HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY 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

PLAINTIFFS' OUTLINE OF ORAL SUBMISSIONS

PART I PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

2. **Introduction**. The central question is whether the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* ("2020 Act") is *in toto* – or in any and which part – a valid law of Western Australia. The argument sketches first the background to the 2020 Act, then sets out the essential structure and effect of the 2020 Act, then deals with the plaintiffs' submissions as follows.

3. ***Australia Act*, s. 6**. Section 6 of the *Australia Act 1986* (Cth) was an exercise of Commonwealth legislative power under s. 51(xxxviii) at the request of the States. In some respects the *Australia Act* expanded States' powers; in other respects it limited them. Section 6 did the latter.

4. There is no question that the 2020 Act is "a law made … by the Parliament of a State". It is also a law "respecting the constitution, powers or procedure of the Parliament" of Western Australia. The relational term "respecting" is not to be construed narrowly. In a number of respects, the 2020 Act deals with Parliament's "powers or procedure": see, for example, the definition of "protected matter" in s. 7(1) pars (b), (c), (d), (e) and (l); see too ss. 20(1), 19(1)-(3), 18, 10 and 11, 17 and 25, and 30.

5. The relevant manner and form provision is cl. 32 of the Agreement (SCB 197). Clause 32 is "a law made by" the Parliament. The terms of the 2002 Act, as amended by the 2008 Act, give the Agreement force of law by providing that it shall be observed by the parties: *Sankey v. Whitlam* (1978) 142 CLR 1 at 30-31, 77, 89-91, 105-106. See too ss. 4(3) and 6(3) of the 2002 Act as amended by the 2008 Act, and s. 3 of the *Government Agreements Act 1979* (WA), which provide that the Agreement takes effect despite or notwithstanding any other Act or law. *Re Michael; Ex parte WMC Resources* (2003) 27 WAR 574 was wrongly decided on this point.

6. Clause 32 is the *only* way in which the Agreement may be amended. Preservation of Parliament's power unilaterally to amend the Agreement was not intended. Such a power is inconsistent with the terms and objects of the Agreement. The 2020 Act is an extreme example of what cl. 32 was intended to prevent.

7. As the 2020 Act was enacted in contravention of a valid manner and form requirement (cl. 32), it is of no force and effect in its entirety. There is no scope for severance.

8. **State legislative power**. State legislative power, which derives from s. 107 of the Constitution, is exercisable subject to the Constitution. The 2020 Act exceeds multiple limitations on State legislative power sourced in the Constitution.

9. *First*, the 2020 Act infringes the principle recognised in *Kable v. DPP (NSW)* (1996) 180 CLR 51, that a State law that would substantially impair or be repugnant to the institutional integrity of a State court so as to be incompatible with its role as a potential repository of federal jurisdiction is invalid. The 2020 Act targets a specific party, and
10 directs courts as to the disposition of that party's civil claims. In so doing it removes the courts' ability independently or impartially to adjudicate the dispute (P[55]-[58]).

- *Knight v. Victoria* (2017) 261 CLR 306 at 317 [5]; *Kuczborski v. Queensland* (2014) 254 CLR 51 at 98 [139]-[140], 118 [226], 119 [228].
- cf *Duncan v. ICAC* (2015) 256 CLR 83 at 98 [27]-[28].

10. *Secondly*, the 2020 Act is invalid as an exercise of judicial power by a State Parliament (P[59]-[68]). State Parliaments are precluded from exercising judicial power because they stand apart from the integrated judicial system prescribed by Ch. III and referred to in *Kable*, *Kirk* and *Rizeq* (P[60]-[65]). The 2020 Act has all of the "typical" qualities of judicial power referred to in *Duncan v. New South Wales* (2015) 255 CLR 388 at
20 408, [42] – see especially ss. 9(1), 10(1), 11(1), 19(1), 20(1), (10), 27.

11. *Thirdly*, the 2020 Act contravenes the rule of law and unwritten common law principles (P[69]-[77]). The rule of law forms an assumption upon which the Constitution "depends for its efficacy". The 2020 Act is contrary to the rule of law in multiple respects (P[75], [77]). For similar reasons, the 2020 Act is one of the rare pieces of legislation that exceeds the limitations referred to in *Durham Holdings Pty Ltd v. NSW* (2001) 205 CLR 399 at 410, [14].

- *Australian Communist Party v. Commonwealth* (1951) 83 CLR 1 at 193; *APLA v. Legal Services Commissioner* (2005) 224 CLR 322 at 351 [30]; *Kartinyeri v. Commonwealth* (1998) 195 CLR 337 at 381 [89]; *Momcilovic v. The Queen*
30 (2011) 245 CLR 1 at 216 [563].

12. *Fourthly*, by directing the disposition of and proscribing judicial proceedings in other States and Territories, the 2020 Act is a substantial interference with those polities'

governmental functions (P[78]-[86]). See especially ss. 11(3)-(4), 19(3)-(4), and the definition of "proceedings" in s. 7(1).

13. *Fifthly*, ss. 30-31 of the 2020 Act impermissibly delegate legislative power to the executive (P[110]-[116]). Both the circumstances in which the Minister may recommend the making of an order, and the scope of orders that may be made in consequence, are so broad as to constitute an abdication of the legislative power vested in the WA Parliament by ss. 107 and 108 of the Commonwealth Constitution. Having regard to the objects and effect of these provisions, their validity is not hypothetical.

14. *Sixthly* the indemnities respecting the Commonwealth prescribed by ss. 16 and 24 of the 2020 Act are invalid because they effectively impose on those invoking federal jurisdiction a liability *to Western Australia* for so doing (the State may, or may not, pay that money or assign that right to the Commonwealth). A State has no power to do so.

- *Rizeq v. Western Australia* (2017) 262 CLR 1 at 24 [57]; *Spence v. Queensland* (2019) 93 ALJR 643 at 673, [107], [109]; 715, [309].

15. *Seventhly*, aspects of the indemnities in the 2020 Act infringe s. 115 of the Constitution. Section 115 prohibits States from making something legal tender for all, some, or particular debts. The indemnity provisions create "debts". The 2020 Act provides that such debts may be discharged in the manner prescribed – but that is the thing which s. 115 says that a State may not do. The notion of "setting off" relied upon by the defendant (D[155]-[157]) is used in a particular context, and does not govern this case.

16. *Eighthly*, parts of the 2020 Act cannot validly be applied in federal jurisdiction. The provisions directed at "proceedings" affect and detract from the exercise of federal jurisdiction. Section 64 of the *Judiciary Act 1903* (Cth) prevents State laws that grant privileges to the State, such as those in the 2020 Act, from being picked up by s. 79.

17. *Ninthly*, the 2020 Act contravenes the requirement in s. 118 that the laws of the States be given full faith and credit throughout the Commonwealth. Sections 10(4) and (6) of the 2020 Act say that, contrary to commercial arbitration legislation in force in other States, the awards are of *no effect*. That is what s. 118 proscribes.

D.F. Jackson Q.C. **M.A. Karam** **H.C. Cooper**

15 June 2021