HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No B52 of 2020

BETWEEN:

CLIVE FREDERICK PALMER
Plaintiff

and

STATE OF WESTERN AUSTRALIA
Defendant

PLAINTIFF'S OUTLINE OF SUBMISSIONS

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PART I: FORM OF SUBMISSIONS

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

PART II: ISSUES PRESENTED

2. The questions which arise in the Special Case concern whether the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA) (**Amending Act**) is, in whole or in part, a valid law of Western Australia. In respect of those questions, I adopt and rely on the written submissions of David Jackson QC filed on behalf of the plaintiffs in proceeding B54/2020. In addition to the bases dealt with in those submissions, I argue that the Amending Act is invalid or of no force and effect *in toto* because *inter alia* of the following:

   (a) it discriminates against a resident of another State and therefore contravenes s.117 of the *Constitution* [Paragraphs 18 to 34];

   (b) it contravenes s.75(iv) of the *Constitution* by purporting to exercise adjudicative authority in a matter between a State and a resident of another State [Paragraphs 35 to 59];

   (c) it is a bill of pains of penalties [Paragraphs 68 to 74] or otherwise exceeds constitutional limits [Paragraphs 75 to 78]; and

   (d) it is inconsistent with section 109 of the *Constitution* [Paragraphs 79 to 107].

   (e) the Amending Act is contrary to the rule of law.

3. I also make additional submissions in respect of the following bases, which are also dealt with in the submissions of the plaintiffs in B54: failure to comply with section 6 of the *Australia Act 1986* (Cth) [Paragraphs 60 to 64]; invalid delegation of legislative power [Paragraphs 65 to 67].

PART III: SECTION 78B NOTICE

4. I have served Notices pursuant to 78B of the *Judiciary Act 1903* (Cth) on the Commonwealth Attorney-General and all State and Territory Attorneys-General.

PART IV: DECISIONS BELOW

5. This proceeding is brought in the Court's original jurisdiction.

PART V: STANDING, FACTS AND INTRODUCTION

6. I have standing to make these submissions before this Court *inter alia* because, pursuant to ss 7, 14 to 16 and 22 to 24 of the Amending Act, I am required to indemnify the State and because provisions of the Amending Act *"have a direct adverse effect"* on me and my (and my descendants') *"legal rights and property"* generally.[1]

Factual summary

7. I rely on the facts as presented, succinctly, in the Special Case agreed in these proceedings and filed 12 April 2021. As above, I also adopt and rely on the factual summary included in the written submissions filed by the plaintiffs in B54 of 2020.

Initial observations about the Amending Act

8. On 18 November 2020, Justice Nettle stated that the Amending Act was *"unprecedented"* and *"extraordinary"*.[2] I agree overwhelmingly with his Honour's assessment. The Amending Act *inter alia*:

   (a) exempts the "State" (which is broadly defined and includes any "State agent" and any "State authority") from the application of the criminal law: section 20(8);

   (b) prohibits matters from being brought before a Court: sections 20(1) and 21(4);

   (c) where a court has heard a matter, extinguishes any outcome unfavourable to the State: section 20(6);

   (d) abolishes freedom of information (**FOI**) rights: sections 13 and 21;

   (e) requires my descendants, including those not yet born, to indemnify the State for losses: sections 14(2)-(5) and 22(2)-(5);

   (f) allows the Minister and Governor to make new laws without reference to the Parliament of the Defendant: sections 30(1)-(2) and 31;

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[1] *Palmer v The State of Western Australia*, unreported, Nettle J, 18 November 2020 at [4].
[2] Ibid at [36].

(g) impermissibly delegates State legislative power; and

(h) is a bill of pains and penalties which targets me both directly and indirectly.

9. Under the Amending Act, the State purports to erase judicial function by terminating extant legal proceedings and extinguishing any newly commenced proceedings to the extent those proceedings are 'against' or unfavourable to the State. I submit that if the Amending Act is valid, the law it establishes means that the Western Australian Government, contrary to the rule of law, could invoke the Amending Act to deny a Court an opportunity to hear a matter which is subject to the Amending Act.

10. The Amending Act is repugnant to justice. Under the Amending Act, the Western Australian Parliament can be usurped by the Minister and Governor making new laws without oversight. Under the Amending Act, a resident of the State of Queensland can be made liable for liabilities of the State of Western Australia.

11. Lady Justice and her blindfold have served the law well, but the Amending Act is, as Nettle J observed, *"extraordinary"* and *"unprecedented"*. It is time for Lady Justice to balance the scales of justice in favour of substance over form. All lawyers and judges, as well as society, must maintain the rule of law as we know it. All just Australians have a moral compass, which tells us the differences between right and wrong. The Amending Act is repugnant to the moral compass of many Australians.

12. All citizens and all generations, not just lawyers and judges, have a duty to protect and defend the rule of law, and the good order it provides. History records German lawyers and judges choosing form over substance, allowing for the legal ascension of a criminal, yet legal, government.[3] Such outcomes are repugnant to justice and are abhorrent. That is why I have accepted the burden of representing myself in these proceedings. It is a duty that my moral compass does not allow me to avoid.

13. The Amending Act is not only an attack on me personally, but also a frontal assault on the rule of law. It is an attempt to remove from the courts, including this Court, the roles envisaged by the Constitutional Convention debates[4] and by the Australian

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[3] *United States of America v Alstotter et al.* 3 TWC 1 (1948). See "Opinion and Judgment" of the Tribunal at 954 to 1177, particularly at 987.

[4] Federation Conference Debates 1890; Convention Debates 1891 and Convention Debates 1897-8. See for instance National Australasian Convention, Sydney, March 6, 1891, at 95-96, 253; March 18, 1891, at 475; April 1, 1891, at 536; National Australasian Convention, Sydney, April 3, 1891, at 696.

Constitution. If Parliament can require matters not to be heard by a court or determine a judicial outcome the question would be asked: "Why hire a lawyer? Better to hire a lobbyist?"

14. The rule of law requires this Court to examine the Amending Act's substance, ignoring just its form.

PART VI: ARGUMENT

A. The Foundational Constitutional Argument

15. Just as the State Courts invested with federal jurisdiction play a significant constitutional role in Chapter III of the Constitution, so too do State Parliaments play a significant constitutional role in Chapter I. It is submitted that a State Parliament invested with duties with respect to Chapter I has a constitutional existence akin to that of a State Court invested with Chapter III jurisdiction.

16. The Constitution's creation of the States had a "transformative" effect on what were, once, colonial legislatures, courts, and executives.[5] In each case, boundaries are erected by the Constitution as to, first, what laws may be enacted by the State legislatures, and, secondly, how the States may render their courts, their legislatures, and their executives, as unfit for the constitutional role that the Commonwealth's Constitution requires these emanations of the States to play in the "system of representative and responsible government" that the Constitution does create.[6] More simply, each of the former colonies – in their courts, legislatures, and executives – are transformed by the Constitution that creates them as States and as they become constituent polities of the federal Commonwealth. This proposition is true for original States (section 6) and for any States that may, in future, be established by or admitted to the Commonwealth (section 121).

17. The text and structure of the Constitution, and as expounded in these consistent authorities, requires that all branches of State government – not just the courts invested with federal jurisdiction under Chapter III – must have an existence and constitutional integrity that goes beyond their colonial origins and that will be true for the

[5] *Western Australia v Wilsmore* (1981-82) 148 CLR 79 at 86, per Murphy J.
[6] *Re Canavan & Ors* (2017) 263 CLR 284 at 305, [39] per the Court.

Commonwealth and the States (whether they be original States or States yet to be established or admitted).

B. Section 117 of the Constitution[7]

18. In terms of section 117 of the Constitution, it cannot be doubted that the provisions of the Amending Act single me out for "disability" and "discrimination" of an extraordinary nature: refer paragraph 36 below. The legislation is an *ad hominem* attack on me of a kind which has no precedent in Australian legal history. The question is whether this is prohibited by section 117 of the Constitution.

19. The aim of section 117 is to prevent States from discriminating against residents of other States. Section 117 is a continuing 'constitutional safeguard' and is not concerned with the form in which that law subjects the individual to disability or discrimination – it is enough that the individual is subject to either disability or discrimination.[8] The protection afforded by s.117 to a person in my position is intended to address "*....disability or discrimination in the form of laws and governmental actions or policies*".[9]

20. In his interlocutory reasons dated 18 November 2020,[10] Nettle J said of the particulars subjoined to the allegations made in what are now paragraphs 138 to 140 of my 3FASOC, including references to passages published in *Hansard* from Parliamentary debates which preceded the enactment of the Amending Act, that:

> *"For present purposes, it is not my task to judge if those statements aid significantly in discerning the purpose or object of the Amending Act or in ascertaining the meaning of any ambiguous provisions. It is arguable, however, that, perforce of s 19(2)(h) of the Interpretation Act 1984 (WA), they may. Consequently, I see no basis on which to exclude them as subject to Parliamentary privilege"*.[11]

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[7] Third Further Amended Statement of Claim (**3FASOC**), [138]-[140].
[8] *Davies v Western Australia* (1904) 2 CLR 29 at 45 per Barton J; *Street v Queensland Bar Association* (1989) 168 CLR 461 at 487 per Mason CJ.
[9] *Sweedman v Transport Accident Commission* (2006) 226 CLR 362 at 409, [65] per Gleeson CJ, Gummow, Kirby, and Hayne JJ.
[10] *Palmer v The State of Western Australia*, unreported, Nettle J, 18 November 2020.
[11] Ibid., [40] (Nettle J).

21. For the reasons which follow, the passages from *Hansard* referred to below in relation to the section 117 claim (and the section 75(iv) claim) do aid significantly in discerning the purpose, object, meaning and effect of the Amending Act. Accordingly, with respect, Nettle J was correct to not exclude them and I rely on them as an important part of my case.

