HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B52 of 2020

B E T W E E N:

CLIVE FREDERICK PALMER
Plaintiff

AND

STATE OF WESTERN AUSTRALIA
Defendant

DEFENDANT'S SUBMISSIONS

Date of Document: 21 May 2021

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PART I PUBLICATION

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

PART II ISSUES

2. The plaintiff challenges the validity of the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA) (the "**Amending Act**"). Many of the grounds advanced by the plaintiff overlap with the grounds advanced by the plaintiffs in B54 of 2020. For that reason, the defendant adopts its submissions in B54 of 2020 ("**B54 DS**").

3. These submissions address the following additional grounds:

   (a) **Section 117 (Additional Issue 1)** – the plaintiff submits that the Amending Act discriminates against him as a resident of Queensland contrary to section 117 of the *Constitution*: plaintiff's submissions ("**PS**") [18]-[34].

   (b) **Section 75(iv) (Additional Issue 2)** – the plaintiff submits that the Amending Act constitutes an exercise of adjudicative authority in respect of a matter under section 75(iv) of the *Constitution*, contrary to this Court's decision in ***Burns v Corbett*** [2018] HCA 15; (2018) 265 CLR 304: PS [35]-[59].

   (c) **Bill of pains and penalties or "extreme law" (Additional Issue 3)** – the plaintiff submits that the Amending Act constitutes a bill of pains and penalties or is otherwise an unconstitutional "extreme law" because it deprives the plaintiff of property without compensation: PS [69]-[78].

   (d) **Inconsistency with Commonwealth laws (Additional Issue 4)** – the plaintiff submits that the Amending Act is inconsistent with Commonwealth laws conferring and regulating the exercise of federal jurisdiction; laws dealing with the enforcement of judgments and orders of federal courts; laws dealing with costs in federal courts; the *Federal Court Rules 2011* (Cth) ("***Federal Court Rules***"); the *Evidence Act 1995* (Cth) ("***Evidence Act***"); the *Corporations Act 2001* (Cth) ("***Corporations Act***"); the *Bankruptcy Act 1966* (Cth) ("***Bankruptcy Act***"); the *Personal Property Securities Act 2009* (Cth) ("***PPS Act***") and various Commonwealth criminal laws: PS [79]-[105].

4. Further, certain procedural-type grounds common to both B54 of 2020 and B52 of 2020 are also addressed in these submissions. These are:

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

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

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

PART III NOTICE UNDER SECTION 78B

5. The plaintiff has given sufficient notice under section 78B of the *Judiciary Act 1903* (Cth) ("***Judiciary Act***").

PART IV FACTS

6. The defendant relies on the facts as set out in the Special Case, and the background set out in B54 DS [8]-[42]. It adds the following.

7. The Amending Act amends the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA) ("the **Act**") primarily by inserting Part 3 into that Act. That Act annexed and gave effect to a State Agreement (the "**State Agreement**") between the defendant, Mineralogy Pty Ltd ("**Mineralogy**") and six Co-Proponents (including International Minerals Pty Ltd ("**International Minerals**"). The preamble to the State Agreement recorded that Mineralogy was the holder of mining tenements in the Pilbara region; that Mineralogy wished to develop projects incorporating the mining and processing of iron ore, the establishment of new port facilities and the shipping of processed iron ore through such facilities; and that the defendant had agreed to assist the establishment of the proposed projects for the purpose of promoting employment opportunity and industrial development in Western Australia: Special Case Book ("**SCB**") 76-77. The effect of the State Agreement was to confer bespoke rights and obligations on the State and on Mineralogy and International Minerals (and indirectly the plaintiff, as the beneficial owner of the majority of the shares in those companies) in respect of the exploitation of State-owned resources. The plaintiff and his companies have taken the commercial advantage of exploiting the special rights thereby conferred on them by the Act and the State Agreement.

8. The plaintiff's various complaints as to the Amending Act "singling out" the plaintiff and his companies for adverse treatment, and as to the supposedly discriminatory character of the Amending Act, must be understood in this context. As noted at B54 DS at [16], the Act is not a law of general operation regulating the rights and obligations of the community at large. It is, and always has been, an ad hominem law which confers special rights and imposes

special obligations on a small number of identified parties in respect of a particular set of projects (primarily through the ratification of the State Agreement).

9. The existing rights and obligations that were altered by the Amending Act were themselves derived from the State Agreement and the Act. As explained more fully in B54 DS [27], in the first arbitral award made on 20 May 2014 the Hon Michael McHugh AC QC (the "**Arbitrator**") concluded that the defendant had breached the State Agreement by failing to consider and deal with the first Balmoral South Proposal lodged by Mineralogy and International Minerals ("**First Award**"): SC [28]-[29]. The Minister then proceeded to consider and deal with the first Balmoral South Proposal and, by letters dated 22 July 2014, imposed 46 conditions precedent to giving approval to that proposal: SC [32]. Mineralogy and International Minerals contend that this constituted a second alleged breach of the State Agreement: SC [32]. In the second arbitral award made on 11 October 2019, the Arbitrator in effect concluded that Mineralogy and International Minerals were entitled to pursue a claim for damages for the first breach and the second alleged breach ("**Second Award**"): SC [36].

10. On 8 July 2020, Mineralogy, International Minerals and the defendant agreed to appoint the Arbitrator to hear and determine the companies' claim for damages arising from the first breach and second alleged breach referred to above: SC [39]. The hearing was to commence on 30 November 2020: SC [40].

11. In that arbitration, Mineralogy and International Minerals claimed damages of a staggering magnitude. In the Second Reading Speech for the Amending Act, it was said that the potential scope of the damages claim was close to AUD $30 billion: SCB 510. To put that claim into perspective, the Second Reading Speech noted that it is roughly equivalent to the entire State budget: SCB 510. This is the extraordinary mischief to which this legislation was directed.

PART V ARGUMENT

ADDITIONAL ISSUE 1: SECTION 117 – DISCRIMINATION AGAINST INTERSTATE RESIDENT

12. The plaintiff submits that the Amending Act discriminates against him by reason of the fact that he is a resident of Queensland, contrary to section 117 of the *Constitution*: PS [18]-[34]. There is no such discrimination. The operation and effect of the Amending Act, including upon the plaintiff, would not be any different if the plaintiff were a resident of Western Australia.

Operation of Section 117

13. Section 117 only protects an interstate resident from the operation of a law where "the effect of a law is to subject an interstate resident to a disability or discrimination to which that person would not be subject as an intrastate resident": ***Street v Queensland Bar Association*** (1989)

168 CLR 461, 559 (Toohey J). It is only in such circumstances that a resident of a State can be said to be subjected in another State to a "disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State", as proscribed by section 117. The fact of disability or discrimination is to be discovered by comparing the situation of the out-of-State resident with that person's hypothetical situation if he or she were resident in the legislating State and asking whether the disadvantage suffered by the person would in substance be removed if he or she were resident in the legislating State: ***Street***, 488-489 (Mason J), 506-507 (Brennan J), 525 (Deane J), 544-545 (Dawson J), 559 (Toohey J), 566-567 (Gaudron J), 582 (McHugh J). The presence of the discrimination or disability is to be discovered by considering the terms of the law as well as its practical operation and individual effect: ***Street***, 487 (Mason J), 506-507 (Brennan J), 527 (Deane J), 545 (Dawson J), 569 (Gaudron J), 583 (McHugh J). The purpose of examining the operation of the impugned law is to decide whether "the discrimen it chooses concerns the State residence of the person" upon whom it operates: ***Sweedman v Transport Accident Commission*** [2006] HCA 8; (2006) 226 CLR 362, [65] (Gleeson CJ, Gummow, Kirby and Hayne JJ).

14. The plaintiff does not point to any provision of the Amending Act which, in form or in substance, selects, as a criterion for its operation, the fact that the plaintiff is a resident of Queensland. There is no such provision. Nor is there any aspect of its practical operation and individual effect that has a differential operation according to whether or not a person is an interstate resident. If the plaintiff were a resident of Western Australia the Amending Act would operate in the same way.

15. The plaintiff instead points to various statements made in the course of the Parliamentary debates in an attempt to prove that Parliament *passed* the Amending Act because he is a resident of Queensland: PS [22], [26]. This is a misguided approach to applying section 117. Section 117 is concerned with the substance and practical operation of laws and whether or not they are inapplicable to particular persons and circumstances (rather than invalid): ***Sweedman***, [57], [59] (Gleeson CJ, Gummow, Kirby and Hayne JJ). Section 117 does not invite an inquiry as to whether or not a law would have been enacted, or would have been enacted in some different form, if one of the persons affected by the law were not an interstate resident. The proper focus of inquiry is rather the terms and practical effect of the Amending Act itself. The plaintiff's attempt to impugn the purpose of the legislation and the motivation of the legislators is therefore misdirected.

The Plaintiff's Factual Proposition

16. The plaintiff's section 117 ground should be dismissed on the basis of the submissions made above. In any event, the factual proposition advanced – that Parliament chose to legislate "against [the plaintiff]" because he is a resident of Queensland (see PS [23]) – should be rejected. The fact that the Amending Act contains provisions specifically directed to the plaintiff, Mineralogy, International Minerals and "relevant transferees" of such persons (see sections 14(3) and 22(4)) is a function of the fact that, as noted above, the Act and the State Agreement confer rights and obligations only on specific persons, including the plaintiff's companies Mineralogy and International Minerals. The place of residence of those persons is irrelevant (noting that corporate entities are not subjects of the Queen whose place of "residence" is significant for the purposes of section 117: ***Sweedman***, [59] (Gleeson CJ, Gummow, Kirby and Hayne JJ)). The contention that the legislature would have taken a different approach to the threat of a liability in the order of $30 billion if the individual standing behind the companies resided in Western Australia is baseless.

17. Given the context, even if discriminatory treatment were discerned, it would be of a kind that was appropriate and adapted to the attainment of a proper objective: ***Sweedman***, [66] (Gleeson CJ, Gummow, Kirby and Hayne JJ).

18. The plaintiff seeks to attach significance to statements made in Parliament in a manner which is contrary to well-established principles of statutory interpretation. The purpose of an Act is to be determined "objectively": ***Thiess v Collector of Customs*** [2014] HCA 12; (2014) 250 CLR 664, [22]-[23] (the Court). It may be discerned from an express statement in the statute, inference from the text and structure and, where appropriate, reference to extrinsic material: ***Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross*** [2012] HCA 56; (2012) 248 CLR 378, [25] (French CJ and Hayne J). However, determination of statutory purpose "neither permits nor requires some search for what those who promoted or passed the legislation may have had in mind when it was enacted": ***Certain Lloyd's Underwriters***, [25] (French CJ and Hayne J). To speak of legislative "intention" is to use a metaphor. The search is for the purpose of the statute manifested by its text read in context: ***Certain Lloyd's Underwriters***, [25] (French CJ and Hayne J), citing inter alia ***Zheng v Cai*** [2009] HCA 52; (2009) 239 CLR 446, [28] (the Court).

