52]. Covering cl 5 of the Constitution renders the Constitution "binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State." Within that single system of jurisprudence, the common law conforms to the Constitution[53] and, where it is passed in conformity with that Constitution, to statute[54].

46. That is so even in respect of "fundamental" common law rights and freedoms. The adoption by the courts of the principle of legality presupposes the Parliament

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[49] Ibid, approved in *Theophanous* at 160 per Brennan J.

[50] *Lange* at 564 *per curiam*, quoting Dixon, "Sources of Legal Authority", reprinted in *Jesting Pilate* (1965) 198 at 199.

[51] Ibid at 562 *per curiam*.

[52] Ibid.

[53] *Lange* at 566 *per curiam*; *Theophanous* at 140 per Mason CJ, Toohey and Gaudron JJ; *AustralAid/Watch Incorporated v Commissioner of Taxation* (2010) 241 CLR 539 at [44] per French CJ, Gummow, Hayne, Crennan and Bell JJ.

[54] *Strickland v Commonwealth Director of Public Prosecutions* (2018) 266 CLR 325 at [101] per Kiefel CJ, Bell and Nettle JJ.

may abrogate those rights and freedoms. That principle forms a rebuttable presumption, not a limit on legislative power[55]. While courts will not readily impute to the legislature an intention to abrogate or curtail fundamental rights and freedoms, they will give effect to that intention if it is clearly manifested by unambiguous language which indicates that the legislature has directed its attention to the rights and freedoms in question and has consciously decided upon abrogation and curtailment[56]. The principle applies to those most obvious of candidates among civil rights to attract the label "deeply rooted", such as the rights to liberty[57], property[58] and access to the courts[59]. The limitation asserted by the Plaintiffs cannot be reconciled with that principle.

D *KABLE* ISSUE

47. *Summary:* These submissions address only the declaratory provisions in the Amending Act (ss 8(2)-(3), 9, 10, 11(1)-(2) and (8), 18(1)-(3), 19(1)-(2), 27). The Plaintiffs submit those provisions offend the principle identified in *Kable v Director of Public Prosecutions (NSW)*[60] (***Kable***) because they require judicial power to be exercised at the behest of the legislature and without the judicial process (**PS[50]-[58]**). The declaratory provisions do not have that effect. They do no more than alter the substantive law to be applied by courts. That does not substantially impair the institutional integrity of State courts.

Plaintiffs' Kable argument

48. *Kable* established two propositions. First, State legislatures cannot, consistently with Ch III of the Constitution, enact a law which purports to abolish the Supreme Court of a State[61]. Secondly, State legislation which purports to confer on a court a power or function which substantially impairs the institutional integrity of State

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[55] *South Australia v Totani* (2010) 242 CLR 1 at [31] per French CJ.

[56] *Al-Kateb v Goodwin* (2004) 219 CLR 562 at [19] per Gleeson CJ.

[57] Ibid.

[58] *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603 at [43]-[44] per French CJ.

[59] *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at [31] per Gleeson CJ.

[60] (1996) 189 CLR 51.

[61] *Kable* at 103 per Gaudron J, 111 per McHugh J, 140-143 per Gummow J; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at [151]-153] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ; *Wainohu v New South Wales* (2011) 243 CLR 181 at [46] per French CJ and Kiefel J.

courts is constitutionally invalid[62]. Subsequent cases have since elaborated on the content of these propositions[63].

49. The Plaintiffs *inter alia* identify two features of the declaratory provisions which are said to infringe the second proposition. First, they say the provisions are *ad hominem* (**PS[55]**). Secondly, the provisions dictate "answers to quintessentially judicial questions" and "direct courts to reach findings that are plainly contrary to the true position" (**PS[56], [58]**). Neither argument is made out.

Ad hominem legislation

50. It may be accepted that aspects of the declaratory provisions are *ad hominem*. That is hardly surprising given the purpose of the Amending Act was to alter the rights and duties which arose under the principal Act, itself *ad hominem* legislation enacted regarding a particular project[64].

51. However, legislation does not offend the *Kable* principle merely because it is *ad hominem*. Private Acts are common both in English and Australian legal history[65], and to say that an Act has a limited sphere of operation says nothing about its impact on the judiciary. The focus of the inquiry must be upon the effect of the legislation on the institutional integrity of the courts, not whether the legislation is directed to a wide or narrow class of persons[66].