22. The Amending Act does not itself disclose the purpose of its enactment, whether by an "Objects of the Act" provision or otherwise. Nor is it possible to discern the purpose, object, meaning and effect of the Amending Act adequately from a review of its own provisions. In the absence of the objects, it is necessary to look at the context. The legislative intention of the Amending Act is graphically revealed by the extracts from *Hansard* included in the Special Case. They reveal that the purpose of the Amending Act was to target me both directly and (through the companies I control) indirectly, to refer to me by name, to single me out for adverse treatment and to subject me to the various forms of "disability" and "discrimination" identified in my 3FASOC. I refer in particular to the following extracts, in which I have used bold type to highlight references to me as the relevant *"subject of the Queen, resident in [Queensland]"*:

(a) to stop money being *"sent from Western Australian families to **one selfish and greedy billionaire in Queensland**"*;[12]

(b) to stop me from getting across the Western Australian border to *"plunder"* from Western Australian taxpayers and to *"rob all our families of prosperity"* and *"rob all their jobs"*;[13]

(c) to *"defend Western Australians"* against *"**Clive Palmer**"*;[14]

(d) to take *"the side of the Western Australian public"* against me;[15]

(e) to avoid putting at risk *"the interests of all Western Australians"*;[16]

(f) to avoid putting *"all Western Australians at health risk"*;[17]

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[12] Western Australia, *Parliamentary Debates,* Legislative Assembly, 12 August 2020, 4783. **[SCB 407]**
[13] Western Australia, *Parliamentary Debates,* Legislative Assembly, 4785, 4788, 4789. **[SCB 409, 412, 413]**
[14] Western Australia, *Parliamentary Debates,* Legislative Assembly, 12 August 2020, 4787, 4794. **[SCB 411, 418];** Western Australia, *Parliamentary Debates,* Legislative Council, 13 August 2020, 4892. **[SCB 525]**
[15] Western Australia, *Parliamentary Debates,* Legislative Assembly, 12 August 2020, 4812. **[SCB 436]**
[16] Western Australia, *Parliamentary Debates,* Legislative Assembly, 11 August 2020, 4597. Western Australia, *Parliamentary Debates,* Legislative Assembly, 12 August 2020, 4787, 4821, 4830, 4831. **[SCB 411, 445, 454, 455]** Western Australia, *Parliamentary Debates, Legislative Council,* 13 August 2020, 4877, 4879. **[SCB 510, 512]**
[17] Western Australia, *Parliamentary Debates,* Legislative Assembly, 12 August 2020, 4822. **[SCB 446]**

(g) to protect *"everyone in Western Australia"* from me;[18]

(h) to address "*the clear and present risk that the State now faces from **Mr Palmer** in his pursuit against the people of Western Australia"*;[19]

(i) to stop *"**that man from Queensland**"* from taking money *"out of our coffers"*;[20]

(j) to ensure that I am *"hit to the boundary"* so as to demonstrate that I am *"**not welcome in Western Australia**"* and that I should *"**stay in Queensland**"*;[21]

(k) to implement the wishes of *"every single Western Australian"* by passing *"this piece of legislation to hold back **Mr Palmer**"*;[22]

(l) to ensure that *"**the man from Queensland**"* does not have *"a win"*;[23]

(m) *"to ensure ... that **Mr Clive Palmer stays in Queensland**"*;[24]

(n) to deal with *"the barbarian ... at the gate"*, likened *inter alia* to *"a cane toad"*, by ensuring that the response by the State of Western Australia is *"pretty much slam the doors shut, pull down the shutters and hope he goes away"*;[25]

(o) to promote *"a matter of principle"*, namely that *"We don't like **Clive Palmer**, he is a political opponent; he is **an Eastern Stater** – even worse – and he is suing the State of WA under a contract we don't like because it is not operating to our benefit"*;[26] and

(p) to promote the objective that *"money would be better suited in the hands of Western Australians rather than **a mining elitist billionaire**"*.[27]

23. Thus the Defendant, through both its legislature's representatives and its executive's ministers, has admitted its discriminatory and disabling intent in its laws and governmental actions against me in the series of statements particularised in the foregoing subparagraphs (a) to (p). The Defendant has made clear, repeatedly, that it chose to legislate, personally, against me, because I am a resident of Queensland. This

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[18] Western Australia, *Parliamentary Debates,* Legislative Assembly, 11 August 2020, 4597, 4598, 4599. Western Australia, *Parliamentary Debates,* Legislative Assembly, 12 August 2020, 4780, 4786, 4793, 4796, 4799, 4812, 4821, 4825, 4827, 4828, 4831. **[SCB 404, 410, 417, 420, 423, 436, 445, 449, 451, 452, 455]** Western Australia, *Parliamentary Debates, Legislative Council,* 13 August 2020, 4877, 4879, 4881, 4896. **[SCB 510, 512, 514, 529]**

[19] Western Australia, *Parliamentary Debates, Legislative Council,* 13 August 2020, 4880. **[SCB 513]**

[20] Western Australia, *Parliamentary Debates, Legislative Council,* 13 August 2020, 4884. **[SCB 517]**

[21] Western Australia, *Parliamentary Debates, Legislative Council,* 13 August 2020, 4884. **[SCB 517]**

[22] Western Australia, *Parliamentary Debates, Legislative Council,* 13 August 2020, 4885. **[SCB 518]**

[23] Western Australia, *Parliamentary Debates, Legislative Council,* 13 August 2020, 4890. **[SCB 523]**

[24] Western Australia, *Parliamentary Debates, Legislative Council,* 13 August 2020, 4892. **[SCB 525]**

[25] Western Australia, *Parliamentary Debates, Legislative Council,* 13 August 2020, 4896. **[SCB 529]**

[26] Western Australia, *Parliamentary Debates, Legislative Council,* 13 August 2020, 4898. **[SCB 531]**

[27] Western Australia, *Parliamentary Debates, Legislative Council,* 13 August 2020, 4901. **[SCB 534]**

discriminatory intention need not have been the sole intention or effect of the law or governmental action or policy – it is enough for section 117's purposes that a person has been made subject to disability or discrimination because a law or government action or policy affects that person and makes his or her State residence a relevant basis of discrimination.[28]

24. In his interlocutory reasons dated 18 November 2020, Nettle J described the Amending Act as *"unprecedented"* and *"extraordinary"*.[29] What makes it especially unprecedented and extraordinary, especially in the Australian context of federalism, is that it involves a State Parliament exercising judicial power to quell a dispute and that is done so by allowing the legislative process of the Parliament of Western Australia to be used for the purpose of waging a vendetta against a resident of another State, whose allegedly objectionable characteristics include being a Queensland resident, a person likened to *"a cane toad"*,[30] who is *"not welcome in Western Australia"* and who should *"stay in Queensland"*.[31] The legislative purpose of the Amending Act was to pit *"every single Western Australian"*[32] against a Queensland resident who *"is someone that the Premier, on behalf of the State of Western Australia, has declared war against"*[33] and to ensure that the Western Australians win the so-called *"war"* against the Queensland resident. Nothing like this has ever been seen in Australia before.

25. The State's response to my claim under section 117 is simply to say that *"the operation of the Amending Act, in its application to the plaintiff, would not be any different if he was a resident of Western Australia"*.[34] This is incorrect for two main reasons.

26. *First*, if one follows the reasoning in *Street*,[35] and the plain text of section 117, the Amending Act does subject me to disability and discrimination to which I would not have been subject if I were resident in Western Australia. That is because in that hypothetical scenario:

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[28] *Sweedman* (2006) 226 CLR 362 at 409, [65] per Gleeson CJ, Gummow, Kirby, and Hayne JJ.
[29] *Palmer v The State of Western Australia*, unreported, Nettle J, 18 November 2020 at [36].
[30] Western Australia, *Parliamentary Debates, Legislative Council,* 13 August 2020, 4896. **[SCB 529]**
[31] Western Australia, *Parliamentary Debates, Legislative Council,* 13 August 2020, 4884. **[SCB 517]**
[32] Western Australia, *Parliamentary Debates, Legislative Council,* 13 August 2020, 4885. **SCB 518]**
[33] Western Australia, *Parliamentary Debates, Legislative Council,* 13 August 2020, 4899. **[SCB 532]**
[34] Defence to Third Further Amended Statement of Claim, [94] **[SCB 690]**
[35] *Street v Queensland Bar Association* (1989) 168 CLR 461.

(a) I would myself be one of the *"Western Australian taxpayers"* (and my family would be one of the *"Western Australian families"*) who supposedly benefit from the Amending Act, rather than the so-called *"selfish and greedy billionaire in Queensland"* who is intended to suffer detriment from the Amending Act;

(b) I would be one of the very Western Australians the Amending Act is said to *"defend"*, and whose prosperity, jobs, lives, health and other interests the Amending Act is said to *"protect"*, rather than *"that man from Queensland"*, from whom the Western Australians are said to require such protection;

(c) I would be a member of *"the Western Australian public"*, on the opposite "side" from *"the man from Queensland"* who is said to be engaging in a *"pursuit against the people of Western Australia"*, who is *"not welcome in Western Australia"* and who should *"stay in Queensland"*; and

(d) I would no longer be viewed as guilty of being *"an Eastern Stater"*, *"the man from Queensland"* or *"a cane toad"* but instead, as a Western Australian resident, I would keep money in my own hands rather than seeing it fall into the hands of a resident of another State, namely *"one selfish and greedy billionaire in Queensland"*.

27. *Secondly*, section 117 must be viewed in the light of its fundamental purpose which is not, as some of the judgments in *Street* might suggest, the protection of individual rights.[36] Rather, *"the fundamental purpose of s 117 is ... a federal one"*,[37] its object *"was to make federation fully effective"*[38] and the protection of residents of other States which it provides *"should be seen as serving the object of nationhood and national unity"*.[39]

28. In the light of the unprecedented and extraordinary circumstances of this case, I respectfully submit that it is necessary and appropriate for the purpose and scope of section 117, and to the extent necessary the analysis in the various judgments in *Street*, to be re-examined in this case.

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[36] See generally Simpson, Amelia, *"The (Limited) Significance of the Individual in Section 117 State Residence Discrimination"* (2008) 32(2) *Melbourne University Law Review*, 639.
[37] *Street v Queensland Bar Association* (1989) 168 CLR 461, 541 (Dawson J).
[38] Ibid., 583 (McHugh J).
[39] Ibid., 491 (Mason CJ).