19. The plaintiff submits that, in circumstances where the Amending Act contains no "objects" clause, the "purpose" of the Act is to be determined by reference to statements made in Parliament: PS [22]. In doing so, the plaintiff does not refer to that material in order to confirm the ordinary meaning of any provision of the Act, to ascertain the meaning of any ambiguous provision, or to demonstrate the mischief to which the Act was directed: see ***R v A2*** [2019]

HCA 95; (2019) 93 ALJR 1106, [32] (Kiefel CJ and Keane J), [125] (Bell and Gageler JJ); *Interpretation Act 1984* (WA) section 19. Rather, the plaintiff refers to that material in an attempt to establish the subjective motivations of members of Parliament in passing the legislation (being, he submits, to discriminate against him on the basis that he is a resident of Queensland). This exercise is irrelevant to the application of section 117 and to the proper construction and characterisation of the Amending Act. It also wrongly assumes that particular statements made by members of Parliament can be taken to represent the motivation of Parliament generally in enacting the Amending Act. Notably:

(a) The majority of statements referred to at PS [22] were made in the course of debates generally: see, eg, PS [22(c)] (citing SCB 411, 418), [22(d)] (citing SCB 436), [22(e)] (citing SCB 411, 445, 454, 455). Statements made otherwise than in the course of the Second Reading Speech carry little weight, even in the orthodox exercise of determining the mischief to which an Act is addressed.

(b) Some were made by members of Parliament who are not part of the Government and who were expressing concern about the Bill or aspects of it:

I. The statements quoted at PS [22(n)] (citing SCB 529) – referring to the plaintiff as a "barbarian" and "cane toad" and describing the State's approach as being to "slam the doors shut, pull down the shutters, and hope he goes away" – were not made by any member of Government but were made by the Hon Rick Mazza (member of the Shooters, Fishers and Farmers Party (WA)) in critiquing the Bill. His comments were clearly intended as a caricature of the Government's approach to dealing with the plaintiff. They do not prove anything about the purpose of the Amending Act or Parliament's, or even the Government's, purpose in passing it.

II. Likewise, the statements quoted at PS [22(o)] (citing SCB 531) – referring to the plaintiff as an "Eastern Stater … suing the State of WA under a contract we don't like because it is not operating to our benefit" – were made by the Hon Michael Mischin (member of the Liberal Party) in expressing concern about the Bill and were again intended as a critique of the Government's approach. The statement quoted at PS [24] and [32] (citing SCB 532) – that "the Premier, on behalf of the State of Western Australia, has declared war against" the plaintiff – were also made by the Hon Michael Mischin in the same vein.

(c) Further, some of the statements were not made in relation to the Amending Act at all, but were made in the course of updating Parliament regarding the plaintiff's proceedings challenging the interstate border restrictions decided in ***Palmer v Western***

Australia [2021] HCA 5; (2021) 95 ALJR 229: see eg PS [22(b)] (citing SCB 409, 412 and 413, which appear in Hansard under the heading "Coronavirus – Interstate Border Restrictions – High Court Challenge").

Parliamentary Privilege

20. Further, to the extent that the plaintiff is adducing evidence of the statements made in Parliament to prove the truth of any implied representation made by members of Parliament (including to prove the truth of any alleged implied representation that the member's intention in passing the Act was to target the plaintiff because he is a resident of Queensland), that use is in breach of the principles of Parliamentary privilege.

21. Section 1(a) of the *Parliamentary Privileges Act 1891* (WA) provides that the Legislative Council and Legislative Assembly of Western Australia, and their members and committees, have and may exercise "to the extent they are not inconsistent with this Act, the privileges, immunities and powers by custom, statute or otherwise of the Commons House of Parliament of the United Kingdom and its members and committees as at 1 January 1989". The provision thereby picks up Art 9 of the *Bill of Rights 1689* (Imp), which provides: "That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any Court or place out of Parliament". Parliamentary privilege is not "a mere exclusionary rule of evidence"; rather, it is a "fundamental Constitutional doctrine essential to the separation of powers": ***Re Bell Group NV (in liq) (No 2)*** [2017] FCA 927; (2017) 122 ACSR 418, [36(4)] (Jagot J).

22. Article 9 does not prevent the use of Hansard to prove, as a matter of fact, that certain things were said in the course of a debate in Parliament: ***Leyonhjelm v Hanson-Young*** [2021] FCAFC 22; (2021) 387 ALR 384, [30], [35], [44], [49] (Rares J); [248] (Wigney J); [365] (Abraham J). But it does prevent the use of Hansard to prove the truth of representations made by members of Parliament: ***Mees v Road Corporation*** [2003] FCA 306; (2003) 128 FCR 418, [86] (Gray J); ***Re MacTiernan; Ex parte Coogee Coastal Action Coalition Inc*** [2004] WASC 264, [45] (McLure J); ***Szuty v Smyth*** [2004] ACTSC 77, [169] (Higgins CJ); ***Guy v Crown Melbourne Ltd (No 2)*** [2018] FCA 36; (2018) 355 ALR 420, [398] (Mortimer J); ***Re Bell Group NV (in liq) (No 2)***, [42] (Jagot J). Thus, insofar as the plaintiff relies on the statements made by various members of Parliament to prove that they would not have supported the legislation but for him being a resident of Queensland, they cannot be used for that purpose.

The Plaintiff's "National Unity" Argument

23. The plaintiff's broader argument at PS [27]-[34] – appealing to section 117 as "serving the object of nationhood and national unity" (quoting ***Street*** at 491) – should also be rejected. It appears to be put on the basis that section 117 prohibits a law which "demonstrate[s] open hostility" to a resident of another State or which "targets" a resident of another State. Even if that motivation could be established (which it cannot, including through the impermissible references to Hansard), there is no support for that proposition either in the authorities or in the text of section 117 itself. Section 117 does not confer on subjects of the Queen a general immunity from the operation of interstate laws. Nor does it preclude a State from enacting "parochial" laws which are perceived to be in the interests of that State (rather than necessarily the "national interest in national unity").

24. The plaintiff's arguments relying on section 117 could not, in any event, provide a basis for invalidating the Act in whole or in part. The most that could be said is that by virtue of section 117 certain provisions are inapplicable to the plaintiff: ***Sweedman***, [57], [59] (Gleeson CJ, Gummow, Kirby and Hayne JJ).

ADDITIONAL ISSUE 2: SECTION 75(IV) GROUND

25. The plaintiff's argument is premised on the notion that the Amending Act amounts to an exercise of judicial power and an exercise of "adjudicative authority", of the kind that is only capable of being exercised by a Ch III court by virtue of section 75(iv) of the *Constitution*: ***Burns v Corbett***, [43], [45] (Kiefel CJ, Bell and Keane JJ). The Amending Act does not constitute an exercise of judicial power, for the reasons given at B54 DS [43]-[132]. More particularly, the Amending Act does not purport to adjudicate a dispute between the State and the plaintiff. The Amending Act declared the rights and obligations of various parties. It did not purport to ascertain and enforce rights in issue by the application of existing legal rules to particular facts, in the manner of an adjudicative exercise by a court: ***Duncan v New South Wales*** [2015] HCA 13; (2015) 255 CLR 388, [41] (the Court).

26. To the extent that the legislative declaration of new rights had the effect of rendering moot the pre-existing dispute between the parties to the State Agreement, the plaintiff was not a party to that dispute. The premise of the plaintiff's argument that involves characterising the pre-existing dispute as one between the State and a resident of another State, for the purposes of section 75(iv) of the *Constitution* (PS [35]), is therefore wrong. The fact that sections 14-16 and 22-24 of the Act impose new obligations on the plaintiff does not signal that the legislature purported to exercise adjudicative authority in respect of a dispute involving the plaintiff. Further, the plaintiff's reliance on section 20(8) (declaring that certain State conduct

does not constitute an offence) is misconceived: PS [44]. Even if that provision somehow purported to determine a controversy about the criminal liability of State officials (which is denied), that would not be a dispute between a State and resident of another State within the meaning of section 75(iv) of the *Constitution*.

27. The plaintiff's reliance on Hansard with a view to establishing "the intended purpose and effect" of the Amending Act (PS [38]-[39]) is flawed and impermissible for the reasons set out above. In any event, the material referred to by the plaintiff does not support the inference sought to be drawn. The legislature was plainly alive to the threat posed by a multi-billion dollar claim being advanced by Mineralogy and International Minerals, companies under the plaintiff's control. The legislature dealt with that threat by altering the respective rights and obligations of the parties in a way that removed any basis for the claim maintained. The Amending Act incorporates additional layers of protection against the State suffering any adverse consequences, including by imposing indemnities on those who would benefit directly or indirectly from such a claim if it were to succeed. It does not follow that the Amending Act had the purpose or character of an exercise of adjudicative authority in respect of a "matter" (in the constitutional sense) then existing between the plaintiff and the State. In particular the imposition of a new legal obligation in the form of a statutory indemnity has none of the characteristics of an exercise of judicial power.

ADDITIONAL ISSUE 3: BILL OF PAINS AND PENALTIES AND "EXTREME LAWS"

Bill of Pains and Penalties

28. The plaintiff submits that the Amending Act is, or is akin to, a bill of pains and penalties because, based on the text of the Act and statements made in Parliamentary debates, the Amending Act "purported to impose a significant legal burden on [the plaintiff] consequent to a determination of the Defendant of 'civil culpability' in respect of the matters referred to in the *Hansard* extracts" and the purpose of the Act "in attacking the rights of the companies was to cause damage to [the plaintiff]": PS [70]. The "punishment" is said to consist of the "forfeiture of valuable proprietary rights" and the "imposition of a series of statutorily imposed indemnities": PS [71].

29. To demonstrate that "a law may lead to harsh outcomes, even disproportionately harsh outcomes, is not, of itself, to demonstrate constitutional invalidity": ***Kuczborski v Queensland*** [2014] HCA 46; (2014) 254 CLR 51, [217] (Crennan, Kiefel, Gageler and Keane JJ). Nor is the fact that legislation is directed to a particular person or small group, and operates to their disadvantage, sufficient to demonstrate invalidity. That is particularly so in circumstances where, as in this case, the impugned Act is directed to a small group of

identified persons because it amends an existing Act which already creates a special regime of rights and obligations for, or for the benefit of, that small group of identified persons. The legislation considered in ***Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth*** (1986) 161 CLR 88 (which cancelled the Federation's registration); ***Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations*** (1986) 7 NSWLR 372 (which stated that the Federation's registration was to "be taken to have been cancelled"); and ***Knight v Victoria*** [2017] HCA 29; (2017) 261 CLR 306 and ***Minogue v Victoria*** [2019] HCA 31; (2019) 93 ALJR 1031 (which altered the conditions for making a parole order in relation to a particular person) all involved provisions that singled out specific persons for adverse treatment, but were held to be valid.