52. No case since *Kable* has held legislation invalid because it is directed to an individual or a known group of individuals. That is despite this Court being invited to consider the validity of a number of Acts on that basis[67].

53. The legislation in *Kable* fell into a special category because it was both *ad hominem* and it drew the Court into implementing what was essentially an

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[62] *Kable* at 96 per Toohey J, 103 per Gaudron J, 116-9 per McHugh J, 127-8 per Gummow J.

[63] See *North Australian Aboriginal Justice Agency Ltd v Northern Territory of Australia* (2015) 256 CLR 569 at [39] per French CJ, Kiefel and Bell JJ.

[64] *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA).

[65] *Duncan v New South Wales* (2015) 255 CLR 388 at [38] per French CJ, Hayne, Kiefel, Bell, Gageler, Keane and Nettle JJ.

[66] *Questions of Law Reserved (No. 1 of 2019)* (2019) 135 SASR 226 at [25] per Stanley J (Nicholson and Doyle JJ concurring at [44] and [45]).

[67] *Monigue v Victoria* (2019) 93 ALJR 1031 at [23] per Kiefel CJ, Bell, Keane, Nettle and Gordon JJ; *Knight v Victoria* (2017) 261 CLR 306 at [26] *per curiam*; *Duncan v New South Wales* (2015) 255 CLR 388 at [38] *per curiam*; *Baker v The Queen* (2004) 223 CLR 513 at [50] per Callinan J; *Nicholas v The Queen* (1998) 193 CLR 173 at [83] per Gaudron J, [208] per Kirby J, [249] per Hayne J; *Re Macks, Ex parte Saint* (2000) 204 CLR 158 at [212] per Gummow J.

executive decision that Mr Kable should be detained[68]. For the reasons which follow, the declaratory provisions do not have that effect.

Dictation of answers

54. Even assuming the effect of the provisions is to declare a state of affairs "plainly contrary to the true position" (**PS[56]**), there is nothing constitutionally impermissible about the legislature's use of a statutory fiction. For example, it may be accepted that the words "taken not to have been, and never to have been" in s 8(3) declare something to be that which it is not or might not be[69]. But that drafting device does not intrude on the judicial function, even if it were to impose liability for a serious offence[70]. If a statute operates within a field of legislative power conferred on the Parliament, it is immaterial that its operation depends in part on the creation of a fiction[71]. The use of that device will only ground invalidity if it purports to oust the jurisdiction of the Court to determine constitutional facts on which the exercise of legislative power may depend[72]. No such objection can be made to the declaratory provisions here.

55. Similarly, legislation does not interfere with the judicial process by merely altering substantive rights[73]. The Plaintiffs' objection on this ground is inconsistent with the long line of cases which has held that such laws are consistent with Ch III, even when enacted during the pendency of litigation[74].

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[68] *Kable* at 122 per McHugh J.

[69] *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at [115] per McHugh J; *Silbert v Director of Public Prosecutions (WA)* (2004) 217 CLR 181 at [43] per Kirby J.

[70] *Director of Public Prosecutions (Cth) v Keating* (2013) 248 CLR 459 at [47] *per curiam*; *Maroney v The Queen* (2003) 216 CLR 31 at [56]-[57] per Kirby J.

[71] *Northern Land Council v Commonwealth* (1986) 161 CLR 1 at 6 per Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ.

[72] *University of Wollongong v Metwally* (1984) 158 CLR 447 per Mason J.

[73] *Duncan v Independent Commission Against Corruption* (2015) 256 CLR 83 at [26] per French CJ, Kiefel, Bell and Keane JJ.

[74] *Nelungaloo Pty Ltd v Commonwealth* (1948) 75 CLR 495 at 579-580 per Dixon J; *R v Humby; Ex parte Rooney* (1973) 129 CLR 231 at 243 per Stephen J (Menzies J agreeing at 240) and 250 per Mason J; *Re Macks, Ex parte Saint* (2000) 204 CLR 158 at [15] and [25] per Gleeson CJ, [81] per Gaudron J, [111] per McHugh J, [210]-[211] per Gummow J, [354]-[355] per Hayne and Callinan JJ; *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88 at 96 *per curiam*; *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 at [8], [9], [18]-[22] *per curiam*; *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 at [53] per French CJ, Crennan and Kiefel JJ, [96] per Gummow, Hayne and Bell JJ, [116]-[117] per Heydon J; *Duncan v Independent Commission Against Corruption* (2015) 256 CLR 83 at [15] per French CJ, Kiefel, Bell and Keane JJ, at [41]-[42] per Gageler J, and [45]-[47] per Nettle and Gordon JJ.