29. The Australian Constitution (unlike, for example, the Constitution of the United States) has no "bill of rights" that is focused on the protection of individual rights and liberties. Rather, the Constitution's fundamental purpose was to establish and maintain Australia as a federation and to establish the basis for Australia's federal *"system of representative and responsible government"*.[40] As such, a purposive approach to section 117 must seek to ensure national unity and must strike against *"localism of a kind corrosive to national unity"*.[41]

30. Because section 117 *"was not intended as a human rights charter for interstate residents"*,[42] and because its object is instead *"to foster the concept of Australian nationhood"*,[43] this section requires a much broader application than the one expounded in *Street*, a case concerned with the entitlement of a lawyer resident in one State to practise in another State. This broader application is necessary because the true purpose of section 117 is to strike against prejudice and parochialism of the kind which the Defendant has engaged in and which, as evidenced in the extracts from *Hansard* referred to above, lies behind the purpose of enacting the Amending Act.

31. Because the true purpose of section 117 is *"serving the object of nationhood and national unity"*,[44] this section will operate to invalidate a law made by a State Parliament which represents a threat to that national unity by demonstrating open hostility towards the interests of a resident of another State and which elevates "parochial" local interests above the national interest in national unity.

32. The purpose of enacting the Amending Act was to subject me to disability and discrimination as someone Western Australians supposedly *"don't like"*, for reasons including that I am *"an Eastern Stater"*, and as someone *"the Premier, on behalf of the State of Western Australia, has declared war against"*. It is entirely antithetical to the "object of nationhood and national unity" which informs the purpose of section 117 for the Defendant's State Parliament to allow its processes to be used to enact legislation directly targeted against a resident of another State, who is considered

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[40] *Re Canavan & Ors* (2017) 263 CLR 284 at 305, [39] per the Court.
[41] Simpson, op. cit., p. 666.
[42] *Street v Queensland Bar Association* (1989) 168 CLR 461, 583 (McHugh J).
[43] *Goryl v Greyhound Australia Pty Ltd* (1994) 179 CLR 463, 486 (Dawson and Toohey JJ).
[44] *Street v Queensland Bar Association* (1989) 168 CLR 461, 491 (Mason CJ).

unpopular in the Defendant's jurisdiction (even to the extent of the Defendant's Premier having purportedly "declared war" on him or her, as referred to in the *Hansard* extracts), for the purpose of inflicting harm and retribution on that interstate resident. To put it another way, a State Parliament capable of doing that is not a State Parliament of the kind provided for by the Australian Constitution.

33. The Amending Act represents the "*judgment*" of the executive and legislature of Western Australia and the statements made in the parliamentary debate conducted in support of the bill's passage constitute the stated reasons for that legislative judgment against me.[45] The repeated statements of vehement hostility by members of the Parliament and executive of the Defendant against me as a resident of Queensland, and which in their view justified the enactment of the Amending Act against me, amounted to an impermissible law and governmental action by the Defendant that intended to exclude me from Western Australia as an "*undesirable*" who was not entitled to section 117's protection under the Constitution nor the common citizenship shared by all members of the Australian federation.[46]

34. The Amending Act has no stated object or purpose. By reference to voluminous and vitriolic *ad hominem* statements of the Defendant's legislators, as contained in the *Hansard* material, the express purpose of the Act was (and is) to attack me as a Queensland resident. That is a discriminatory purpose which contravenes section 117 of the Constitution. The Amending Act therefore fails in its purpose and is invalid in its entirety.

C. Section 75(iv) of the Constitution[47] - A Matter "between a State and a resident of another State"

35. Only Chapter III *courts* are capable of exercising jurisdiction over federal matters, including matters in the "diversity jurisdiction" comprehended by section 75(iv) of the Constitution involving (*inter alia*) disputes between a State and a resident of another State.[48] The Amending Act purports to exercise jurisdiction and adjudicative authority over matters between the State of Western Australia and me, the Plaintiff, a resident

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[45] *Commonwealth v Tasmania* (1983) 158 CLR 1 at 125-126 per Mason J.
[46] See *R v Smithers* (1912) 16 CLR 99 at 108-109 per Griffith CJ; at 109-110 per Barton J and *Street v Queensland Bar Association* (1989) 168 CLR 461 at 485 per Mason CJ.
[47] 3FASOC, [102]-[115]. [**SCB 640-642**]
[48] *Burns v Corbett* (2018) 265 CLR 304.

of the State of Queensland. This is in direct contravention of section 75(iv) of the Constitution which reserves that jurisdiction and adjudicative authority to Chapter III courts.

36. The Amending Act itself demonstrates there is a dispute between the State of Western Australia and me, which the Amending Act purports to quell. The Amending Act names me personally and summarily imposes liabilities and burdens upon me: see, for instance, sections 14(2) to (5); 15(3); 16, 22(2) to (5); 22(7); 23(3) and 24. The Amending Act is focused upon me in my personal capacity, even purporting to apply to the extent that relevant liabilities might be passed to my descendants, even those yet to be born: sections 14(2) to (3); 22(2) to (3). Given the purported operation of the indemnities, all of the matters of contention within the Amending Act find their apex with me: whether as the ultimate beneficial shareholder of the companies, or by way of indemnity given to the State in respect of liability the State has to other unnamed parties. The main purpose of the Amending Act as passed by the Parliament of Western Australia was to determine (purportedly judicially) a dispute between a resident of the State of Queensland (the plaintiff) and the Defendant by way of mechanisms legislated within the Amending Act.

37. For the reasons mentioned *inter alia* in paragraph 21 above, it is necessary to have regard to the Parliamentary debates which preceded the enactment of the Amending Act in order properly to discern the legislative intention of the Amending Act.

38. The following passages published in *Hansard* (most of which appear in the Special Case) establish that the intended purpose and effect of the Amending Act was to resolve a matter between a State (namely the Defendant) and a resident of another State (namely me). Bold type is used to highlight the references to the Defendant and to me as the resident of the other State:

(a) *"It is not in the interests of **Western Australians** to be exposed to a risk of having to pay **Mr Palmer** billions of dollars. The men, women and children of **Western Australia** need the members of both this chamber and the other place to protect them from claims of this nature and concentrate on economic recovery"*;[49]

[49] Western Australia, *Parliamentary Debates (Hansard)*, Legislative Assembly, 11 August 2020, p. 4597.

(b) *"Both Labor and Liberal governments have found themselves dealing with* ***Mr Palmer's*** *various claims against* ***the State****. Members of this chamber and the other place now need to work together on the matter for the benefit of the people of* ***Western Australia****"*;[50]

(c) *"Indeed, it would be fiscally irresponsible for members of both this chamber and the other place to risk a successful arbitral damages award in favour of* ***Mr Palmer****, Mineralogy and International Minerals. Consequently, the McGowan Government is taking the necessary steps to protect* ***the State and the people of Western Australia*** *from the rapacious nature of* ***Mr Palmer****, Mineralogy and International Minerals"*;[51]

(d) *"Lastly, as I have already indicated, it would be fiscally irresponsible for this claim to continue and for the state and all* ***Western Australians*** *to be exposed to the risk, or even the possibility of a risk, of having to pay* ***Mr Palmer****, Mineralogy and International Minerals what might be tens of billions of dollars"*;[52]

(e) *"I trust also that members will likewise recognise that the alternative to this bill is to risk* ***both the State and all the people of Western Australia*** *being exposed to an award of damages in the billions of dollars—damages that* ***Mr Palmer*** *says have arisen because of* ***his*** *frustrated attempts to sell the Balmoral South iron ore project to a Chinese-controlled entity. Now, because* ***he*** *could not sell the project to an overseas company,* ***he*** *wants to claim billions of dollars from* ***Western Australia****, and* ***he*** *does so notwithstanding that the resources are still in the ground. The McGowan government will not expose the people of* ***Western Australia*** *to that risk, and, in this bill, it has instead taken decisive action to protect* ***the State****"*;[53]

(f) *"You need to listen. It will reach a potential conclusion later this year in which one person, an arbitrator, could potentially rule against Western Australia to the tune of $30 billion, or $30 thousand million. It would be sent from* ***Western Australian*** *families to* ***one selfish and greedy billionaire in Queensland***

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[50] Western Australia, *Parliamentary Debates (Hansard)*, Legislative Assembly, 11 August 2020, p. 4597.
[51] Western Australia, *Parliamentary Debates (Hansard)*, Legislative Assembly, 11 August 2020, p. 4599.
[52] Western Australia, *Parliamentary Debates (Hansard)*, Legislative Assembly, 11 August 2020, p. 4599.
[53] Western Australia, *Parliamentary Debates (Hansard)*, Legislative Assembly, 11 August 2020, p. 4599.

*because **he** did not get the right—because of Colin Barnett's decision, which I support—to sell a project to a Chinese company. **He** wants to sue the State"*;[54]

(g) *"[Colin Barnett] made the right decisions but, ever since, **Mr Palmer** has pursued arbitration and it started to come to a head in July this year when we knew a decision was coming towards the end of the year or early next year and we knew it was a massive risk to the people of **Western Australia**"*;[55]

(h) *"The reason we are doing this is to prevent **Mr Palmer** from having another course of action against **Western Australia**. **Mr Palmer** is the most litigious man in Australia and he uses his money to sue everyone all the time"*;[56]

(i) *"This is my first opportunity to table this document. What is this document saying? It is saying, '**I** don't care about the state border closure. What **I** care about is getting **my** arbitrator and the legal team and the experts into Perth to plunder **Western Australia** for $30 billion in an arbitration. **I** will agree to withdraw my High Court challenge and to leave the border closed if you, **Western Australia**, agree to shift the venue over to a jurisdiction in the Eastern States of **Mr Palmer's** choosing'. What a liar **he** has exposed himself to be!"*;[57]

(j) *"**He** has a visceral hatred for Western Australia"*;[58]

(k) *"**His** only interest is getting across that border with **his** legal team and experts and arbitrator to plunder $30 billion from **Western Australian** taxpayers"*;[59]

(l) *"**He** wants the borders open so that **he** can come and plunder $30 billion from **this State** and rob all our families of prosperity, rob all their jobs, shut **the State** down and send it bankrupt"*;[60]

(m) *"**He** says that **Western Australia** needs travel now so that **he** can travel over with **his** experts, with **his** counsel, with Mr Dunning, QC, to plunder **this State** for $30 billion"*;[61]