30. The relevant question is not whether an Act matches the description of a "bill of pains and penalties", but rather whether it exhibits that characteristic of a bill of pains and penalties which is said to represent an impermissible intrusion upon judicial power: ***Haskins v The Commonwealth*** [2011] HCA 28; (2011) 244 CLR 22, [25] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), citing ***Polyukhovich v The Commonwealth*** (1991) 172 CLR 501, 649-650 (Dawson J), and also 536 (Mason CJ), 685-686 (Toohey J), 721 (McHugh J). While it is enough to ask of Commonwealth legislation whether it amounts to an exercise of judicial power, since there is no strict separation of powers at the State level the relevant question is whether the Amending Act exhibits characteristics that interfere with the institutional integrity of the Supreme Court as a repository of federal jurisdiction (as articulated in ***Kable v Director of Public Prosecutions (NSW)*** (1996) 189 CLR 51) or is otherwise contrary to constraints on State legislative power arising from Ch III. For that reason, whether the Amending Act amounts to a bill of pains and penalties really reduces to the question whether the Amending Act is contrary to implications arising from Ch III, which the defendant has already addressed at B54 DS [43]-[132].

31. Even if one approached the matter by assuming *arguendo* that the Amending Act is a Commonwealth law and asking whether it constitutes a judicial imposition of punishment (as to which, see B54 DS [58]), the answer would be "no". A legislative intrusion upon judicial power in that sense requires at least a "legislative determination of guilt" or a "legislative finding of a contravention of a norm of conduct" and the imposition of a punishment for the conduct the subject of that determination or finding: ***Haskins***, [26] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), [33] (Heydon J). What is required is a "legislative enactment adjudging a specific person or specific persons guilty of an offence constituted by

past conduct and imposing punishment in respect of that offence": ***Polyukhovich***, 535 (Mason CJ), see also 721 (McHugh J).

32. The Amending Act does not meet that description. The Amending Act does not identify any law or norm of conduct that the plaintiff is said to have contravened. The plaintiff again relies on extracts from Hansard in an attempt to prove that the legislature has made a finding of guilt and passed the Amending Act in order to punish the plaintiff in respect of that finding. Reliance on Hansard in that way suffers from the same problems outlined at [16]-[22] above. Nor has the plaintiff identified with any particularity the conduct of his that is said to have been the subject of any legislative determination of guilt or the offence in respect of which he is said to have been judged guilty by the legislature. The notion of "civil culpability" invoked by the plaintiff at PS [70] has no resonance in this context. Nor is the plaintiff's argument advanced by a general reference to "the exercise of lawful rights by me or by companies controlled by me" (PS [70]) and "seeking to vindicate…legal rights against the State": PS [71]. Nothing in the legislation or the surrounding context indicates that Parliament was expressing a legislative conclusion that any such activity contravened any law or norm of conduct.

33. Since there is no legislative determination of a contravention of any law or norm, none of the disadvantageous consequences flowing to the plaintiff under the Amending Act can be considered a "punishment" in a constitutionally significant sense. That is because "[p]unishment presupposes an offense, not necessarily an act previously declared criminal, but an act for which retribution is exacted": ***United States v Lovett*** (1946) 328 US 303, 324 (Frankfurter J). Legislative provisions that impose adverse consequences on a person are not, simply for that reason, characterised as punitive. In ***Lovett***, Frankfurter J went on to observe at 324: "The fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking, all discomforting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there may be reasons other than punitive for such deprivation." See also ***Kariapper v Wijesinha*** [1968] AC 717, 735-736 (Sir Douglas Menzies for the Privy Council); cf ***Liyanage v The Queen*** [1967] 1 AC 259, 290-291 (Lord Pearce for the Privy Council).

34. Here, to the extent Hansard can be used to prove anything about Parliament's intention in passing the Amending Act, it illustrates that the Amending Act was passed in order to protect Western Australians from the crippling effects that an adverse determination in the arbitral proceedings brought by Mineralogy and International Minerals, to the tune of around $30 billion, would have on the economy: SCB 508-512. Addressing that mischief by extinguishing the legal basis for any such liability, and by imposing additional layers of

protection against attempts to re-enliven such a claim, is not an exercise of legislative "punishment".

Limit on the State Passing "Extreme" Laws

35. The plaintiff argues that Parliament is precluded from depriving him of valuable property rights without compensation because the Parliament lacks power to enact such "extreme" laws: PS [75]-[78]. The argument is foreclosed by existing authority (***Durham Holdings Pty Ltd v New South Wales*** [2001] HCA 7; (2001) 205 CLR 399), which the plaintiff has made no real attempt to re-open in accordance with the established criteria for reconsidering previous decisions of this Court: see, eg, ***Wurridjal v The Commonwealth*** [2009] HCA 2; (2009) 237 CLR 309, [65]-[72] (French CJ). In any event, the present legislation could hardly qualify as an "extreme" law of the kind that could prompt a judicial response of the kind alluded to by Kirby J in ***Durham Holdings*** (at [75]), such as to warrant consideration of a previously unknown limit on State legislative power. His Honour had in contemplation a purported State law that "was not, in truth, a 'law' at all" but rather an "an extreme affront masquerading as a State law". The Amending Act, at its heart, is a law which in a conventional way adjusts the rights and obligations of the parties to a special commercial arrangement, made possible by the Act and the State Agreement, facilitating the exploitation of State resources. While there may be other exceptional features in the Amending Act, relating to the layers of protection against liability and against further agitation of claims that have been effectively extinguished, that does not mean that the Amending Act ceases to be a State law properly so called.

ADDITIONAL ISSUE 4: INCONSISTENCY WITH COMMONWEALTH LAW

36. The plaintiff submits that the Amending Act is inconsistent with Commonwealth laws conferring and regulating the exercise of federal jurisdiction; laws dealing with the enforcement of judgments and orders of federal courts; laws dealing with costs in federal courts; various provisions of the *Federal Court Rules* dealing with document production; the *Evidence Act*; the *Corporations Act*; the *Bankruptcy Act*; the *PPS Act* and various Commonwealth criminal laws: 3FASOC [92]-[95D]; PS [79]-[105]. Each is addressed in turn (noting that the plaintiff has generally failed to articulate the precise bases on which particular provisions are said to be inconsistent with the Act), after stating some general principles.

Inconsistency – General Principles

37. A majority of this Court has recently affirmed the ongoing relevance of the concepts of "direct" and "indirect" inconsistency: describing the former as a case where the State law

"alters, impairs or detracts" from the operation of the Commonwealth law, and the latter as a case where the Commonwealth law is read as expressing "completely, exhaustively, or exclusively" what the law shall be on a subject matter: ***Work Health Authority v Outback Ballooning Pty Ltd*** [2019] HCA 2; (2019) 266 CLR 428, [32]-[33] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ); cf [67] (Gageler J), [105] (Edelman J). In both cases the aim is to discern whether there is a "real conflict" between the two laws: ***Outback Ballooning***, [70] (Gageler J) and [105] (Edelman J), citing ***Jemena Asset Management (3) Pty Ltd v Coinvest Ltd*** [2011] HCA 33; (2011) 244 CLR 508, [42] (the Court).

38. Although the plaintiff's case is primarily put as an inconsistency for the purposes of section 109 of the *Constitution*, in some instances the correct question may be whether Commonwealth law "otherwise provides" for the purposes of section 79 of the *Judiciary Act*: cf PS [94]. Section 79 applies where there is a gap in the law, arising from the absence of State legislative power to command a court as to the manner of its exercise of federal jurisdiction, by picking up State laws which purport to regulate the exercise of federal jurisdiction and applying them as Commonwealth law: ***Masson v Parsons*** [2019] HCA 21; (2019) 266 CLR 554, [30] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ). Some of the provisions of the Act which are alleged to be inconsistent with Commonwealth law – such as those dealing with the Court's powers to order discovery or admit evidence (sections 18(5)-(7)) – are apt to fall into that category. In that case, the relevant question is not whether there is an inconsistency with Commonwealth law for section 109 purposes, but whether a Commonwealth law "otherwise provides" for the purposes of section 79 of the *Judiciary Act*. Given the tests under section 109 and section 79 are substantially the same (***Masson***, [43] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ)), little turns on that question, at least at the threshold step of determining whether there is an inconsistency.

39. The distinction is more relevant in the event that an inconsistency is established. If there is an inconsistency for section 109 purposes, then the State law will only be inoperative "to the extent of the inconsistency". Sections 8(4) and 8(5) of the Act will also apply. Section 8(4)(a) provides that a provision of Part 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 inconsistently with a law of the Commonwealth". Contrary to PS [82], the word "apply" in section 8(4) does not fix upon a provision's "practical operation" as opposed to its "legal meaning"; section 8(4) requires a provision to be read down to the extent necessary to avoid an inconsistency with Commonwealth law. Section 8(5) provides that if, despite section 8(4), a provision of Part 3 (or part of a provision) is invalid the rest of the Part is to be regarded as divisible from, and capable of operating independently of, the invalid part.

40. If instead the relevant provision of the Act is of the kind to which section 79 of the *Judiciary Act* applies, and it is concluded that a Commonwealth law "otherwise provides", then there is no question of the provision being read down or severed. Nor is there any question of invalidity warranting relief of the kind sought by the plaintiff. The result is simply that the relevant provision will not be picked up and applied by a court exercising federal jurisdiction: ***Masson***, [42] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ). Whether or not the law will be picked up and applied is an issue that will not arise unless and until relevant proceedings are commenced in federal jurisdiction. It follows that even if the plaintiff is successful in establishing that a Commonwealth law "otherwise provides" in relation to a particular provision of the Act, that provides no basis for a submission that the provision in question, let alone the balance of the Act, is invalid.

Commonwealth Laws Dealing with Jurisdiction, Enforcement and Costs

Laws conferring federal jurisdiction

41. The plaintiff alleges that various provisions of the Act are inconsistent with Parts III-V of the *Judiciary Act* (original and appellate jurisdiction of the High Court) and section 58 of the *Judiciary Act* (suits against State in matters of federal jurisdiction); Part III Div 1 of the *Federal Court of Australia Act 1976* (Cth) ("***FCA Act***") (original jurisdiction of the Federal Court); and section 33 of the *FCA Act* (appeals from the Federal Court to the High Court): 3FASOC [92], [94], PS [88]. The plaintiff also alleges an inconsistency with section 73 of the *Constitution* (appeals from State Supreme Courts to the High Court) and section 75(iv) of the *Constitution* (diversity jurisdiction – which has been dealt with above): 3FASOC [94].

42. The provisions of the Act said to give rise to the inconsistency are (most relevantly) those which preclude the commencement of proceedings against the State (eg sections 11(3) and 19(3)) or provide that certain conduct of the State cannot be the subject of any appeal or review (sections 12(1) and 20(1)); which terminate proceedings of a certain kind (eg sections 11(4), 12(4), 19(4) and 20(4)); and which extinguish orders and remedies (sections 11(5)-(6), 12(5)-(6), 13(6)-(7), 19(5)-(6), 20(5)-(6), 21(6)-(7)). The plaintiff submits that to the extent those provisions apply to proceedings in federal jurisdiction, they are inconsistent with the Commonwealth laws noted above.

43. As explained in B54 DS [104], the validity of the latter category – provisions extinguishing orders and remedies (described as Interim Proceeding Provisions in B54/2020) – does not arise. Those provisions only operate in respect of proceedings brought at or after introduction time and completed before the end of the day on which the Amending Act received Royal Assent. The Special Case does not identify any proceedings within the scope of those sections, and none can now arise.