56. The reasoning in *Duncan v Independent Commission Against Corruption* (***Duncan***)[75] demonstrates the point. Following this Court's decision in *Independent Commission Against Corruption v Cunneen*[76], the New South Wales Parliament inserted a new Pt 13 into Sch 4 to the *Independent Commission Against Corruption Act 1988* (NSW). Clause 35(1) provided that anything done or purported to have been done by the Commission before the date of the decision, that would have been validly done if corrupt conduct for the purposes of the Act included "relevant conduct", was taken to have been, and always to have been, validly done. Clause 34(1) defined relevant conduct to mean conduct that would be corrupt conduct for the purposes of the Act if the reference in s 8(2) to conduct that adversely affected, or could adversely affect, the exercise of official functions included conduct that adversely affected, or could adversely affect, the efficacy (but not the probity) of the exercise of official functions. The legislation was passed while litigation concerning that issue was on foot. The plaintiff said the legislation infringed the *Kable* principle because it directed "courts to treat as valid acts that were, and remain, invalid"[77].

57. The Court unanimously dismissed the challenge. French CJ, Kiefel, Bell and Keane JJ held that the effect of the legislation was to declare the new legal position to be that which would have obtained if the Commission had been authorised by the legislation to investigate and report on the relevant conduct[78]. That did not offend the *Kable* principle because "it is well settled that it is open to the legislature to select the fact that these activities occurred as the ground for attaching such legal consequences as it may choose"[79]. In addition, their Honours noted that the declaratory provisions did not "purport to confer any power or function upon a court" or "give a direction to a court to treat as valid that which the legislature has left invalid"[80]. Therefore, the legislation did not impair the courts' institutional

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[75] (2015) 256 CLR 83.

[76] (2015) 256 CLR 1.

[77] *Duncan* at [9] per French CJ, Kiefel, Bell and Keane JJ.

[78] Ibid at [13].

[79] Ibid at [14]. See also at [25].

[80] Ibid at [27].

integrity. In separate reasons, Gageler J and Nettle and Gordon JJ reached the same result[81].

58. The Plaintiffs' submission cannot be reconciled with that reasoning. Taking s 8(3) as an example, the provision merely alters the legal effect or status of the State's conduct regarding the Agreement and, consequently, the Plaintiffs' rights under that Agreement. It attaches new legal consequences to that conduct, namely that it does not attract the consequences of repudiation. The mere fact that it impacts on rights which may be the subject of future legal proceedings is not an impermissible interference with judicial power. Further, it does not affect the procedures that would be applied by any court or confer a function on any court. It merely alters the legal consequences to be applied in respect of particular things done by the State. As in *Duncan*, that is not a direction to the courts which impairs their integrity.

Part V: Estimate

59. The Territory estimates that no more than 20 minutes will be required for oral submissions.

Dated 28 May 2021

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[81] Ibid at [41]-[42] per Gageler J and [45]-[47] per Nettle and Gordon JJ.

ANNEXURE TO INTERVENER'S SUBMISSIONS

(ATTORNEY-GENERAL OF THE NORTHERN TERRITORY OF AUSTRALIA)

Pursuant to paragraph 3 of Practice Direction No. 1 of 2019, the Attorney-General of the Northern Territory of Australia 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	s 51(xxxix)
Statutes			
2.	*Australia Act 1986* (Cth)	Current	ss 2(2), 5, 6
3.	*Colonial Laws Validity Act 1865* (Imp)	29.06.1865	ss 2, 3
4.	*Constitution Act 1889* (WA)	Current	s 2(1)
5.	*Independent Commission Against Corruption Amendment (Validation) Act 2015* (NSW)	6.05.2015	ss 34, 35
6.	*Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA)	Current	ss 8, 9, 10, 11(1)-(2) and (8), 18(1)-(3), 19(1)-(2), 21(5), 27
7.	*Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA)	13.08.2020	