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[54] Western Australia, *Parliamentary Debates (Hansard)*, Legislative Assembly, 12 August 2020, p 4783. **[SCB 407]**.
[55] Ibid.
[56] Western Australia, *Parliamentary Debates (Hansard)*, Legislative Assembly, p4784. **[SCB 408]**.
[57] Western Australia, *Parliamentary Debates (Hansard)*, Legislative Assembly, 4785. **[SCB 409]**
[58] Western Australia, *Parliamentary Debates (Hansard)*, Legislative Assembly, 4785. **[SCB 409]**
[59] Western Australia, *Parliamentary Debates (Hansard)*, Legislative Assembly, 4785. **[SCB 409]**
[60] Western Australia, *Parliamentary Debates (Hansard)*, Legislative Assembly, 4785. **[SCB 409]**
[61] Western Australia, *Parliamentary Debates (Hansard)*, Legislative Assembly, 4785. **[SCB 409]**

(n) *"The position taken by **Mr Palmer** is that **he** is seeking a payment of around $30 billion from **Western Australian** taxpayers, plus further unspecified damages for breaches **he** claims"*;[62]

(o) *"We are not going to risk selling out **Western Australia** to someone like **Clive Palmer**"*;[63]

(p) *"We will not give in to **one man** who is seeking to take $30 billion from the citizens of **this State**—to take it out of their pockets—and if **he** is successful, force **us** to take dramatic steps like closing hospitals and schools, sacking masses of people, increasing levies and taxes across **the State**, and seeking bailouts from the Commonwealth. That is the sort of thing that would be required if **Mr Palmer** were successful"*;[64]

(q) *"In other words, **Mr Palmer's** High Court border challenge is a disgusting sham; it is a disgusting subterfuge. The only reason **he** wanted to bring the border down was so that he could take **this State** for $30 billion"*;[65]

(r) *"**He** just wanted to bring the border down and risk the lives of Western Australians so he could get money out of **us**"*;[66]

(s) *"I say to the State opposition: Support us. Let us get legislation through both houses today and tomorrow. Let us defend **Western Australians**. Do not support **Clive Palmer**"*;[67]

(t) *"Firstly, once **Mr Palmer** launched the proceedings, the motivation for which is now laid bare to the chamber—that is, just to come over the border and plunder **Western Australia** for $30 billion"*;[68]

(u) *"**Clive Palmer** has played him for a dope and sucked him into some High Court proceedings to support **Clive Palmer** coming across the border to plunder Mr Porter's home **State of Western Australia** of $30 billion"*;[69]

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[62] Western Australia, *Parliamentary Debates (Hansard)*, Legislative Assembly, 4786. **[SCB 410]**
[63] Western Australia, *Parliamentary Debates (Hansard)*, Legislative Assembly, 4787. **[SCB 411]**
[64] Western Australia, *Parliamentary Debates (Hansard)*, Legislative Assembly, 4787. **[SCB 411]**
[65] Western Australia, *Parliamentary Debates (Hansard)*, Legislative Assembly, 4787. **[SCB 411]**
[66] Western Australia, *Parliamentary Debates (Hansard)*, Legislative Assembly, 4787. **[SCB 411]**
[67] Western Australia, *Parliamentary Debates (Hansard)*, Legislative Assembly, 4787. **[SCB 411]**
[68] Western Australia, *Parliamentary Debates (Hansard)*, Legislative Assembly, 4788. **[SCB 412]**
[69] Western Australia, *Parliamentary Debates (Hansard)*, Legislative Assembly, 4789. **[SCB 413]**

(v) *"I do not approve of these actions and I would be absolutely mortified if* ***Clive Palmer*** *... was successful in suing my grandchildren for $12 000 each as a result of his litigation"*;[70]

(w) *"Does anyone want to pay $30 billion to* ***Clive Palmer****? I certainly do not"*;[71]

(x) *"I am sure that the government is very confident that it has, through the media, made* ***Clive Palmer*** *look like an orc. In the public's mind, anything that is done to an orc is justifiable, even removing its legal rights. The government has said that this orc is going to double the debt of* ***the State*** *and therefore it is justified in removing his rights. That may be true. I am not going to say that* ***Mr Palmer*** *is an orc, but he is not very far from being one"*;[72]

(y) *"****Palmer*** *talks about natural justice.* ***He*** *can bleat,* ***he*** *can squeal,* ***he*** *can abuse and* ***he*** *can buy full-page ad after full-page ad, but neither the Premier nor I will be intimidated by* ***this bullying billionaire****. I am very conscious of the fact that I stand here not as some puffed-up Attorney General. I am carrying a heavy responsibility this evening on behalf of all* ***Western Australians*** *to see this bill through and to think strategically down the board to anticipate what* ***Mr Palmer*** *might do next, and, like in a chess game, foreclose on his options. This government did foresee that* ***Mr Palmer*** *would try to register the awards of 2014 and 2019 in the Supreme Court as soon as* ***he*** *heard about the legislation, and that is what* ***he*** *did. Too late, mate! Not checkmate; too late mate—by a day"*;[73]

(z) *"****Mr Palmer*** *is very inventive and a very suss character"*;[74]

(aa) *"That is in case* ***he*** *has transferred assets or assigned rights under leases or contracts. Under this indemnity clause, if* ***he*** *invents an action and somehow works out how to get through the wall that we have built, there are layers of protection for the public so that* ***Mr Palmer*** *will have to fully indemnify* ***the State*** *and we can execute and grab the money back"*;[75]

(bb) *"we have built rows and rows of defences into the bill to protect everyone in* ***Western Australia*** *from* ***this rapacious, fraudulent person****"*;[76]

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[70] Western Australia, *Parliamentary Debates (Hansard)*, Legislative Assembly, 4794. **[SCB 418]**
[71] Western Australia, *Parliamentary Debates (Hansard)*, Legislative Assembly, 4799. **[SCB 423]**
[72] Western Australia, *Parliamentary Debates (Hansard)*, Legislative Assembly, 4814. **[SCB 438]**
[73] Western Australia, *Parliamentary Debates (Hansard)*, Legislative Assembly, 4822. **[SCB 446]**
[74] Western Australia, *Parliamentary Debates (Hansard)*, Legislative Assembly, 4824. **[SCB 448]**
[75] Western Australia, *Parliamentary Debates (Hansard)*, Legislative Assembly, 4825. **[SCB 449]**
[76] Western Australia, *Parliamentary Debates (Hansard)*, Legislative Assembly, 4825. **[SCB 449]**

(cc) *"I was just saying that we have taken the best legal advice that the government has to protect **Western Australians** from all imaginable and almost unimaginable efforts of **Mr Palmer** and his legal team"*;[77]

(dd) *"We are protecting mums, dads, children, workers and everybody from **this rapacious, fraudulent, dishonest litigant**"*;[78]

(ee) *"To put it another way, if the cost of **Mr Palmer's** claim was shared equally amongst all **Western Australians**, it would cost every man, woman and child in **Western Australia** more than $12 000; that is, each of the 2.5 million people living in **Western Australia** would pay **Mr Palmer** more than $12,000. **Mr Palmer** wants **Western Australia** to pay him $30 billion"*;[79]

(ff) *"It is not in the interests of **Western Australians** to be exposed to a risk of having to pay **Mr Palmer** billions of dollars"*;[80]

(gg) *"There is a single-minded determination to protect **Western Australia** against **a single individual** with more money than anyone in here will ever see and who has form for using that money to litigate as the default position"*;[81]

(hh) *"We do not want to provide **Mr Palmer** with the opportunity to take steps in the courts, which he started yesterday, to protect his position"*;[82]

(ii) *"The Attorney-General read in the bill in the other House at 5.01 pm. I understand that that was to prevent **Mr Palmer** from launching court action. I understand exactly why the government did that, because once the bill had been read in, that completely nullified any court action that **Mr Palmer** could take"*;[83]

(jj) *"The stakes are $30 billion for **Western Australians**. What happens if this bill gets through and is challenged in the High Court, and **Mr Palmer** is successful and **we** lose?"*;[84]

(kk) *"We are doing it because we believe that this legislation should be treated with the respect that it deserves; that is, when it goes to the Standing Committee on Legislation, that committee can look at the legislation, find any flaws in it and*

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[77] Western Australia, *Parliamentary Debates (Hansard)*, Legislative Assembly, 4828. **[SCB 452]**
[78] Western Australia, *Parliamentary Debates (Hansard)*, Legislative Assembly, 4831. **[SCB 455]**
[79] Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, 4877. **[SCB 510]**
[80] Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, 4877. **[SCB 510]**
[81] Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, 4881. **[SCB 514]**
[82] Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, 4881. **[SCB 514]**
[83] Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, 4884. **[SCB 517]**
[84] Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, 4884. **[SCB 517]**

*bring it back, and then every single member in this chamber can collectively look at **Mr Palmer** and say, '**We** gotcher, mate! No matter what'"*;[85]

(ll) *"I would absolutely hate it—I would absolutely loathe it—if **that man** won because this bill was flawed. I would hate it. Would it not be terrible for **that man from Queensland** to take $30 billion out of **our** coffers only because **we** did not have the moral fortitude to send this bill to a committee for 30 days to find out whether something was missing? Would that not be terrible? I am telling members that we have an opportunity right now to resolve this. We have an opportunity to say to **Mr Palmer**, 'We're going to make sure **you** are hit to the boundary, mate. You're not welcome in **Western Australia**. **Stay in Queensland**. **We're** going to keep **our** $30 billion'"*;[86]

(mm) *"I would hate to think that we will get down the road and **the man from Queensland, Mr Palmer**, has a win. That would be the worst outcome. I do not care about it from a political standpoint; I just care about it from a **Western Australian** standpoint"*;[87]

(nn) *"I have asked this a couple of times now: when the Leader of the House responds—I know there are no guarantees, even in the black and white area of law—I want her to explain to me and to the house why she or the government feels that this legislation will provide a positive outcome against this action by **Mr Clive Palmer** for the people of **Western Australia**. That is fundamental to this whole bill"*;[88]

(oo) *"As I said, the intent of the opposition with this bill is to ensure that **the government** is successful in defending the action from **Mr Clive Palmer**, that **Mr Clive Palmer** stays **in Queensland**"*;[89]

(pp) *"The barbarian is at the gate. Earlier in the week, **Mr Palmer** was King Kong hanging off Dumas House, yesterday **he** was Dr Evil, and today **he** is a cane toad. What is **the State** going to do about that? **We** pretty much slam the doors shut, pull down the shutters, and hope **he** goes away"*;[90]