44. In respect of the provisions which preclude or terminate proceedings, the word "proceedings" is defined in section 7(1) of the Act to include "non-WA proceedings", which is in turn defined to include proceedings under the law of the Commonwealth or another State or Territory or that are outside Western Australia on any other basis. That definition is broad enough to include proceedings brought in federal jurisdiction either in State or federal courts (although, in respect of the provisions terminating proceedings, the only proceeding in federal jurisdiction identified in the Special Case to which they could apply is the Federal Court proceedings referred to at SC [45], and that only engages sections 11(4) and 19(4) of the Act).

45. The Commonwealth laws referred to above operate to confer jurisdiction on Ch III courts. That legislative grant of jurisdiction simply means that those courts have authority to hear and determine a matter: ***Rizeq v Western Australia*** [2017] HCA 23; (2017) 262 CLR 1, [8] (Kiefel CJ), see also [53]-[54] (Bell, Gageler, Keane, Nettle and Gordon JJ). That concept of jurisdiction is to be distinguished from the law that the court applies in the exercise of that jurisdiction, and the "fact that a court is exercising federal jurisdiction says nothing about the laws to be applied in a particular case": ***Rizeq***, [9] (Kiefel CJ), see also [53] (Bell, Gageler, Keane, Nettle and Gordon JJ).

46. The defendant accepts that whatever jurisdiction Commonwealth laws confer cannot be taken away by the Act: ***Rizeq***, [60] (Bell, Gageler, Keane, Nettle and Gordon JJ). But the Act does not purport to withdraw or narrow the scope of that jurisdiction. Rather, the scope of that jurisdiction remains as it always has been, and the effect of Part 3 of the Act is to alter the law that the courts are to apply in the exercise of that jurisdiction (with the provisions of Part 3 applying either of their own force, or through the prism of section 79 of the *Judiciary Act*). Taking section 11 as an example:

    (a) section 11(1)-(2) precludes or extinguishes any liabilities of the State connected with a disputed matter;

    (b) section 11(3) provides that, on and after commencement, no proceedings can be brought against the State that are for the purpose of enforcing such a liability or that are otherwise connected with a disputed matter;

    (c) if, following commencement of the Amending Act, such a proceeding were brought in federal jurisdiction, the court would be required to construe section 11(3), determine whether the proceeding falls within the scope of that provision, and if so make appropriate orders (eg to dismiss or permanently stay the proceeding);

    (d) section 11(4) provides that any proceedings brought against the State of the kind described in section 11(3) are terminated if they were brought before commencement but were not completed before commencement or were brought before the end of the

day on which the Amending Act received Royal Assent but were not completed before the end of that day (as noted above, the only proceedings in federal jurisdiction meeting that description are the Federal Court proceedings at SC [45]);

(e) in those Federal Court proceedings, the Court will be required to construe section 11(4), determine whether the proceedings fall within the scope of that provision, and if so make appropriate orders (which, again, may be to dismiss or permanently stay the proceedings).

47. Viewed in that way, the jurisdiction conferred on the court by Commonwealth law remains, and is available to be engaged, and the court in the exercise of that jurisdiction will be required to construe and apply the Act. In terms of its constitutional character, there is no substantive difference between provisions such as section 11(3)-(4) and limitation periods prescribed under State law, which have been applied even in federal jurisdiction: see, eg, ***O'Mara Constructions Pty Ltd v Avery*** [2006] FCAFC 55; (2006) 151 FCR 196.

Laws dealing with enforcement

48. Next the plaintiff alleges that the Act is inconsistent with various Commonwealth laws dealing with enforcement of orders or judgments: Part VIII of the *Judiciary Act* (which deals with the enforcement of historical orders of Victorian courts made in the 1980s, and is entirely irrelevant to these proceedings); sections 64-66 of the *Judiciary Act* (execution against the Commonwealth or a State) and section 77M of the *Judiciary Act* (judgments of the High Court may be enforced in like manner as a judgment of the Supreme Court of the State or Territory in which it is sought to be enforced); Part 10 of the *High Court Rules 2004* (Cth) ("***High Court Rules***") (execution of judgment); Part 41 of the *Federal Court Rules* (enforcement); section 14 of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth) (enforcement of judgments); and Part 6 of the *Service and Execution of Process Act 1992* (Cth) (enforcement of Australian judgments in a different State or territory from that in which they were rendered): 3FASOC [92].

49. The plaintiff's submission seems to be primarily directed towards sections 17(4)-(5) and sections 25(4)-(5) of the Act. The effect of those provisions is that no asset, right or entitlement of the State can be taken or used to enforce liabilities of the State connected with disputed or protected matters and no execution can be issued out of any court against the State in relation to such liabilities.

50. To the extent any Commonwealth law purported to *require* any assets, rights or entitlements of the State to be made available for execution of such liabilities, a question would arise as to whether the Commonwealth Parliament had the power to make such a law, given the fundamental constitutional principle that the executive government can only spend public

money under legislative authority: see B54 DS [128]-[129]. But that is not the effect of the Commonwealth laws referred to above. Rather, what Commonwealth law contemplates – see sections 65-66 of the *Judiciary Act* – is that *no execution shall be issued* against the property or revenues of a State; rather, the State's liability is to be enforced by the Registrar issuing a certificate to the Treasurer and the relevant sum being paid out of moneys legally available. Sections 17(4)-(5) and 25(4)-(5) of the Act therefore reflect the position at Commonwealth law and are entirely consistent with that regime.

Laws dealing with costs

51. Finally, the plaintiff alleges the Act is inconsistent with various Commonwealth laws conferring or regulating the power to award costs or make other orders: Chapter 5 of the *High Court Rules*; section 43 of the *FCA Act*; Part 39 ("Orders") and Part 40 ("Costs") of the *Federal Court Rules*: 3FASOC [93]. The plaintiff alleges that all of the provisions of the Act referred to above are inconsistent with these laws, as well as the provisions providing that no person can seek payment from the State of legal costs connected with certain proceedings and that the State has no liability for such legal costs (sections 11(7), 12(7), 13(8), 19(7), 20(7) and 21(8)). Of those provisions, only the validity of sections 11(7) and 19(7) arises (because they apply to the Federal Court proceedings referred to at SC [45]). The Special Case does not refer to any proceedings in federal jurisdiction to which the other "no costs" provisions could apply.

52. The Commonwealth laws referred to above give the relevant courts the power to award costs in the exercise of their discretion and in some cases stipulate the form in which such costs orders can be made (eg by way of lump sum). They do not confer an *entitlement* to an award of costs on any party. The "no costs" provisions in sections 11(7) and 19(7) do not alter the scope of the Court's power to award costs, but rather alter the law to be applied by the Court in the exercise of that power by specifying that costs are not available against the State in certain circumstances and that the State has no liability for such costs. Again, no inconsistency arises. See ***Grueff v Virgin Australia Airlines Pty Ltd*** [2021] FCA 501, [132]-[133] (Griffiths J), concluding that Sch 1 to the *Legal Profession Uniform Law Application Act 2014* (NSW) (which limits legal practitioners' costs in matters concerning "personal injury damages") was picked up by section 79 of the *Judiciary Act*; and also ***Hayson v The Age Company Pty Ltd (No 3)*** [2020] FCA 1163, [36]-[39] (Bromwich J), reaching the same conclusion in respect of section 40 of the *Defamation Act 2005* (NSW) (dealing with costs in defamation proceedings).

If an inconsistency is established

53. To the extent the provisions of the Act referred to above cannot apply of their own force in federal jurisdiction and can only apply via section 79 of the *Judiciary Act*, then if any inconsistency with Commonwealth law is established (ie because a Commonwealth law "otherwise provides") then the result is simply that the relevant provisions of the Act will not be picked up and applied in federal jurisdiction. As explained above, that does not result in the invalidity of the provision, let alone the balance of the Act. The plaintiff would not be entitled to any declaration of invalidity.

54. Alternatively, by force of section 8(4) of the Act, the provisions would not apply to proceedings in federal jurisdiction or, by force of section 109 of the *Constitution*, would not operate to the extent of the inconsistency. The word "proceedings" is a general term that can be construed distributively so as not to apply to proceedings in federal jurisdiction: cf ***Knight v Victoria***, [34] (the Court). The impugned provisions of the Act were intended to preclude or terminate proceedings, prevent execution against the State, or preclude an award of costs, to the fullest extent possible; the prohibition of such matters in federal jurisdiction is not an essential aspect of those provisions such that Parliament cannot have intended them to operate without it: see ***Bell Group NV (in liq) v Western Australia*** [2016] HCA 21; (2016) 260 CLR 500, [52], [69]-[73] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ).

Federal Court Rules and Evidence Act

55. The plaintiff submits that sections 13(4)-(5), 18 and 21(4)-(5) of the Act are inconsistent with Parts 7 (Div 7.3) and Parts 20 and 24 of the *Federal Court Rules* and Chapter 2 (Part 2.1), Chapter 3 and section 193 of the *Evidence Act*: 3FASOC [65], [95]; PS [91].

56. No question properly arises as to the validity of sections 13(5) and 21(5), because they only operate to terminate certain proceedings which are brought before commencement of the Amending Act (on 13 August 2020) but not completed before that day; or brought before the end of the day on which the Amending Act received Royal Assent (on 13 August 2020) but not completed before the end of that day. The Special Case does not disclose the existence of any such proceedings: as to which see B54 DS [104].

Sections 13(4), 18(6) and 21(4)

57. In summary, sections 13(4) and 21(4) provide that, on and after commencement, no proceedings can be brought to the extent that they are connected with seeking, by or from the State, the production of documents or other things connected with disputed or protected matters. Section 18(6) provides that no document or other thing connected with a protected matter can be required to be discovered or produced in any proceedings or otherwise under a

written law. Sections 18(5) and (7) relate to the admissibility of evidence and compellability of witnesses and are addressed separately below.

58. As noted at [44] above, the definition of "proceedings" in section 7(1) of the Act would include proceedings brought in the Federal Court. Sections 13(4), 18(6) and 21(4) would preclude, for example, preliminary discovery applications connected with seeking from the State documents or things connected with disputed or protected matters. Of course, if any such application were brought in the Federal Court, the Court would still be required to construe sections 13(4), 18(6) and 21(4) and determine whether they applied to the particular application before the Court, including whether the application sought from the State documents or things "connected with" a disputed matter or protected matter.

59. These provisions must be construed in light of the central legislative declarations in sections 9, 11(1)-(2), 19(1)-(2) and 27 extinguishing State liability. As explained in B54 DS at [107], the rights of enforcement, and to use litigation procedures such as preliminary discovery, are effectively secondary to the primary rights and liabilities which have been extinguished. In the context of those provisions, sections 13(4), 18(6) and 21(4) should be characterised as extinguishing the secondary rights to bring applications for discovery/production in aid of the enforcement of primary rights which no longer exist.

60. Viewed in that way, no question of inconsistency arises regarding sections 13(4), 18(6) or 21(4) and the *Federal Court Rules*. The power to order preliminary discovery, discovery and production or inspection are only conferred in aid of the enforcement of substantive rights. If those rights no longer exist because they have been extinguished by the Amending Act, then it is not inconsistent with the *Federal Court Rules* for sections 13(4), 18(6) and 21(4) to provide that no applications for discovery/production may be brought in aid of those rights. The powers provided for in those provisions can never be engaged, as the Federal Court is no longer seized of a "matter" in respect of the substantive rights. The same reasoning applies insofar as the plaintiff asserts an inconsistency with section 193 of the *Evidence Act*, which provides courts with certain powers regarding discovery and inspection.

