HIGH COURT OF AUSTRALIA

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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

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PLAINTIFF'S OUTLINE OF SUBMISSIONS IN REPLY

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PART I: FORM OF SUBMISSIONS

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

PART II: INTRODUCTION

2. These submissions reply to certain of the submissions filed and served by the Defendant in this proceeding on 21 May 2021 (**DS**).

3. Many of my grounds overlap with grounds advanced by the plaintiffs in B54 of 2020 and consequently the reply submissions in B54 (**B54 RS**) deal with some of those issues. For that reason, I adopt and rely on B54 RS and add to them in this reply to deal with certain matters raised by the Defendant in its submissions dated 21 May 2021 in B54.

PART III: SECTION 117

4. The Defendant[1] seeks to rely on statements from *Street v Queensland Bar Association* (1989) 168 CLR 461 (***Street***): DS [12]-[14]. That authority is addressed in my submissions dated 23 April 2021 (**PS**) in paragraphs [25]-[34]. The Defendant also relies on statements of principle in *Sweedman v Transport Accident Commission* (2006) 226 CLR 362 (***Sweedman***): DS [13]-[17]. The authority of *Street* is not immutable: DS [12]-[14]. As I previously submitted *"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"* (PS [29]). The established criteria for reconsidering previous decisions of this Court[2] are made out because:

   (a) although it has been said that the Court will generally only review a previous decision where it was *"manifestly wrong"*,[3] the Court has a *"duty ... to correct an erroneous interpretation of the fundamental law"* because to do otherwise would make the Court *"guardians, not of the Constitution, but of existing decisions"*;[4]

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[1] And interveners who duplicate or expand on the Defendant's relevant submissions: Submissions for Queensland, intervening, [8]-[10]; Submissions for Victoria, intervening, [4]-[5]; Submissions for the Commonwealth, intervening, [6]-[11].
[2] E.g. *Wurridjal v The Commonwealth* (2009) 237 CLR 309 (***Wurridjal***), [65]-[72] (French CJ).
[3] *The Tramways Case (No 1)* (1914) 18 CLR 54, 58 (Griffith CJ), 69 (Barton J), 70 (Isaacs J), 83 (Gavan Duffy and Rich JJ), 86 (Powers J); *Wurridjal*, [66] (French CJ).
[4] *The Tramways Case (No 1)* (1914) 18 CLR 54, 69 (Isaacs J); *Perpetual Executors and Trustees Association of Australia Ltd v Federal Commissioner of Taxation* (1949) 77 CLR 493, 496 (per totam curiam); *Wurridjal*, [67] (French CJ).

(b) it cannot be said that the decision in *Street* went with *"a definite stream of authority"*; rather, it was *"isolated"* in the sense of receiving no support from other decisions in the very limited section 117 jurisprudence to that point. There is, for the purposes of this case, no *"stream of authority"*;[5] the decision in *Street* should be confined as being an authority for the precise question which it decided and not as setting the metes and bounds of section 117 for all time; *Street* was a constitutional decision and that *"the effect of constitutional decisions cannot generally be remedied by legislative amendments"*;[6] accordingly, it is for this Court to correct and expand the approach to interpreting section 117.

10 5. It is submitted that this Court should apply the Constitution according to its *"ordinary and natural meaning"*[7] and it is not required to adhere to the limited interpretation of section 117 espoused in *Street* (and *Sweedman*). Despite the *"strongly conservative cautionary principle, adopted in the interests of continuity and consistency in the law, that such a course should not lightly be taken"*,[8] the Court should adopt the broader view of section 117 in my primary submissions, even if that involves a departure from the scope of that provision as explained in *Street* (and *Sweedman*): PS [25]-[34]. In any event, a change of *"constructional choice"* in a constitutional case may reflect *"an evolving understanding of the Constitution"*.[9] Adopting a broader view of section 117 does not require a finding that *Street* (or *Sweedman*) was wrongly decided. This is
20 a case in which, *"upon a consideration of text, context, history, and attributed purpose"* the constructional choice per my primary submissions is to be preferred, which *"is not necessarily to say that the choice rejected is wrong"*.[10] The fact this involves different "constructional choices" from those made in *Street* and *Sweedman* is immaterial. That is the answer to the Defendant's submission that I have advocated a *"misguided approach to applying section 117"*: DS [15].

6. The Defendant's submission that it is *"baseless"* to contend that the legislature would have taken a different approach if I resided in Western Australia (DS [16]) is also irrelevant if the Court adopts the broader view of section 117 which I submit it should adopt. In any event, it is clear from the statements made in Parliament that my

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[5] See *Queensland v The Commonwealth* (1977) 139 CLR 585, 630 (Aickin J); *Wurridjal*, [68] (French CJ).
[6] *Wurridjal v The Commonwealth* (2009) 237 CLR 309, [68] (French CJ)
[7] *Re Canavan & Ors* [2017] HCA 45 at [19] and [27] per the Court.
[8] Ibid., [70] (French CJ).
[9] Ibid., [71] (French CJ).
[10] Ibid.

submission was correct: see PS [26].