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[85] Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, 4884. **[SCB 517]**
[86] Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, 4884. **[SCB 517]**
[87] Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, 4890. **[SCB 523]**
[88] Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, 4892. **[SCB 525]**
[89] Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, 4892. **[SCB 525]**
[90] Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, 4896. **[SCB 529]**

(qq) *"I am very, very concerned that **Mr Palmer** might be successful. The damage to **the State** would be irreparable"*;[91]

(rr) *"The principle is that **this particular litigant, Clive Palmer**, is **a bad guy** and therefore any measure should be taken to avoid paying **him** a dollar, which is what the Attorney General has said: '**He** won't get a dollar out of **WA**'"*;[92]

(ss) *"It is a matter of principle: '**We** don't like **Clive Palmer**; **he** is a political opponent; he is **an Eastern Stater**—even worse—and **he** is suing **the State of WA** under a contract **we** don't like because it is not operating to **our** benefit"*;[93]

(tt) *"If **he** has legal rights that **he** is trying to enforce, simply saying that **he** is **someone that the Premier, on behalf of the State of Western Australia, has declared war against**, hardly takes us anywhere"*;[94]

(uu) *"Once again we are being asked to listen to a Premier who has declared "war" on **a litigant, a political opponent** ..."*;[95] and

(vv) *"**WA** cannot afford this and, frankly, it would be unfair if **the billionaire** were to bankrupt **the State** because **he** did not get **his** way. **WA** needs to keep itself afloat economically. That money would be better suited in the hands of **Western Australians** rather than **a mining elitist billionaire**"*.[96]

39. Those passages comprehensively demonstrate that the intended purpose and effect of the Amending Act was to resolve the matter between the Defendant and a resident of another State (namely me). Put another way, the purpose of the Amending Act was to resolve, determine, erase or "quell" a dispute between the State of Western Australia and me.

40. This case is therefore completely different from *Duncan v New South Wales*.[97] In that case, it was said that, in terminating mining exploration licences and in making consequential provision, the legislation under consideration exhibited *"none of the typical features of an exercise of judicial power"*[98] because:

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[91] Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, 4896. **[SCB 529]**
[92] Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, 4898. **[SCB 531]**
[93] Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, 4898. **[SCB 531]**
[94] Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, 4899. **[SCB 532]**
[95] Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, 4900. **[SCB 533]**
[96] Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, 4901. **[SCB 534]**
[97] (2015) 255 CLR 388.
[98] (2015) 255 CLR 388, [42] per the Court.

> *"It quells no controversy between the parties. It precludes no future determination by a court of past criminal or civil liability. It does not determine the existence of any right that has accrued or any liability that has been incurred. Save for the limited immunity it confers on the State and its current or former employees, it does not otherwise affect any accrued right or existing liability."*[99]

41. In this case, the Amending Act exhibits all of those features. There are at least four reasons for this. *First*, the following provisions of the Amending Act involved a purported exercise of judicial power by the Parliament of Western Australia, in a matter falling within section 75(iv) of the Constitution, by quelling a controversy between the parties (and, indeed, one which had been ongoing for some eight years prior to the enactment of the Amending Act): sections 9(1), 10(1), 10(2), 10(4), 10(5), 10(6), 10(7), 11(1), 11(2), 11(4), 11(6), 12(1), 12(4), 12(6), 18(1), 19(6), 20(4), 20(6) and 27.

42. The Amending Act refers to "Mineralogy" and "International Minerals", companies of which I am the ultimate beneficial shareholder. The purpose of the Amending Act in attacking the rights of the companies is to attack me as their beneficial shareholder.[100]

43. *Secondly*, the Amending Act purports to extinguish, or prevent the coming into existence of, matters relating to civil liability which should properly be heard by a Court. That purported operation must be an exercise of judicial power, undertaken by the Parliament of Western Australia. The following provisions of the Amending Act involved a purported exercise of judicial power by the Parliament of Western Australia, in a matter that falls squarely within section 75(iv) of the Constitution, by precluding future determination by a court (potentially including, ultimately, this Honourable Court) of past civil liability: sections 8(3), 9(1), 11(1), 11(2), 11(3), 11(4), 12(1), 12(4), 18(1), 19(1), 19(2), 19(3), 19(4), 20(1) and 27.

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[99] Ibid.

[100] Defence to 3FASOC at [66], the Defendant admits that I am the beneficial owner of almost all interests in the companies. [**SCB 684**]

44. *Thirdly*, one of the Amending Act's most extraordinary provisions is section 20(8) which provides that:

> *"Any conduct of the State that occurs or arises before, on or after commencement, and that is, or is connected with, a protected matter does not constitute an offence and is taken never to have constituted an offence".*

45. The Amending Act thereby purports to determine matters relating to criminal liability which should properly be heard by a Court. That purported operation must be an exercise of judicial power, undertaken by the Parliament of Western Australia.

46. This provision precludes any determination by a court of past criminal liability, even in respect of conduct yet to be engaged in by "the State". The definitions of "State", "State agent" and "State authority" in the Amending Act create a privileged class of State officials and confederates who are now immune from criminal liability for engaging in conduct connected with a "protected matter" being conduct which, if engaged in by any other member of the community, would constitute an offence.

47. The Amending Act gives no indication of what kind of conduct that might be. On the contrary, it contains an elaborate set of secrecy provisions in section 21 which are designed to ensure that no member of the public will ever be able to find out.

48. One of the most basic precepts of the rule of law is that, in a free and democratic society, the law must be more important and more powerful than any individual. A V Dicey[101] spoke of equality before the law as being one of the most fundamental principles of the rule of law. Every person, no matter his or her "rank or condition", is *"subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals"*.[102] The law should apply to all persons equally.

49. As it was put by the Supreme Court of Canada, the rule of law means *inter alia* that *"the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power"*.[103]

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[101] Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (1959), p. 193.

[102] Ibid.

[103] *Re Manitoba Language Rights* [1985] S.C.R. 721 at 748, *per totam curiam.*

50. In order for the law to apply to all persons equally, it is necessary to ensure that government officials should not be afforded any special privileges or immunities merely because they are government officials and are not what might be described by some as "ordinary" people. The Amending Act offends this foundational constitutional principle.

51. *Fourthly*, the following provisions of the Amending Act involved a purported exercise of judicial power by the Parliament of Western Australia, in a matter falling within section 75(iv) of the Constitution, by determining the existence or otherwise of rights which have accrued and liabilities which have been incurred and otherwise affecting rights which had been accrued or liabilities which existed before the commencement of the Amending Act: sections 9(1), 9(2), 11(1), 11(2), 11(6), 11(7), 11(8), 12(2), 12(6), 12(7), 14, 15, 16, 17, 18(1), 19(1), 19(2), 19(6), 19(7), 20(2), 20(7), 22, 23, 24, 25 and 27.

52. Having regard to section 75(iv) of the Constitution, the Defendant did not have the power to enact the Amending Act. The Amending Act exceeds the implied constitutional constraint against State legislative power which makes a State law invalid if it involves the exercise of judicial power in respect of "federal matters" by a body which is not a Chapter III court.[104]

53. Considerations of text, history and purpose demonstrate that *"adjudicative authority in respect of the matters listed in ss 75 and 76 of the Constitution may be exercised only as Ch III contemplates and not otherwise"*.[105]

54. Further, section 75(iv) of the Constitution (like each other provision of sections 75 and 76) involves a "federal element" which is a characteristic making the matter appropriate for adjudication by an independent court. This is particularly so because of the *"minimum characteristics of independence and impartiality required of a Ch III Court"*.[106] A court with those characteristics may exercise adjudicative authority in respect of matters listed in sections 75 and 76 of the Constitution. A State Parliament, of course, has none of those characteristics

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[104] *Burns v Corbett* (2018) 265 CLR 304.
[105] *Burns v Corbett* (2018) 265 CLR 304, [43] (Kiefel CJ, Bell and Keane JJ).
[106] Ibid., [96] (Gageler J).

55. In violation of the implied constitutional constraint referred to above, the Parliament of Western Australia sought impermissibly to exercise judicial power in enacting the Amending Act. There are several reasons for the conclusion that the enactment of the Amending Act involved a purported exercise of judicial power.

56. What the Amending Act has purported to do by making legislative adjudicative determinations about these numerous matters is therefore plainly impermissible. The approach to the interpretation of Chapter III which found favour with the majority in *Burns v Corbett*[107] is *"apt to deny the possibility that any matter referred to in ss 75 and 76 might be adjudicated by an organ of government, federal or State, other than a court referred to in Ch III"*.[108]

57. Chapter III of the Constitution contains an *exhaustive* statement not only of the adjudicative authority of the courts but also of *any* "organ of government, whether federal or State".[109] It exhaustively defines those bodies capable of exercising such authority in federal matters, being only Chapter III courts. This exclusive jurisdiction is a *"jurisdiction exclusive of all other authority"*.[110]

58. The attempted subversion by the Amending Act of section 75(iv) of the Constitution is, in effect, an attempt to deny section 73(i) and, especially, this Court's authority to make judgments and orders which are *"final and conclusive"*.

59. For the reasons set out at paragraphs 35 to 58 above, the Amending Act is contrary to the rule of law, repugnant to justice and is beyond the legislative power of the government. The Amending Act is invalid in its entirety as its primary purpose is to judicially determine a controversy between the resident of the State of Queensland and the State of Western Australia. The Amending Act exceeds the implied constitutional constraint against State legislative power and engaging in an impermissible attempt to exercise adjudicative authority in respect of a matter falling within section 75(iv) of the Constitution, which is something only a Chapter III court can do.

D. *Australia Act 1986* (Cth), section 6 – "Manner and form" issues

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[107] (2018) 265 CLR 304.
[108] Ibid., [45] (Kiefel CJ, Bell and Keane JJ).
[109] Ibid.
[110] Cf. *Burns v Corbett* (2018) 265 CLR 304, [221] (Edelman J).

60. The State Agreement, a Schedule to the *Iron Ore Processing (Mineralogy Pty. Ltd.) Agreement Act 2002* (WA)(**Original Act**), amended or had the effect of amending Western Australian legislation as follows:

(a) By section 5(1), the operation of the *Mining Act 1978* (WA) is amended such that licences and leases granted in accordance with it are lapsed or surrendered.