61. If, contrary to the above submissions, sections 13(4), 18(6) and 21(4) insofar as they apply to the Federal Court are inconsistent with the *Federal Court Rules*, then (if the matter is analysed by reference to section 79 of the *Judiciary Act*) they would simply not be picked up and applied to a proceeding in the Federal Court. Alternatively, by force of section 8(4) of the Act, they would not apply to proceedings in the Federal Court or, by force of section 109 of the *Constitution*, would not operate to the extent of the inconsistency. Again, the word "proceeding" can be given a distributive operation and Parliament should not be taken to have

intended that the provisions would apply either in respect of all proceedings or not at all: see the authorities at [54] above.

62. Insofar as sections 13(4), 18(6) and 21(4) apply to State courts exercising federal jurisdiction, no issue of inconsistency arises. The *Federal Court Rules* only apply to the Federal Court. Almost all provisions of the *Evidence Act* (including section 193, part 2.1 and all of Chapter 3 save for section 70(2), which relates to customs and excise prosecutions and is entirely irrelevant for present purposes) only apply to "federal courts" (section 4(1), cf section 5) as defined in the Dictionary, including the High Court and courts created by federal Parliament (but not including State courts exercising federal jurisdiction).

Section 18

63. The plaintiff also submits that section 18 is inconsistent with Chapter 2 (Part 2.1) and Chapter 3 of the *Evidence Act*: 3FASOC [65], [95(b)]; PS [85]-[86], [92]. Section 18 also applies to "proceedings", which via the definition of "non-WA proceedings" would include proceedings in "federal courts" as defined in the *Evidence Act*. Any inconsistency would only arise insofar as section 18 applies to such courts.

64. Section 18(5) provides that no document, other thing or oral testimony connected with a protected matter is admissible in evidence, or can otherwise be relied upon or used, in any proceedings in a way that is against, or against the interests of, the State or certain State authorities or agents. Presumably it is said that it is inconsistent with Chapter 3 of the *Evidence Act*, which sets out rules regarding the admissibility of evidence. The plaintiff has not pointed to any particular conflict between the two laws; and nor can it be said that the *Evidence Act* is intended to constitute an exhaustive statement of the law of the admissibility of evidence: see Heydon, *Cross on Evidence* (LexisNexis Butterworths, 12th ed, 2020) [1635], [1720]-[1745], [1815]. In any event unless and until particular evidence is sought to be adduced in a "federal court" proceeding to which section 18(5) applies, it is difficult in the abstract to articulate the extent of any such inconsistency. The Court should not entertain this issue in the absence of a concrete factual scenario of that kind: see ***Knight v Victoria***, [33] (the Court).

65. Section 18(7) provides that no person is compellable in any proceeding or otherwise under a written law to produce documents or things connected with a protected matter, answer questions connected with a protected matter, provide information connected with a protected matter, or give any other type of testimony or evidence connected with a protected matter. Insofar as section 18(7) precludes applications for the discovery or production of documents, and it is alleged that that is inconsistent with section 193 of the *Evidence Act*, the defendant relies on its submissions at [60] above.

66. Insofar as section 18(7) provides that witnesses are not compellable to give certain oral evidence, then there may be an inconsistency with the *Evidence Act* to the extent that the *Evidence Act* provides that that person is compellable to give evidence. However, again, unless and until a particular witness is called to give evidence in a "federal court" proceeding to which section 18(7) applies, it is difficult in the abstract to articulate the extent of any such inconsistency and the Court should not entertain the issue.

67. If there is an inconsistency, then (if the matter is analysed by reference to section 79 of the *Judiciary Act*) the result is that section 18(7) would not be picked up and applied to a proceeding in a federal court. Alternatively, by force of section 8(4) of the Act, section 18(7) would not apply to proceedings in a federal court or, by force of section 109 of the *Constitution*, would not operate to the extent of the inconsistency. Again, the word "proceeding" can be given a distributive operation and Parliament should not be taken to have intended that section 18 would apply either in respect of all proceedings or not at all.

Corporations Act and Bankruptcy Act

68. The plaintiff puts the alleged inconsistency with the *Corporations Act* and the *Bankruptcy Act* in two ways: first, by focusing on the provisions of the Amending Act which extinguish liabilities and preclude proceedings and, second, by focusing on the indemnity provisions. Each is addressed in turn.

Provisions which extinguish liabilities or preclude proceedings

69. First, it is said that the provisions of the Act which extinguish certain liabilities of the State (eg sections 11(1)-(2), 19(1)-(2), 27) or prevent certain proceedings (eg sections 13, 21) are inconsistent with the duties of administrators, liquidators and trustees in bankruptcy to recover property or compensation for the benefit of creditors and to be compensated for their costs of doing so: PS [101(a)]. That submission should be rejected for the following reasons.

70. **Powers and duties of administrators etc to recover property:** Commonwealth legislation gives powers or duties to administrators, liquidators and trustees in bankruptcy to realise or recover property of the company and to bring proceedings on the company's behalf: eg *Corporations Act* section 438A (administrators), section 477 (liquidators), *Bankruptcy Act* section 134 (trustees). However, insofar as the Amending Act extinguishes certain liabilities of the State, the Amending Act operates by altering the law that would otherwise govern the existence of any rights or liabilities, that would give rise to such property, or that would be the subject of consideration in such proceedings. The Amending Act does not alter, impair or detract from the powers or duties of administrators, liquidators and trustees mentioned above.

71. None of the provisions of the *Corporations Act* or the *Bankruptcy Act* invoked by the plaintiff purport to regulate the substantive rights, including proprietary rights, which may be available to be realised or recovered by administrators, liquidators and trustees in bankruptcy. The statutory powers of administrators, liquidators and trustees in bankruptcy are exercised against the backdrop of general law and State and Commonwealth statutes that regulate the property, rights and liabilities of companies and bankrupt persons. The plaintiff's argument, in particular at PS [100], reduces to the extreme and unsustainable proposition that State laws cannot validly affect the rights and liabilities of entities that might become subject to administration and/or liquidation and persons who might become subject to bankruptcy.

72. The Amending Act does not in any relevant sense purport to exempt the State from the consequences that would follow from the ordinary operation of the insolvency provisions of the *Corporations Act* or the provisions of the *Bankruptcy Act*. To the extent that the plaintiff's argument involves particular scenarios that might arise in the context of a particular administration, liquidation or bankruptcy, that is a wholly abstract exercise not ripe for consideration. There is no suggestion that any such scenario has arisen or is imminent.

73. As to the commencement of proceedings, for the reasons explained in B54 DS at [102], [110(f)], the Amending Act does not operate on its proper construction to preclude proceedings being brought altogether. In any given case, a party with standing (including an administrator, liquidator or trustee in bankruptcy) asserting a claim for relief would be entitled to bring proceedings and it would be necessary for the relevant court to determine, among other things, the application of relevant provisions of the Amending Act. No inconsistency therefore arises with the provisions of the *Corporations Act* and the *Bankruptcy Act* authorising the bringing of proceedings.

74. In relation to sections 13 and 21 of the Amending Act, the plaintiff alleges an inconsistency with sections 422 and 438D of the *Corporations Act:* 3FASOC [95D(b)]. Sections 13 and 21 disapply provisions of the *Freedom of Information Act 1992* (WA) ("***FOI Act***") in relation to documents connected with disputed or protected matters and restrict the ability to seek from the State production or discovery of documents or things connected with disputed matters or protected matters. Section 422(1)(a)-(c) provides that a receiver or managing controller must report to ASIC if it appears to them that certain persons may have committed an offence, misapplied company property or been guilty of neglect, default, breach of duty or trust relating to the company. Section 422(1)(d) provides that the receiver or managing controller must give ASIC such information, and such access to and facilities for inspecting and taking copies of any documents, as ASIC requires. Section 438D is in relevantly identical terms but applies to an administrator.

75. These provisions do not purport to confer any powers on receivers or administrators to seek information under the *FOI Act* or to bring applications for production or discovery. They merely require the relevant persons to make reports to ASIC and provide to ASIC such documents as they have in their possession. The *Corporations Act* does not purport to say what procedures may be or must be available to be invoked by a receiver or administrator, including statutory rights of access under State laws such as the *FOI Act*. To the extent that this indirectly raises a question about a receiver or administrator wishing to utilise ordinary court processes to seek production or discovery of documents, then any question of inconsistency concerns the relationship between sections 13 and 21 and the federal legislation governing those processes (such as the *Federal Court Rules*). This issue has already been addressed at [60] above.

76. **Section 530C of the *Corporations Act*:** The plaintiff's submissions also refer to section 530C of the *Corporations Act*: PS [101(a)] (not raised in the 3FASOC). That provision empowers the Court to issue a warrant if a company is being wound up and if, on application by the liquidator or ASIC, the Court is satisfied that a person has concealed or removed property of the company with the result that the taking of the property into the custody or control of the liquidator will be prevented or delayed or a person has concealed, destroyed or removed books of the company or is about to do so. The warrant may authorise a specified person to search for and seize property or books of the company. Quite how sections 13 or 21 of the Act would preclude the bringing of proceedings to obtain such a warrant has not been articulated. Sections 13(4) and 21(4) only apply to proceedings connected with seeking discovery or production by or from the State. They have no conceivable application to proceedings for a warrant to seize property or books of a company.

Indemnity provisions

77. The plaintiff contends that the indemnity provisions of the Act (sections 14, 15, 16, 22, 23, 24) are inconsistent with the provisions of the *Corporations Act* and *Bankruptcy Act* which establish regimes for proofs of debt, adjudication upon proofs and court review of such adjudications: PS [101(b)], 3FASOC [95AA], [95AC], [95AD]. The plaintiff refers to Part 5.6 of the *Corporations Act* (winding up generally) and Parts III to VI of the *Bankruptcy Act*: 3FASOC [95AA], [95AC], [95AD].

78. **Regime for proofs of debt:** Part 5.6 of the *Corporations Act* deals with the time when a winding up is taken to commence (Div 1A); the liabilities of members (Div 2); the appointment and rights/duties of liquidators (Div 3); proof and ranking of claims (Div 6); effect on certain transactions (Div 7); disclaimer of onerous property (Div 7A); moratoriums on enforcement against the company's property (Div 7B); and pooling arrangements (Div 8).

The *Bankruptcy Act* provides for jurisdiction and powers of courts in bankruptcy proceedings (Part III); acts of bankruptcy, creditors' and debtors' petitions, and the effects of bankruptcy on property and proceedings (Part IV); powers of trustees to obtain information about the bankrupt's affairs (Part V); and proofs of debt, realisation of property and distribution of property (Part VI).