(b) By section 20(6) "Modification of the LA Act", the *Land Administration Act 1997* (WA) was amended by providing that priority is granted to the company the party to the State Agreement and that the provision of the State Agreement prevails over the *Land Administration Act 1997* (WA).

(c) By section 20(7) "Modification of the AH Act", the *Aboriginal Heritage Act 1972* (WA) was amended by providing that proposals under the State Agreement shall be deemed to be within the expression "owner of any land" for the purpose of section 18 *Aboriginal Heritage Act 1972* (WA).

(d) By section 27(2), certain definitions of the *Land Administration Act 1997* (WA) were amended.

(e) By section 31(3), provisions of the *Mining Act 1978* (WA), *Land Administration Act 1997* (WA), and *Transfer of Land Act 1893* (WA), are amended such that their application in respect of certain fundamental aspects of their legislative operation do not operate in respect of the State Agreement.

61. The State Agreement itself has the full force of law under sections 2 to 6 of the Original Act, in so much as *inter alia* its terms alter other Acts of the Parliament of Western Australia upon the State Agreement being ratified as an Act of the Parliament of Western Australia. The provisions of the State Agreement itself are part of an Act of Parliament. That part of the Act constituting the State Agreement can only be amended in the manner set out in that part of the Act. In respect of the State Agreement, amendment is by agreement of the parties, pursuant to section 32 of the State Agreement. The parties to the State Agreement have not consented to it being amended. Therefore the Amending Act, which purports to amend the State Agreement is in contravention of section 6 of the *Australia Act 1986* (Cth) and is therefore a nullity.

62. This conclusion is reinforced by the fact that the Defendant, Western Australia, has, since 1952, used "*State Agreements*" in order to attract investment in resource development, extraction, and processing. As these investments, because of their size, cost, and duration, often require, long term certainty, extensive or complex land tenure and are located in relatively remote areas of the State, these investments are codified by a specific State statute. The State's own ratification of the investment in the form of a legislated State Agreement, i.e. through a specific Act, was designed to protect otherwise exposed investors. That enactment has profound consequences for the Defendant and how its relationships with the Plaintiff in this B52 matter and the Plaintiffs in the B54 matter were to be juridically managed.

63. The Original Act was a law that bound the Defendant to observe its "*Manner and Form*". The Defendant – its legislature passing the law and its Crown assenting to it – bound both the Parliament and the Executive of Western Australia by law in inviting the B54 Plaintiffs' reliance on the Original Act's terms and its provisions. Included among the Original Act's provisions was, in particular, the requirement that any dispute or difference between the parties arising out of or in connection with the legislated State Agreement was a matter for Arbitration.[111] There is no mention anywhere in the Original Act that the Defendant reserved to itself any right to legislatively annihilate its State Agreement with the B54 Plaintiffs[112] (set out in Schedule 1 to the Original Act). At all times, then, the State's Parliament was enacting a law that concerned its powers and procedure, and thus the Original Act was a law that could only be altered by express compliance with the 'manner and form' as expressed in that Original Act: *Australia Act*, section 6.

64. The State has attempted impermissibly to avoid its own clear "Manner and Form" obligations by the vehicle of Amending Act. Per the Australia Act, section 6, the whole of the Amending Act is invalid and the Defendant was and is bound by the whole terms of the Original Act.

E. Invalid delegation of legislative power[113]

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[111] *Iron Ore Processing (Mineralogy Pty. Ltd.) Agreement Act 2002* (WA), Sch 1, cl 42. [**SCB 140**]
[112] Set out in Schedule 1 to the Original Act.
[113] 3FASOC, [132A]-[137]. [**SCB 644-645**]

65. No State Parliament can validly effect its own abolition or its own degradation of its legislative power.[114] To a similar effect, no State Parliament may validly make laws to nullify or reverse a decision of the High Court which is "…. *final and conclusive*" (per s.73). There are express constitutional boundaries that both protect and also limit the legislative powers of each State – and where this power may reside.

66. The power conferred by the Amending Act on Western Australia's executive to alter or amend the application of the Amending Act is an abdication of legislative power by the Parliament to the executive under the guise of a statutory delegation. I repeat and rely on paragraph 9 of these submissions. Public confidence in the Australian constitutional system will be diminished if the Parliament of a State intrudes into the judicial power.[115].

67. The Parliament cannot validly cede its constitutionally conferred legislative power to the executive. The purported cession by sections 30 and 31 of the Amending Act of the State's legislative power to the State's executive is invalid:

(a) Section 30: creates an unconstrained law-making power on the Executive of a kind which is properly reserved solely to the State Parliament of Western Australia which is therefore impermissible and invalid and leaves open the possibility that the State Parliament's delegation of power to the Executive would allow the Executive to amend the Act without engaging the State's constitutionally entrenched legislative process.

(b) Section 30(1): delegates the legislative power of the Parliament of Western Australia to the Minister to make law based upon his/her opinion with respect to the matters at (a)-(e).

(c) Section 30(2): delegates the legislative power of the Parliament of Western Australia to the Governor, on the Minister's recommendation, to alter the Amending Act. This provision allows the Executive to, in effect, alter the Amending Act's statutory scheme without further legislation by the Parliament.

(d) Section 31(a): delegates the Parliament's power to make law by allowing the Executive through the Minister to say whether or not such legislation should

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[114] *Kable* (1996) 189 CLR 51 at 65-66 per Brennan CJ.
[115] *Kable* (1996) 189 CLR 51 at 107 per Gaudron J and 124 per McHugh J.

"have effect despite the State Agreement, Part 2 of the Original Act, Part 3 of the Amending Act or any other Act or law". This is an impermissible abdication by the Parliament of Western Australia of the legislative power reserved solely to it by the Constitution and is invalid.

(e) Section 31(b) delegates the Parliament's power to make law by allowing the Executive through the Minister to determine whether "a specified provision of the State Agreement, Part 3 of the Amending Act or a written law does not apply, or applies with specified modifications, to or in relation to any matter or thing". This, again, is an impermissible delegation by the Parliament of Western Australia of the legislative power reserved solely to it by the Constitution and is therefore invalid. The Parliament of a State must always be able to meet the Constitution's description of a Parliament in substance as well as form: see section 107. The Parliament of a State cannot, by its own acts, either increase the power of the State executive over a State legislature, nor can the State Parliament engage in its own constructive abolition of itself. This delegation of legislative power to the executive is impermissible.

F. The "Palmer provisions"[116]

68. Paragraphs [99] to [101] of my 3FASOC raise some issues which are dealt with more fully elsewhere in these submissions or in the submissions in B54/2020 which I have adopted. However, they also raise two relatively novel issues which are not covered elsewhere and which I now briefly address.

69. *First*, by reason of the matters pleaded in paragraphs [99] to [100F] of my 3FASOC, I submit that the Amending Act is invalid as being, or being akin to, a bill of pains and penalties.

70. Quite apart from the matters pleaded there, it is apparent from a review of the provisions of the Amending Act itself, and what the *Hansard* extracts reveal about the purpose of the legislation (as referred to earlier in these submissions), that the Amending Act has purported to impose a significant legal burden on me consequent to a determination by the Defendant of "civil culpability" in respect of the matters

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[116] 3FASOC, [99]-[101]. [**SCB 632-639**]

referred to in the *Hansard* extracts, notwithstanding that the matters for which I have been condemned involved the exercise of lawful rights by me or by companies controlled by me. The purpose of the Amending Act in attacking the rights of the companies was to cause damage to me, the ultimate beneficial shareholder of the companies.[117]

71. Accordingly, the Amending Act had the purpose of imposing, and did in fact impose, punishment on me (and persons associated with me) in respect of matters of which the Defendant considered me to have been guilty or culpable. Specifically, the provisions of the Amending Act seek to punish me for seeking to vindicate, in a perfectly legitimate and lawful manner, legal rights against the State. That punishment consists, *inter alia*, of the forfeiture of valuable proprietary rights, including the potential fruits of victory in two arbitral proceedings which were being pursued in a third arbitral proceeding, and in the imposition of a series of statutorily imposed indemnities.

72. A bill of pains and penalties of this kind is ultra vires a State Parliament. An analogy may be drawn to the special legislation considered in *Liyanage v The Queen*,[118] which was enacted as a form of legislative retribution by the Ceylon Parliament against conspirators in a failed coup attempt. Features of the legislation included removal of the right to a trial by jury and an alteration of the rules of evidence. The Judicial Committee of the Privy Council said that:

> *"It goes without saying that the legislature may legislate, for the generality of its subjects, by the creation of crimes and penalties or by enacting rules relating to evidence. But the Acts of 1962 had no such general intention. ... That the alterations in the law were not intended for the generality of the citizens or designed as any improvement of the general law, is shown by the fact that the effect of those alterations was to be limited to the participants in the January coup ..."*.[119]

73. The Judicial Committee also observed that the alterations to the law in that case *"constituted a grave and deliberate incursion into the judicial sphere"* and that *"If*

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[117] Defence to 3FASOC at [66], the Defendant admits that I am the beneficial owner of almost all interests in the companies. [**SCB 684**]
[118] [1967] AC 259.
[119] *Liyanage v The Queen* [1967] AC 259 at 283.

such Acts were valid the judicial power could be wholly absorbed by the legislature and taken out of the hands of the judges".[120]

74. No Parliament may direct the Courts in this country as to the manner and outcome of the exercise of the Court's jurisdiction.[121] It is therefore submitted that the Amending Act is invalid as being, or being akin to, a bill of pains and penalties.

75. *Secondly*, paragraph 101(d) of the 3FASOC refers to the acquisition, confiscation or forfeiture of valuable propriety rights *"without providing for just compensation or any compensation at all"*.