79. The effect of the indemnity provisions has been explained at B54 DS [133]-[142]. In short, they impose indemnities on the plaintiff, Mineralogy, International Minerals, persons acquiring rights by transfer from those three parties; and anyone else holding rights in respect of liabilities of the State or proceedings connected with disputed or protected matters. They are to indemnify the State against loss, liability or proceedings connected with disputed or protected matters, including legal costs. The indemnities can be enforced by set-off: sections 14(7)(b), 15(5)(b), 22(7)(b), 23(5)(b). The State is entitled to be indemnified in respect of any loss to the Commonwealth if the Commonwealth is sued, and may assign its rights to the Commonwealth: sections 16, 22.

80. The plaintiff's complaint is that the imposition of these indemnities on relevant persons in favour of the State operates to prevent distributions to other creditors and that this detracts from the schemes for proofs of debt under the *Corporations Act* and the *Bankruptcy Act*: 3FASOC [95AA(b)(iii)]. However, the fact that the indemnity provisions may have the effect of the State becoming a creditor of the relevant person, and thereby reduce the amounts paid out to other creditors, does not affect the processes for proofs of debt provided for under the *Corporations Act* or the *Bankruptcy Act*. The indemnity provisions do not detract from the operation of those Commonwealth laws any more than any State legislation which creates a liability of a company (for example, a legislative requirement to pay taxes of a certain kind). The treatment of that liability in the context of an administration or liquidation depends on the operation of the *Corporations Act*.

81. Nor do the indemnity provisions relieve the State from having to prove the debt in accordance with the processes provided for under the *Corporations Act* or *Bankruptcy Act* or affect the priorities provided for under that legislation: cf 3FASOC [95AA(b)(iv)], [95AC(r)], [95AD(c)]. The indemnity provisions create a new statutory source of the debt, but do not affect the processes for proof or priorities.

82. **Sections 443C and 553C of the *Corporations Act*:** The 3FASOC also refers to section 443C in Part 5.3A (administrator not liable for company's debts) and section 553C of Part 5.6 (insolvent companies – mutual credit and set off) (at [95D(a)]), although these are not given any substantial attention in the written submissions.

83. The plaintiff alleges that the definition of a "relevant person" "would capture an administrator such that on appointment the administrator would be liable under the indemnity" for losses and liabilities connected with a disputed or protected matter, which would be inconsistent with section 443C: 3FASOC [95D(a)(vi)]. This appears to be the basis for the suggestion in PS [101(a)] of the Amending Act requiring an administrator personally to indemnify the State.

84. The question is hypothetical and abstract in circumstances where no administration has occurred and there is no basis on which to assess at a factual level the assertion that an administrator would somehow meet the definition of a "relevant person". There is no sound basis to conclude that the Amending Act would apply to an administrator as a "relevant person" (including as a "relevant transferee" or otherwise).

85. Section 553C is in Subdiv A of Div 6 of Part 5.6. That subdivision deals with admission to proof of debts and claims in a winding up. Section 553C provides that where there have been "mutual credits, mutual debts or other mutual dealings between an insolvent company that is being wound up and a person who wants to have a debt or claim admitted against the company", any sum due from one party is to be set off against the sum due from the other party and only the balance of the account is admissible to proof against the company or is payable to the company as the case may be.

86. The plaintiff pleads that the liability of "relevant persons" under the indemnity provisions "offsets the liability of the defendant in a manner inconsistent with s 553C" (3FASOC [95D(a)(vii)]), presumably relying on the set-off provisions in sections 14(7)(b), 15(5)(b), 22(7)(b) and 23(5)(b) of the Act. Those provisions provide that the defendant may "enforce the indemnities" provided for in sections 14, 15, 22 and 23 "by setting off the liability of the relevant persons under the indemnity against any liability that the State has to 1 or more of them". What the set-off provisions contemplate is that State may "enforce the indemnities" – that is, recover on any debt owed by a relevant person to the State under those indemnities – by effectively reducing any amount owed by the State to one or more relevant persons by the amount owed to the State.

87. The question of how such arrangements would operate in the event of a winding up, including subject to section 553C of the *Corporations Act*, has not arisen and it is inappropriate to consider such questions in the abstract. While the point has been pleaded the plaintiff has said nothing about it in his submissions. To the extent the point arises, the defendant submits that nothing in the Amending Act would alter the ordinary operation of section 553C, if the circumstances were such as to engage the section.

PPS Act

88. The plaintiff submits that the indemnity provisions are inconsistent with the *PPS Act* because they "have the effect of creating a security interest without complying with the *PPS Act* and are perfected and enforceable in priority to other security interests notwithstanding" the *PPS Act*: 3FASOC [95D(d)(xxxi)]; PS [102]. The *PPS Act* addresses the circumstances in which a "security interest" attaches to personal property; when it becomes enforceable against the grantor and against third parties in respect of particular collateral; when a security interest is perfected and thus takes priority over other security interests; and for priorities between multiple perfected security interests. A "security interest" is defined as "an interest in personal property provided for by a transaction that, in substance, secures payment or performance of an obligation": *PPS Act*, section 12.

89. The indemnity provisions in the Amending Act impose an obligation on "relevant persons" to pay money to the State in certain circumstances and on demand. The Amending Act does not purport to create any "security interest" falling within that definition or otherwise disturb the operation of security interests in respect of personal property. No inconsistency with the *PPS Act* arises.

Commonwealth Criminal Laws

90. The plaintiff submits that section 20(8)-(9) is inconsistent with the *Crimes Act 1914* (Cth), the *Criminal Code Act 1995* (Cth) and the *Criminal Code* (Cth): 3FASOC [95B]-[95BD]; PS [103]-[105]. Section 20(8)-(9) provides that any conduct of the State (including a State agent) that is or is connected with a protected matter does not constitute an offence. The plaintiff also submits that section 20(1), which provides that conduct of the State that is or is connected with a protected matter cannot be called into question in any proceedings, is inconsistent with section 9 of the *Director of Public Prosecutions Act 1983* (Cth) which gives the Director power to prosecute offences against Commonwealth laws.

91. It is not possible to determine the alleged inconsistency at the level of abstraction at which it has been put. The plaintiff has not alleged that the State or any State agents have or may have committed any particular offence under the *Crimes Act* or the *Criminal Code*. The question of inconsistency cannot be determined at large by reference to Commonwealth criminal laws generally. Different considerations might arise depending on the nature of the relevant Commonwealth offence and the circumstances in which it is alleged to have been committed. For example, if it were alleged that there were a particular Commonwealth law that criminalised conduct of a State or State agent connected with a protected matter (and noting that "protected matter" is defined to include the preparation and enactment of the Amending

Act and the preparation and making of Part 3 subsidiary legislation), a real question would arise, having regard to the ***Melbourne Corporation*** principle, as to the application and validity of such a law.

COMMON ISSUE 7 IN B54 OF 2020: NON-COMPLIANCE WITH MANNER AND FORM REQUIREMENTS

92. In both B52 and B54 of 2020, the plaintiffs challenge the validity of the whole of the Amending Act upon the basis that the Amending Act is a law "respecting the constitution, powers or procedure" of the WA Parliament for the purposes of section 6 of the *Australia Act 1986* (Cth); it amends the State Agreement; the State Agreement was given effect by the Act as a WA law; clause 32 of the State Agreement prescribes a "manner and form" for amending the State Agreement; that "manner and form" was not satisfied by the amendments in the present case; and the failure to comply with the prescribed "manner and form" requirements means that the Amending Act is of no force and effect due to section 6 of the *Australia Act*.

93. An argument based on section 6 of the *Australia Act* requires the identification of two laws: first, the former law made by Parliament that is said to prescribe the manner and form for the making of laws respecting the constitution, powers and procedure of the Parliament; and, secondly, a subsequent law respecting the constitution, powers and procedure of Parliament that does not comply with the "manner and form" prescribed by the former law. The plaintiff's argument is that clause 32 of the State Agreement, supposedly given statutory force by the Act, is the "former law", while various provisions of the Amending Act are the "subsequent law". These arguments should not be accepted for the reasons set out below.

94. First, clause 32 does not have the force of statute law:

(a) nothing in the Act, the State Agreement or the *Government Agreements Act 1979* (WA) provides that a State Agreement should be regarded as having the force of statute law. While section 4(3) of the Act provides that the State Agreement "operates and takes effect despite any other Act or law", that does not invest the State Agreement with statutory force; rather, it clears any legislative obstacle out of the path of the Agreement taking effect. The same can be said in respect of section 6(3) of the Act, which operates in respect of the Variation Agreement entered into in 2008: SC [18]. Where the State Parliament intended a State Agreement to have the force of law, it expressly provided for this (compare, eg, *Iron Ore (Rhodes Ride) Agreement Authorisation Act 1972* (WA), section 3; *Iron Ore (McCamey's Monster) Agreement Authorisation Act 1972* (WA), section 3);

(b) the State Agreement was evidently a contract executed prior to the Act itself. The same is also true of the Variation Agreement and the statute giving it effect. On the one occasion where statutory force is required (for the taking of land affecting third

parties), this is expressly provided: see section 5 of the Act, which expressly confers power upon the State by reference to clause 27 of the State Agreement to take land for a project under Parts 9 and 10 of the *Land Administration Act 1997* (WA) and the *Public Works Act 1902* (WA) (see B52 SCB 128-129);

(c) there is authority both of the WA Court of Appeal and the Full Federal Court that the terms of the Act giving effect to the State Agreement do not invest it with statutory force. See ***Re Michael; Ex parte WMC Resources Ltd*** [2003] WASCA 288; (2003) 27 WAR 574, [21]–[30] (Parker J, Templeman and Miller JJ agreeing); ***Commissioner of State Revenue v OZ Minerals Ltd*** [2013] WASCA 239; (2013) 46 WAR 156, [179]–[183] (Buss JA, Newnes JA agreeing, Murphy JA agreeing on this point); ***Western Australia v Graham*** [2016] FCAFC 47; (2016) 242 FCR 231, [25]–[41] (Jagot J, Mansfield and Dowsett JJ agreeing).

95. For these reasons, the fundamental premise that clause 32 prescribes a manner and form "required by a law made by [the WA] Parliament" for the amendment of the Act is incorrect. PS [92]-[95] in B54 of 2020 should not be accepted. Indeed, the argument that the State Agreement has effect as a law made by the WA Parliament is inconsistent with a fundamental aspect of the plaintiffs' claims. If the State Agreement is statute law, it is difficult to see how the plaintiffs could ever say that they had a claim for contractual damages arising from breach of contract.

96. Secondly, even if the Act did give the State Agreement and the Variation Agreement statutory force, clause 32 does not thereby become a "law made by [the WA] Parliament" for the purposes of section 6 of the *Australia Act*. The State Agreement and Variation Agreement were not made by Parliament. The most that can be said is that they are existing agreements and Parliament has passed a law which operates by reference to them. On this analysis, it is the provisions which give clause 32 its supposed statutory effect – sections 4(3) and 6(3) – that are the relevant laws "made by [the WA] Parliament". However, those provisions do not lay down any requirement as to how any future law made by the Parliament respecting the constitution, powers or procedures of the Parliament shall be made. It follows that there is no former law that purports to prescribe any manner and form requirement.

97. Thirdly, even assuming clause 32 is properly treated as the relevant former "law made by [the WA] Parliament", clause 32 does not purport, by its terms, to prescribe a manner and form which must be followed *by Parliament* for the enactment of legislation to amend the State Agreement. At most, it prescribes a manner and form for *the parties* to follow themselves if they wish to amend the contractual effect of the State Agreement. Clause 32(1) commences by saying: "The parties to this Agreement may from time to time by agreement in writing add

to substitute for cancel or vary all or any of the provisions of this Agreement …" (B52 SCB 132). If the supposed manner and form requirement prescribed by clause 32 is that there must be an agreement between a representative of the executive and the private corporations which are the parties to the State Agreement and Variation Agreement, that is so outside the concept of the "manner and form" of the making of a law that it is not caught by section 6 of the *Australia Act*.

98. Clause 32 does not provide that Parliament is to follow any particular procedure for an amendment to the State Agreement to have force and effect. It simply provides that Parliament may pass a resolution disallowing an amendment. If Parliament does nothing, the amendment shall have effect from the last day it is laid before the Houses of Parliament: clause 32(3), B52 SCB 133. Clause 32 is simply a provision about how parties to a State Agreement may amend that agreement.

99. Fourthly, the provisions of the Amending Act upon which the plaintiffs rely do not relevantly concern the "constitution, powers or procedure" of the WA Parliament as claimed by the plaintiffs; or if arguably they do (contrary to the State's submissions), those provisions of the Amending Act do not amend the State Agreement and therefore do not have to comply with the manner and form requirements of clause 32:

(a) on even the most generous interpretation of the phrase "constitution, powers or procedure", sections 10, 11, 18 and 19 of the Act do not fall into that category. Section 10 terminates the arbitration and declares the legal effect of arbitral awards and agreements; section 11 declares that the State has no liability connected with "disputed matters" and deals with proceedings related to such liabilities; section 18 declares the legal effect of "protected matters" and deals with the admissibility and production of evidence in respect of such matters in court proceedings; and section 19 declares that the State has no liability connected with "protected matters" and deals with proceedings related to such liabilities;

(b) sections 17 and 25 (which prevent charges against the Consolidated Account and execution against State assets) and sections 30 and 31 (which contain Henry VIII clauses) do not purport to amend the State Agreement. Moreover, none of these provisions affects the "constitution, powers or procedure" of the WA Parliament. In so far as sections 17 and 25 prevent charges to the Consolidated Account, they prevent payments by the Executive, not appropriations by Parliament. Henry VIII clauses, such as sections 30 and 31, do not affect the constitution of Parliament: ***Cobb & Co Ltd v Kropp*** [1967] 1 AC 141, 157 (Lord Morris for the Privy Council); ***Dean v Attorney-General of Queensland*** [1971] Qd R 391, 402 (Stable J). Nor do

they direct or confine Parliament's legislative authority, and consequently are not laws respecting the powers or procedure of the WA Parliament: ***Attorney-General (NSW) v Trethowan*** (1931) 44 CLR 394, 418 (Rich J), 429-430 (Dixon J).

100. Fifthly, if (contrary to all of the above) the effect of clause 32 is somehow to alter the ability of Parliament to enact a law, by introducing some extra-Parliamentary element or body or in any other way, clause 32 is itself of no force or effect as a law of the WA Parliament. It was not enacted in accordance with the procedure in section 73 of the *Constitution Act 1889* (WA), which requires an absolute majority of both houses of Parliament and a referendum.

COMMON ISSUE 8 IN B54 OF 2020: INVALID DELEGATION OR ABDICATION OF EXECUTIVE POWER

101. The plaintiffs challenge the executive power to make orders amending WA statute law, contained in sections 30 and 31 of the Act. They say that this is an invalid delegation or abdication of legislative power: B54 3FASOC [99]-[106]; B52 3FASOC [132A]-[137]. The plaintiffs' submissions also state that they challenge section 29 of the Act (PS [113], B54/2020), however, they do not substantively address the invalidity of that provision.

102. Section 29 provides a regulation making power to the Governor to prescribe any matters that are necessary or convenient to be prescribed for giving effect to Part 3 of the Act.

103. Section 30 provides the Governor with a particular power to make orders to amend Part 3 to address particular circumstances, or to make other provision which is necessary or convenient to address particular circumstances. In other words, this is a "Henry VIII clause".

104. This additional regulation making power is activated if: Part 3 does not deal adequately or appropriately with a matter or thing; Part 3 does not apply to a matter or thing to which it is appropriate for it to apply; Part 3 applies to a matter or thing to which it is not appropriate for it to apply; it is appropriate to make provision for improving the effectiveness of an indemnity under sections 14(4), 15(2) or (3), 22(4) or 23(2) or (3); or it is appropriate for Part 3 to be otherwise improved.

105. Regulations under section 29 or an order under section 30 (described as "**Part 3 subsidiary legislation**"), may be expressed to have effect despite the State Agreement, Part 2, Part 3 or any other Act or law; and may provide that a specified provision of the State Agreement, Part 3 or a written law does not apply, or applies with specified modifications, to or in relation to any matter or thing; and may be expressed to take effect before the day on which the legislation is published in the *Gazette*, but not earlier than the commencement of the Amending Act. See section 31.

The Issue is Hypothetical

106. The challenge to sections 30 and 31 does not rely on any orders having been made pursuant to these provisions. Accordingly, the issue raised as to the invalidity of these provisions is hypothetical and should not be determined by the Court.

107. Sections 30 and 31 of the Act do not themselves impose any duty or attendant liability on the plaintiffs – they confer power on the Governor to make subsidiary legislation. Cf ***Croome v Tasmania*** (1997) 191 CLR 119, 136 (Gaudron, McHugh and Gummow JJ). If an order is made pursuant to these provisions, it is possible that it could adversely affect the rights, duties and liabilities of the plaintiffs in B52 and B54/2020, but it will not necessarily do so. In the absence of any order having been made pursuant to sections 30 and 31, there is no immediate right, duty or liability to be established by determination of the challenge by the plaintiff in B52/2020 or the plaintiffs in B54/2020 to these provisions. Cf ***In re Judiciary and Navigation Acts*** (1921) 29 CLR 257, 265 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ); ***Croome***, 127 (Brennan CJ, Dawson and Toohey JJ), 136 (Gaudron, McHugh and Gummow JJ).

Sections 30 and 31 of the Act Involve a Permissible Delegation of Legislative Power

108. In any event, Australian legislatures may delegate their legislative powers to the executive, including through a "Henry VIII clause" which empowers the executive to make subsidiary legislation that alters the operation of the Act under which it is made or any other Act or law: ***Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan*** (1931) 46 CLR 73, 83-84 (Gavan Duffy CJ and Starke J), 86-87 (Rich J), 100-102 (Dixon J), 114, 117-119, 121 (Evatt J); ***Kropp***, 157 (Privy Council); ***Giris Pty Ltd v Federal Commissioner of Taxation*** (1969) 119 CLR 365; ***ADCO Constructions Pty Ltd v Goudappel*** [2014] HCA 18; (2014) 254 CLR 1, [31] (French CJ, Crennan, Kiefel and Keane JJ), [61] (Gageler J).

109. At both the State and federal level, the constitutional distribution of powers among the separate organs of government does not confine the legislative power to the legislature so as to restrain it from reposing in the executive an authority of an essentially legislative character: ***Victorian Stevedoring***, 84 (Gavan Duffy CJ and Starke J), 86-87 (Rich J), 100-101 (Dixon J), 113-114, 117-119, 121 (Evatt J); ***Giris***, 373 (Barwick CJ), 375 (McTiernan J), 378-379 (Kitto J), 381 (Menzies J); ***Capital Duplicators Pty Ltd v Australian Capital Territory*** (1992) 177 CLR 248, 280 (Brennan, Deane and Toohey JJ). Further, a delegation of legislative power to the executive does not result in the unauthorised creation of a new legislative body or authority: ***Kropp***, 154-155 (Privy Council). The statement made by Heydon J in ***Momcilovic v The Queen*** [2011] HCA 34; (2011) 245 CLR 1, [398] quoted at PS [114]

(B54/2020) does not support any contrary argument. It was made by his Honour in the context of distinguishing the amendment role of the legislature from the interpretive role of Ch III Courts.

110. There has been some recognition in the cases that Australian legislatures cannot "abdicate" their legislative functions entirely: ***Victorian Stevedoring***, 95-96, 101 (Dixon J), 121 (Evatt J); ***Kropp***, 154-155, 157 (Privy Council); ***Giris***, 373-374 (Barwick CJ), 379 (Kitto J), see also 381 (Menzies J). However, it has also been said that "[t]here are very considerable difficulties in the concept of an unconstitutional abdication of power by Parliament. So long as Parliament retains the power to repeal or amend the authority which it confers upon another body to make laws with respect to a head or heads of legislative power entrusted to the Parliament, it is not easy to see how the conferral of that authority amounts to an abdication of power": ***Capital Duplicators***, 265 (Mason CJ, Dawson and McHugh JJ). See also ***Re Gray*** (1919) 57 SCR 150, 176 (Anglin J, Sir Louis Davies agreeing).

111. Assuming such a limitation exists, sections 30 and 31 of the Act do not infringe it. Contrary to PS [113]-[114] (B54/2020), they do not confer on the executive an unconstrained legislative power. The powers conferred on the Governor by sections 30 and 31 remain subject to determination by the WA Parliament at any time. These provisions do not alter, limit or remove the power of the WA Parliament to enact primary legislation dealing with the matters that may be dealt with by orders made under section 30, including by enacting legislation that is inconsistent with an order made under section 30 and thereby impliedly repealing the order; by enacting legislation that expressly repeals an order made under section 30; or by enacting legislation that is expressed to take effect despite an order made under section 30. Cf PS [114] (B54/2020) regarding "future laws" and see ***Thoburn v Sunderland City Council*** [2002] 3 WLR 249, [50]-[51] (Laws LJ, Crane J agreeing). Sections 30 and 31 also do not alter, limit or remove the power of the WA Parliament to repeal or amend the authority to make orders conferred by them on the Governor.

112. The importance of this feature is recognised in numerous cases: ***Victorian Stevedoring***, 102 (Dixon J), ***Kropp***, 156 (Privy Council), ***Capital Duplicators***, 265 (Mason CJ, Dawson and McHugh JJ). Cf ***ADCO***, [61] (Gageler J). It is also recognised in other jurisdictions: see, eg, ***Re Gray***, 157 (Gray CJ), 170 (Duff J), 176 (Anglin J, Sir Louis Davies agreeing).

113. The statement made by Evatt J in ***Victorian Stevedoring*** relied upon at PS [115] (B54/2020) was made in the context of his Honour's discussion of the matters relevant to assessing whether a Commonwealth law conferring legislative power on the executive was invalid on the basis that it was not a law upon one or more of the subject matters committed to it by the

Commonwealth *Constitution*. It is not relevant to the question of whether a State law invalidly "abdicates" the legislative function.

114. As well, the power to make subsidiary legislation under sections 30 and 31 is constrained by a number of particular legislative limits contained in these sections.

115. First, the Governor's power to make orders under section 30(2) is exercisable "on the Minister's recommendation". Cf ***Kropp***, 151 (Privy Council)).