76. On the present state of the law, this argument goes nowhere because it has been held that the State (unlike the Commonwealth) has no obligation to provide compensation on just terms.[122] I respectfully submit, however, that a previously identified qualification to that proposition, involving a constitutional limit on the powers of State Parliaments in the case of "extreme" laws,[123] should now be recognised by this Court, having regard to the extreme nature and effect of the provisions of the Amending Act and the nature of a State Parliament as referred to below. Such a qualification fulfils and supports the constitutional design of which this Court, in particular, has spoken.[124]

77. Based upon that previously identified constitutional limitation, and upon the foundational constitutional argument set out earlier in these submissions, I submit that:

(a) a State Parliament must be a Parliament of a kind capable of fulfilling functions stated in the Australian Constitution;

(b) a "law of a State" made by such a Parliament can only be a "law" of a kind valid under by the Constitution;

(c) such an extreme law as the Amending Act falls outside that constitutional presupposition;

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[120] Ibid., at 284-285.
[121] *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 36-37, per Brennan, Deane and Dawson JJ, and at 53, per Gaudron J; *International Finance Trust Company Limited v New South Wales Crime Commission* [2009] HCA 49, [50] (French CJ).
[122] *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399.
[123] *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399; Michael Kirby, *"Deep Lying Rights – A Constitutional Conversation Continues"* (The Robin Cooke Lecture, 2004), 19-23.
[124] *Kable* (1996) 189 CLR 51 at 104-107 per Gaudron J and at 122-124 per McHugh J.

(d) the Amending Act is a purported "State law" that is not, in truth, a "law" at all; and

(e) rather, the Amending Act is *"an extreme affront masquerading as a State law"*.[125]

78. It is therefore submitted that the Amending Act is invalid by reason of exceeding the constitutional limitation described above.

G. Inconsistencies with Commonwealth legislation[126]

79. The general principles concerning section 109 are well-established. This Court[127] held recently that a State law is invalid due to section 109 of the Constitution when that State law would "*alter, impair or detract from*" the operation of the Commonwealth law (direct inconsistency), or when the Commonwealth law is *"completely, exhaustively, or exclusively"* the law governing a particular conduct or matter (indirect inconsistency). The different tests of inconsistency are all "directed to the same end", namely, "discerning whether a 'real conflict' exists between a Commonwealth law and a State law.[128]

80. The tests for "direct" and "indirect" inconsistency are descriptors of ways in which a State law may *"alter, impair or detract from"* the operation of a Commonwealth law.[129] Central to inconsistency is legislative intention and the proper construction of Commonwealth and State laws.[130] Even a statement of legislative intent in a Commonwealth law – that the Commonwealth law is intended to operate concurrently with State laws – is not conclusive.[131] An irreconcilable conflict between State and

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[125] *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, 431-432 (Kirby J).
[126] 3FASOC, [92]-[95D]. [**SCB 611-631**]
[127] *Work Health Authority v Outback Ballooning Pty Ltd* [2019] HCA 2 at [29] – [35] per Kiefel CJ, Bell, Keane, Nettle & Gordon JJ; at [64] – [78] per Gageler J; at [104] – [107] per Edelman J).
[128] *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 at [42] (French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ).
[129] [2019] HCA 2 at [71]-[72] and [105].
[130] [2019] HCA 2, [32] – [35] at Kiefel CJ, Bell, Keane, Nettle & Gordon JJ); at [73] – [78] per Gageler J; at [111], [136] – [139], [146] per Edelman J. See also Jemena at [45]; *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 at [54] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *Ex parte McLean* [1930] HCA 12; (1930) 43 CLR 472 at 483 per Dixon J.
[131] *Momcilovic v The Queen* [2011] HCA 34 at [307] per Gummow J.

Commonwealth laws may "*arise from the laws' legal operation or from their practical effect.*" [132]

81. In ascertaining whether two laws are inconsistent, it is relevant to consider (inter alia) whether: the State law purports to create a scheme which strips a thing (eg a debt) of the characteristics ascribed to it by Commonwealth law; *Bell Group* at [54]-[66]; the State law is "aimed at" a right given by the Commonwealth law: *APLA* at [209]; whether the State law, in its practical effect, qualifies, impairs and negates the essential legislative scheme of the Commonwealth law: *Bell Group* at [91]-[93]; and whether the State law flouts the purpose of the Commonwealth law: *Bell Group* at [91]-[93].

10 82. Where section 109 operates, it prima facie operates to render inoperative the inconsistent State law only "to the extent of" the inconsistency. However, if part of a State law is rendered inoperative, some or all of the balance may fall with it. Whether that is so turns on the intention of the State legislature and, in particular, whether the State intended the balance to survive.[133] The conventional statutory severance provision (relevantly, s 7 of the *Interpretation Act 1984* (WA)) does not apply to permit or encourage severance: *Bell Group* at [71]. That is because the conventional statutory severance provision does not speak to section 109 inconsistency.[134] In contrast, ss 8(4) and (5) of the Amending Act (if valid) do speak to s 109 inconsistency (see s 8(4)(a)), but they do so only in a limited way, where there is an inconsistency in
20 how the two laws "apply". The application of a law is distinct from its legal meaning. Section 8(4)(a) must be read as not capturing (and not providing for severance) where the inconsistency arises, not from the practical operation of the two laws, but from their legal meaning.

83. Section 109 inconsistency can arise where the inconsistency is between, on the one hand, a Commonwealth legislative instrument or regulation and, on the other hand,

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[132] *Bell Group N.V. (in liquidation) v Western Australia* [2016] HCA 21 (***Bell Group***) at [51] per the Court. See also *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at [201]-[202] (Gummow J) (Hayne J agreeing at [375]), [305] (Kirby J).
[133] The applicable principles were explained and applied by this Court in Bell Group at [52] and [69]-[73], by reference to *Wenn v Attorney-General (Vic)* (1948) 77 CLR 84 at 122.
[134] *Bell Group* at [71]; *Sportsbet Pty Ltd v New South Wales* (2012) 249 CLR 298 at [13].

some State law: *Jemena* at [38]. Put another way, the legislative instrument or regulation is a "law" within the meaning of s 109.

Initial observations regarding the Amending Act

84. The Commonwealth's laws operate concurrently with, and against the backdrop of, Australia's general law and any State's laws of general application.[135] The Amending Act is not part of the general law of the Defendant but is a law that operates, intentionally, to create rights of indemnity and immunity in favour of the Defendant State, its officials, contractors and certain other confederates (falling within the extended definitions of "State", "State agent" and "State authority"), and the Commonwealth and its officers. It is these specific indemnities and immunities that "*alter, impair or detract from*" Commonwealth laws. In effect, the Defendant State's law attempts to create individual exemptions to Commonwealth law. That is impermissible. The issue of whether section 109 invalidates Defendant State's law are addressed below.

Interferes with the orderly operation of the Commonwealth judicial process: 3FASOC at [92]-[95] and [95D(c)].

85. The Amending Act targets and interferes with the orderly operation of the Commonwealth judicial process. The Commonwealth judicial process is regulated by a harmonious scheme of laws, including the ***Judiciary Act*** *1903* (Cth), the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**), the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth), the *Service and Execution of Process Act 1992* (Cth), the ***Evidence Act*** *1995* (Cth), the *High Court Rules 2004* (Cth) and the *Federal Court Rules 2011* (Cth) (**FCR**).

86. At a level of generality, those Commonwealth laws (inter alia) provide for, and regulate, the commencement of proceedings (eg *Judiciary Act* Pt IV (the original jurisdiction of the High Court), Pt V (the appellate jurisdiction of the High Court), s 39B (original jurisdiction of the Federal Court of Australia); FCR Pt 8), the termination of proceedings (eg FCR Pt 26), the relief that may be granted (eg *Judiciary Act* s 31;

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[135] *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 447 per Dawson, Toohey, and Gaudron JJ.

FCA Act s 23), the availability of costs (eg *Judiciary Act* s 26; FCA Act s 43), compulsory production of documents (including discovery) (FCR Pt 20) and the rules governing the admissibility of evidence (*Evidence Act*).

87. These Commonwealth laws, together, create an integrated scheme for the conferral, invocation, pursuit and exercise of federal jurisdiction. The Amending Act attacks – and alters, impairs and detracts from – this integrated scheme in multiple respects.

88. Sections 11(3) and 19(3) purport to prohibit the commencement of proceedings against the State. They do so irrespective of whether the matter the subject of the proceedings is in federal jurisdiction. In addition to the provisions otherwise identified in the 3FASOC, these sections are inconsistent with s 58 of the *Judiciary Act* which confers a right on a person to make a claim against a State in respect of matters within the High Court's original jurisdiction in either the Supreme Court of the relevant State or the High Court. These provisions are inconsistent with those identified provisions of federal law which confer jurisdiction and permit the commencement of proceedings invoking that jurisdiction.

89. Sections 11(4), 12(4), 19(4) and 20(4) purport to terminate extant proceedings. They do so irrespective of whether the matter the subject of the proceedings is in federal jurisdiction. These provisions are inconsistent with those identified provisions of federal law which confer jurisdiction (which, necessarily, includes jurisdiction to bring proceedings to an end by way of dismissal or the granting of leave to discontinue) and which regulate the circumstances in which proceedings may be brought to an end without order.

90. Sections 11(5), (6), 12(6), 13(6), 17(4), 17(5), 19(5) and (6), 20(5), (6) and (7) and 25(4) and (5) purport to extinguish orders and other remedies, including orders made in the exercise of federal jurisdiction. These provisions are inconsistent with those identified provisions of federal law which confer jurisdiction and power to make orders. Necessarily, those provisions contemplate that relief given in federal jurisdiction will not be impeached by State law.

91. Further, ss 13(4) and (5), 18(5) and (6), 21(4) and (5) purport to provide special rules restricting the availability of compulsory production in proceedings (inter alia) in

federal jurisdiction. These provisions are inconsistent with those identified provisions of federal law which permit and regulate compulsory production.

92. Further, s 18 of the Amending Act purports to regulate the process of taking evidence, including by rendering certain persons non-compellable and prohibiting the admission of certain testimony. This is inconsistent with those identified provisions of the *Evidence Act* which regulate the process of taking evidence.

93. Aside from everything else, the Amending Act purports to erect the State as a litigant with a different, and preferential, status to other litigants, including other polities. This is inconsistent with the clear command in s 64 of the *Judiciary Act*.[136] Section 64 would be set to naught if (as Western Australia has purportedly done) States could establish themselves as litigants afforded special, protective rights in matters, whether or not they are in federal jurisdiction.

94. In respect of this first category of inconsistency, it is necessary to say something as to the operation of s 79 of the *Judiciary Act*. Section 79 does not apply so as to pick up any relevant part of the Amending Act. There is no "gap" in Commonwealth law which requires or permits the picking up of the Amending Act.[137] Further, and in any event, s 79 only applies where Commonwealth law has not "otherwise provided", and that is a test no less stringent than that which obtains under section 109.[138]

The scheme of indemnities and interference in the orderly operation of insolvency, bankruptcy and personal property security laws: 3FASOC at [95A]-[95AD], [95D(a)-(b)] and [95D(d)]

95. Paragraph 95A of my 3FASOC sets out the effect of sections 14, 15, 16, 22, 23 and 24 of the Amending Act in establishing a scheme of indemnities by which I (and other persons unrelated to the State Agreement) may be required to indemnify the Defendant

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[136] which states that *"[i]n any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject"*.
[137] cf *Masson v Parsons* (2019) 266 CLR 554 at [1] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ); *Rizeq v Western Australia* (2017) 262 CLR 1 at [40]-[42] (Bell, Gageler, Keane, Nettle and Gordon JJ).
[138] Masson at [41]-[43].

(including certain persons other than the body politic) in respect of "*protected matters*" or "*disputed matters*".

96. The indemnities and immunities are supported, also, by exclusions and extinguishment of liabilities in favour of the Defendant in sections 11 and 19 of the Amending Act, and by an exemption in section 20(8) for the Defendant (including any "State agent" and any "State authority") from all forms of judicial review or criminal liability in respect of certain subject matter. They are further reinforced by sections 17 and 25 of the Amending Act, which have the effect of preventing any liability that may slip through the indemnities and immunities[139] from ever being met by the Defendant from its Consolidated Account, from borrowings or from its assets.

97. The clear intention of the Amending Act was and is to exempt and immunise the Defendant State (and all persons falling within the extended definitions of "State") from any and all liabilities associated with both the claims of Mineralogy Pty Ltd and International Minerals Pty Ltd against the Defendant (to paraphrase the definition of the "disputed matters") and the actions taken in connection with the drafting and passing of the Amending Act (again paraphrasing, the "protected matters").

98. That legislative intention is ineffective without including exemptions and immunities from liabilities arising under laws of other Defendants and Territories, and the Commonwealth. That this is so is clear from the inclusion of "*non-WA liabilities*" and "*non-WA rights*" in sections 7, 14 and 22. Thus it can be safely said that the intended effect of the Amending Act was and is to extend to "*alter, impair or detract from*" rights, obligations and liabilities arising under Commonwealth law. That is impermissible.

99. The Commonwealth has legislative power under sections 51(xx) and (xvii) of the *Constitution* to make laws with respect to, relevantly, trading and financial corporations, as well as bankruptcy and insolvency. These heads of legislative power support Chapter 5 of the *Corporations Act* 2001, Parts III-VI of the *Bankruptcy Act* 1966 and the *Personal Property Securities Act 2009*.

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[139] For instance, if a particular liability was to be preserved by operation of s. 109 of the Constitution.

100. Both the *Corporations Act* and *Bankruptcy Act* contain general provisions that attempt to exclude invalidation of State laws on the basis of indirect inconsistency.[140] However, these are both laws of general application to the whole Commonwealth. Both Acts, also, are supported by an express head of Commonwealth legislative power under section 51, pursuant to which the Commonwealth enacted comprehensive regimes applicable throughout the Australian jurisdiction for the appointment of liquidators and trustees and their functions, powers and rights of indemnity; marshalling of assets of insolvent companies and persons; proof and ranking of debts; curial intervention in support of the insolvency processes; distributions to creditors; and the ultimate winding-up of corporations and discharge from bankruptcy. No scope exists for concurrent State laws in these areas of Commonwealth legislative competence.

101. The inconsistencies that arise out of the Amending Act are direct and cannot be avoided. The Amending Act purports to give to the Defendant and its associates rights of indemnity and immunity that would exempt them from the application of the general insolvency provisions of the *Corporations Act* and the *Bankruptcy Act* that otherwise apply uniformly to all creditors and debtors. In particular:

(a) Administrators, liquidators and trustees in bankruptcy have a duty to recover property or compensation for the benefit of creditors and are usually, and subject to the terms of the Commonwealth Acts, entitled to be compensated for their costs of doing so from the general pool without risk of personal liability to persons against whom recovery action is taken.[141] In direct conflict with that general duty, the Amending Act would prevent an administrator, liquidator or trustee from bringing any claim in five ways: first, by purporting to extinguish any liability; secondly, by purporting to exclude all rights to obtain information or documents from the Defendant (e.g. by FOI application, pre-action discovery, or (if applicable) a warrant under s. 530C of the *Corporations Act*) to allow potential claims to be investigated; thirdly, by purporting to exclude any right to access a court (including this Court) to pursue the liability; fourthly, by purporting to require the administrator, liquidator or trustee

[140] See the *Corporations Act 2001*, ss. 5E, 5G and *Bankruptcy Act 1966*, s. 9(1).
[141] *Corporations Act 2001*, Part 5.3A, Division 9.

personally to indemnify the defendant; and fifthly, by preventing any enforcement against the Defendant.

(b) The relevant parts of the *Corporations Act* and the *Bankruptcy Act* each contain comprehensive regimes for proof of debts, adjudication upon proofs and court review of such adjudications. In direct conflict, the Amending Act purports to allow the Defendant and its agents to be indemnified regardless of whether the Defendant and its agents have even suffered, let alone can prove, any loss. Further, the indemnity purports to operate regardless of any other law relating to the quantification of the liability.

(c) The principal assets of mine (and of the Plaintiffs in B54) that would be available for the benefit of creditors in any insolvency are the respective interests in the tenements and agreements that are subject to the State Agreement (in my case, my interests being as shareholder of the ultimate holding company). Any administrator, liquidator or trustee would have an obligation to investigate the value of those assets and to realise their value. The insolvency provisions of the *Corporations Act* and the *Bankruptcy Act* provide powers and mechanisms for them to do so. In direct conflict with this Commonwealth law, the Amending Act seeks to deny all rights of access to information from the Defendant for valuing and offering the assets for sale and purports to oust the jurisdiction of courts under those Acts to make orders in support of the sale that would require the Defendant State to produce any relevant information.

102. It is irrelevant that the insolvency provisions of the *Corporations Act* and the *Bankruptcy Act* have no present application to me and to the Plaintiffs in B54/2020 as they are currently solvent. All persons doing business with me and my companies – including the Australian Taxation Office, for example – are, right now, entitled to the protections afforded by these Commonwealth laws in their dealings, including the protections afforded by the prohibitions on insolvent trading and their rights to participate in an orderly administration of affairs and equitable treatment with other creditors of the same class in the event of insolvency. Similarly, persons doing business with me and my companies look to the Personal Property and Securities Register to understand the security interests attaching to my assets. The scheme of

indemnities creates a security interest which would not be capable of being identified by members of the public.

Inconsistency with the Crimes Act 1914 (Cth), Criminal Code Act 1995 (Cth) and Criminal Code (Cth) and Director of Public Prosecutions Act 1983 (Cth)

103. Section 20(8) of the Amending Act purports to grant immunity from criminal liability to the Defendant (as broadly defined to include also any "State agent" and "State authority"). The Amending Act does not discriminate between criminal liability arising under the State's laws or laws of the Commonwealth or other States or Territories – the immunity that it purports to grant is absolute. No State law can grant immunity from prosecution in respect of Commonwealth or other State/Territory criminal laws, even aside from any question of s. 109 inconsistency.

104. Further, to the extent that s. 20(1) of the Amending Act (read with ss. 20(8) and (9)) purports to prevent the conduct of the Defendant or a "State agent" or "State authority" being called into question on any basis, it is directly inconsistent with Commonwealth officers prosecuting Commonwealth offences: section 9 of the *Director of Public Prosecutions Act* 1983 (Cth).

105. It is irrelevant that no alleged criminal conduct contrary to Commonwealth criminal law has been identified. Criminal laws are the quintessential laws of general application.

Severance and reading-down

106. Notwithstanding section 7 of the *Interpretation Act 1984* and section 8 of the Amending Act, severance or reading-down to avoid section 109 inconsistency with Commonwealth is only possible where what is left of the Amending Act is consistent with the intention of the Parliament.[142] The intended effect of the Amending Act was and is to create a form of absolute sovereign immunity in favour of the Defendant State (and any "State agent" and any "State authority") in any "protected matter". That is impermissible.

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[142] *Bell Group* at [71].

107. It should be concluded, therefore, that the Amending Act is invalid in its entirety.

PART VII: ORDERS SOUGHT

108. Questions 1 to 3 at Part H of the Special Case should be answered: the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA) is invalid in its entirety. The defendant should pay the costs of the Special Case (question 4).[143]

PART VIII: TIME FOR ORAL ARGUMENT

109. I will require a quarter of one day for oral argument, not including reply.

Dated: 23 April 2021

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Plaintiff
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[143] At page 582 of the Special Case. [**SCB 647**]

ANNEXURE

Legislative provisions referred to in written submissions (Practice Direction No 1/2019)

CONSTITUTIONAL PROVISIONS

1. Constitution (Cth), Chs I, III, ss 51, 75, 109, 117

STATUTES

2. *Australia Act 1986* (Cth), s6 (current)
3. *Bankruptcy Act 1966* (Cth) Pt III-VI, s9 (current)
4. *Corporations Act 2001* (Cth), Chpt 5, Pt 5.3A, ss 5E, 5G (current)
5. *Crimes Act 1914* (Cth) (current)
6. *Criminal Code Act 1995* (Cth) (current)
7. *Criminal Code* (Cth) (current)
8. *Director of Public Prosecutions Act 1983* (Cth) (current)
9. *Evidence Act 1995* (Cth) (current)
10. *Federal Court Rules 2011* (Cth) Pt 8, 20, 26 (current)
11. *Federal Court of Australia Act 1976* (Cth) ss 23, 43 (current)
12. *High Court Rules 2004* (Cth) (current)
13. *Judiciary Act 1903* (Cth), Pt IV, V, ss 26, 31, 39B, 58, 64, 78B, 79 (current)
14. *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth) (current)
15. *Personal Protery Securities Act 2009* (Cth) (current)
16. *Service and Execution of Process Act 1992* (Cth) (current)
17. *Interpretation Act 1983 (WA)* ss 7, 19 (current)
18. *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA) (as at 11 December 2008)
19. *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA) (as made)

STATUTORY INSTRUMENTS

Nil