116. Secondly, the Minister may only recommend the making of an order under section 30(2) if he or she is of the opinion that one or more of the circumstances set out in section 30(1) exists or may exist. The circumstances set out in section 30(1) are described in broad terms for the evident purpose of catering for a range of exigencies that may arise. However, this does not render the provisions constitutionally invalid: ***Victorian Stevedoring***, see especially 100 (Dixon J); ***Giris***, 372-374 (Barwick CJ), 379-380 (Kitto J), 381 (Menzies J), 382, 384 (Windeyer J), 387 (Owen J). The circumstances set out in section 30(1) should be regarded as only permitting orders to perfect the intention of the Amending Act. They do not permit orders to be made to supplement that intention. In forming an opinion as to the circumstances set out in section 30(1), the Minister is required to have regard to the purposes and subject matter of Part 3 of the Act.

117. As the plaintiffs observe, Part 3 of the Act does not contain an "objects clause" (PS [113], B54/2020). However, this does not mean that the purposes of Part 3 cannot be ascertained. Most statutes do not contain an objects clause: Pearce and Geddes, *Statutory Interpretation in Australia*, (LexisNexis Butterworths, 9th ed, 2019) [2.2]. Whether or not a statute contains such a clause, its purpose is to be ascertained by inference from its terms as a whole and by appropriate reference to extrinsic materials: ***Lacey v Attorney-General (Qld)*** [2011] HCA 10; (2011) 242 CLR 573, [44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

118. Thirdly, the powers conferred on the executive by sections 30 and 31 of the Act are subject to judicial review for jurisdictional error: section 26(6) of the Act read in conjunction with paras (h), (i) and (k) of the definition of "protected matter". Cf ***ADCO***, [61] (Gageler J).

COMMON ISSUE 9 IN B54 OF 2020: SEVERANCE

119. Section 8(4) provides that a provision of Part 3, or of any Part 3 subsidiary legislation, 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: (a) applying to the matter or thing inconsistently with a law of the Commonwealth; or (b) not being valid for any other reason.

120. Section 8(5) saves the rest of Part 3 if any provision, or part of a provision, within it is invalid. It provides that if, despite section 8(4), a provision, or part of a provision, of Part 3 is not valid for any reason, the rest of Part 3 is to be regarded as divisible from, and capable of

operating independently of, the provision or part of the provision that is not valid.

121. Section 8(6) only applies Part 3 as far as the geographical limits of the State's legislative power extends. It provides that Part 3 applies in relation to matters or things occurring or arising outside WA so far as the legislative power of the Parliament permits.

122. The plaintiffs challenge the operation of the severance provisions in sections 8(4) and (5) of Part 3, upon the basis that these provisions create two versions of Part 3, one for matters within federal jurisdiction and the other for matters outside federal jurisdiction. They contend that this could not have been intended by the WA Parliament; it extends beyond the legislative power of the WA Parliament and impermissibly delegates legislative power to the judiciary: 3FASOC [97]-[98] (B52/2020 and B54/2020). They also contend that the provisions of Part 3 of the Act are a package of interrelated provisions, and that provisions cannot be severed from the package without doing violence to the overall legislative intention of Part 3: PS [141]-[144] (B54/2020).

123. If the central legislative declarations of primary rights and liabilities are valid (ie the Declaratory Provisions, No Offence Provision, No Liability Provisions and Administrative Law Provisions, as defined in B54 DS), but the provisions concerning secondary enforcement rights (ie the No Proceeding Provisions and Admissibility and Discovery Provisions, as defined in B54 DS) are characterised as impermissible legislative directions about the exercise of judicial power, questions of application or severance may arise.

Section 79 and Federal Jurisdiction - Not Picked Up and Applied

124. If (contrary to the State's primary submissions) any of the impugned provisions of the Act are characterised as directing the exercise of federal jurisdiction, then the matter is to be analysed by reference to section 79 of the *Judiciary Act*. The general principles relating to section 79 are explained at [38] and [40] above. If the *Constitution* or Commonwealth law "otherwise provides" within the meaning of section 79, then no question of reading down or severance arises. Nor is there any question of invalidity warranting relief of the kind sought by the plaintiffs. The result is simply that the relevant provision will not be picked up and applied by a court exercising federal jurisdiction: ***Masson***, [42] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ). It follows that even if the plaintiffs are successful in establishing that the *Constitution* or a Commonwealth law "otherwise provides" in relation to a particular provision of the Act, that provides no basis for a submission that the provision in question, let alone the balance of the Act, is invalid.

Partial Disapplication

125. Alternatively, the word "proceedings" should not be construed as extending to judicial

proceedings in federal jurisdiction or in other States.

126. Partial disapplication is a technique which applies words of general import to a confined range of matters to ensure constitutional validity, where this would not lead to the policy or scheme of the legislation being contradicted or altered. See ***Clubb v Edwards*** [2019] HCA 11; (2019) 267 CLR 171, [415]-[433] (Edelman J). In this case, as the secondary enforcement provisions are designed to ensure that the intention of the provisions concerning primary rights is carried into effect as fully as possible, the partial disapplication of the secondary enforcement provisions would not contradict or alter the underlying legislative policy of the Amending Act. To the contrary, where engaged the partial disapplication provisions serve to ensure that the legislative purpose is achieved so far as possible.

127. The provisions concerning secondary enforcement rights operate by reference to "proceedings". The term "proceedings" is widely defined in section 7(1), and includes "non-WA proceedings". That term means "proceedings", or something which corresponds to "proceedings", which takes place under the law of the Commonwealth, another State or a Territory; or under the law of a country or territory, or of a part of a country or territory, outside Australia; or under international law; or outside WA or on any other basis.

128. However, Part 3 only applies to matters or things occurring or arising outside Western Australia so far as the legislative power of the WA Parliament permits: section 8(6). See also section 7 of the *Interpretation Act 1984* (WA). As well, a provision of Part 3 does not apply to a matter or thing to the extent that is necessary to avoid the provision, or any part of the provision, applying to the matter or thing inconsistently with a law of the Commonwealth, or not being valid for any other reason: section 8(4). Parliament clearly intended severance if necessary. The Court should give effect to that aspect of Parliament's intention if at all possible, rather than striking down all of the Amending Act if only some provisions are invalid.

129. Although the definition of "proceedings" includes "non-WA proceedings", the scope of "proceedings" extends to non-judicial proceedings, such as arbitrations and civil investigations or inquiries. To that extent it would be within the legislative competence of the WA Parliament to legislate in respect of such non-judicial proceedings, wherever they occurred. A territorial connection with WA would exist because of the necessary connection with a "disputed matter" or a "protected matter". However, a reference to "proceedings" in Part 3 should not be construed in a manner which is inconsistent with the constitutional limitations contained in Ch III and related to intergovernmental immunities. Doing so is consistent with sections 8(4) and (6).

Entirely severed

130. Alternatively, the provisions concerning secondary enforcement rights can be entirely severed from Part 3. The validity of the provisions concerning primary rights in no way depends upon the operation of the provisions concerning secondary enforcement rights. Their validity depends upon the principle that a legislature may declare the existence of rights and liabilities, even where this affects pending litigation: see B54 DS [76].

131. It follows that the provisions concerning primary rights may operate independently of provisions concerning secondary enforcement rights, if the latter provisions are invalid in so far as they purport to direct the exercise of federal jurisdiction or the jurisdiction of State courts outside WA.

132. Severing the provisions concerning secondary enforcement rights entirely from Part 3 would not cause the remaining provisions to become "a residue of provisions which Parliament never intended to enact". Cf PS [141] (B54/2020). It would be entirely consistent with the intention of the WA Parliament, which is evident from the structure of Part 3 as a whole, the structure of the individual provisions within Part 3, the express terms of section 8(5) and relevant extrinsic materials. During the consideration-in-detail stage of the debates regarding the Bill in the Legislative Assembly, the Attorney General made various comments about the "layers of protection", "layers of defence" and "lines of defence" incorporated into the Bill and stated "even if we are partially knocked down, there will be other layers of defence built into the Bill": Western Australia, *Parliamentary Debates*, 12 August 2020, 4825, 4831.

133. Finally, if the Court were to conclude that provisions dealing with other topics – such as the indemnity provisions, or the Henry VIII provisions – were invalid, then those provisions are also severable. They deal with discrete issues which are not central to the operation of the provisions concerning primary or secondary enforcement rights.

PART VI TIME FOR ORAL ARGUMENT

134. The defendant estimates that 5 to 6.25 hours is required for the presentation of oral argument across B52 and B54 of 2020.

Dated: 21 May 2021

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B52 of 2020

B E T W E E N:

CLIVE FREDERICK PALMER
Plaintiff

AND

STATE OF WESTERN AUSTRALIA
Defendant

ANNEXURE TO DEFENDANT'S SUBMISSIONS

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

	Description	**Relevant date in force**	**Provision**
1.	*Commonwealth Constitution*	Current	Ch III, ss 109 and 117
2.	*Constitution Act 1889* (WA)	Current	s 73
Statutes			
3.	*Australia Act 1986* (Cth)	Current	s 6
4.	*Bankruptcy Act 1966* (Cth)	Current	s 134, parts III to VI
5.	*Bill of Rights 1689* (Imp)	01.01.1989	Art 9
6.	*Corporations Act 2001* (Cth)	Current	ss 422, 438A, 438D, 443C, 477, 530C, part 5.6
7.	*Crimes Act 1914* (Cth)	Current	
8.	*Criminal Code* (Cth)	Current	
9.	*Criminal Code Act 1995* (Cth)	Current	
10.	*Defamation Act 2005* (NSW)	Current	s 40

	Description	Relevant date in force	Provision
11.	*Director of Public Prosecutions Act 1983* (Cth)	Current	s 9
12.	*Evidence Act 1995* (Cth)	Current	ss 4, 5, Part 2.1, Ch 3, s 193
13.	*Federal Court of Australia Act 1976* (Cth)	Current	Part III div 1, ss 33 and 43
14.	*Federal Court Rules 2011* (Cth)	Current	Div 7.3, parts 20, 24, 39, 40 and 41
15.	*Freedom of Information Act 1992* (WA)	Current	
16.	*Government Agreements Act 1979* (WA)	Current	
17.	*High Court Rules 2004* (Cth)	Current	Part 10, Ch 5
18.	*Interpretation Act 1984* (WA)	Current	ss 7, 19
19.	*Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA)	Current	
20.	*Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA)	13.08.2020	
21.	*Iron Ore (Rhodes Ride) Agreement Authorisation Act 1972* (WA)	Current	s 3
22.	*Iron Ore (McCamey's Monster) Agreement Authorisation Act 1972* (WA)	Current	s 3
23.	*Judiciary Act 1903* (Cth)	Current	ss 58, 64, 65, 66, 77M and 79, parts III-V, VIII
24.	*Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth)	Current	s 14
25.	*Land Administration Act 1997* (WA)	Current	Parts 9 and 10
26.	*Legal Profession Uniform Law Application Act 2014* (NSW)	Current	Sch 1
27.	*Parliamentary Privileges Act 1891* (WA)	Current	s 1(a)
28.	*Personal Properties Securities Act 2009* (WA)	Current	s 12
29.	*Public Works Act 1902* (WA)	Current	

	Description	Relevant date in force	Provision
30.	*Service and Execution of Process Act 1992* (Cth)	Current	Part 6