7. There is no basis for the Defendant's submission that *"even if discriminatory treatment were discerned, it would be of a kind that was appropriate and adapted to the attainment of a proper objective"*: DS [17]. On the contrary, what the Defendant now calls *"the extraordinary mischief to which this legislation was directed"* (DS [11]) arose in this way:

(a) the "threat of a liability" was first created when the Defendant's Minister made a decision in 2012 which the arbitrator found was unlawful as being made without any lawful power.[11] The Minister's purported decision in 2012 was not a mere inadvertent breach of his legal obligations; rather, as the arbitrator found, it was *"an attempt to circumvent the Court of Appeal's ruling that the Minister has no power to reject a proposal"*.[12] That attempted circumvention involved a cynical attempt to *"categorise the August 2012 submission as not being a proposal"*.[13] It thus involved a contemptuous disregard of a binding decision of the highest court in the Defendant State. It was only natural for those affected by the Minister's 2012 breach of the State Agreement – which the Defendant was always bound by - to seek redress subsequently for the damage caused by that breach, which I caused them to do and which was the purpose of the subsequent arbitral proceedings; and

(b) the companies which I control have suffered *"damages of a staggering magnitude"* (DS [11]) because the Defendant's breach of its legal obligations has caused very serious damage to those companies and me. It does not mean that the Defendant is justified in targeting legislation against me and using the power of the State (in all its legal emanations) to treat me as a pariah. Nor does it mean that the Defendant acted in a manner which was *"appropriate"* or was seeking *"the attainment of a proper objective"* in enacting the Amending Act and subjecting me to impermissible disability and discrimination. The Amending Act deems events which occurred between 2012 and 2020 not to have occurred. It rewrites history in an Orwellian manner which creates a "statutory fiction"[14] that the Minister never made his unlawful decision, that nothing was done to harm my two companies and

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[11] SCB 190.
[12] SCB 237. The arbitrator was there referring to *Mineralogy Pty Ltd v Western Australia* [2005] WASCA 69 at [58].
[13] SCB 237.
[14] *University of Wollongong v Metwally* (1984) 158 CLR 447, 457 (Gibbs CJ), 465 (Mason J), 478-479 (Deane J).

that the arbitration agreements, arbitral proceedings and arbitral awards never existed. There is therefore nothing "proper" about any disability or discrimination imposed on me by the Defendant. On the contrary, that is merely a perpetuation of conduct by the Defendant towards my companies and me which, since 2012, has been inappropriate and improper in the respects referred to above.

8. As the Defendant accepts in DS [18], it is permissible to seek to discern the purpose of an Act with reference to extrinsic material.[15] That is all I seek to do. Rather than searching for the subjective intentions of those who promoted or passed the Amending Act, I seek to establish the purpose of the Amending Act objectively, including with reference to *Hansard*. For the reasons given in Nettle J's interlocutory reasons dated 18 November 2020,[16] and having regard to section 19(2)(h) of the *Interpretation Act 1984* (WA), I am entitled to do so. I note that the Defendant has regarded itself as perfectly entitled to refer to *Hansard* for similar purposes in DS [34] and has also done so in its submissions in proceeding B54/2020 (at [23] and [129]).

9. The Defendant submits in DS [19] that I do not refer to the *Hansard* material to demonstrate the "mischief" to which the Act was directed but, for the reasons already advanced in my original submissions, and the above paragraph, that is precisely what I do: PS [22]-[24]. The submission in DS [19] that my approach *"wrongly assumes that particular statements made by members of Parliament can be taken to represent the motivation of Parliament generally in enacting the Amending Act"* should also be rejected. The Amending Act was passed without any effective opposition and the legislative intention of the Parliament may safely be discerned, objectively, from the statements made in *Hansard*. This is well illustrated by the statement by the Leader of the Opposition in the Legislative Assembly that *"we are not opposing this legislation. We are taking the government on trust and in good faith that this is the right course of action"*[17] and the statement by the Leader of the Opposition in the Legislative Council that *"On behalf of Western Australians, we are being asked to trust the Western Australian government, given that its representatives in the Legislative Assembly and the Legislative Council have been given zero time to consider this legislation"*.[18] It

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[15] *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547, 561, [12] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).
[16] *Palmer v The State of Western Australia*, unreported, Nettle J, 18 November 2020 at [40].
[17] SCB 417.
[18] SCB 513.

matters not that there were a few lonely voices of dissent.[19]

10. There is no substance in the Defendant's submissions in DS [19] that it is appropriate to differentiate between the statements recorded in *Hansard* on the basis of the political affiliation of the maker of each statement or on the basis that some of the statements expressed concern about the proposed legislation. Reference may still be made to those statements to ascertain, objectively, the purpose of the Amending Act. Alternatively, if it is appropriate to seek to discern *"the motivation of Parliament generally"* as the Defendant suggests in DS [19] (contrary to some of its other submissions), that is abundantly clear from the statements recorded in *Hansard*, including in DS [19].

11. The submissions at DS [20]-[22] concerning Parliamentary privilege should also be rejected. An extreme law requires examination of all available matters in ascertaining its real purpose. As the Defendant acknowledges, section 1(a) of the *Parliamentary Privileges Act 1891* (WA) picks up Article 9 of the *Bill of Rights 1689* (Imp). Article 9 was enacted for the purpose of preventing members of Parliament from being subject to penalties for statements made by them in the House. As much is clear from the text of Article 9 itself, which provides that it is "the freedom of speech and debates or proceedings in Parliament" which must not be "impeached" or "questioned" in any Court or place out of Parliament. Its purpose has never been to shield Parliamentary statements which shed light on the purpose of legislation from scrutiny by the Courts.

12. Article 9 was the result of a long battle between the Parliament and the monarch in England. Its catalyst was a case in the 17th century in which certain members of Parliament were prosecuted, convicted and imprisoned in the Tower of London for allegedly seditious statements made in Parliament during the reign of King Charles I.[20]

13. The essential purpose of Article 9 is thus to enable members of Parliament to carry out their functions effectively, without any fear that they will be subjected to penalties for statements made by them in Parliament. In that regard, when considering the scope of Article 9, the courts have had regard to its evident history and purpose.[21] The purpose of Parliamentary privilege is to ensure that members of Parliament can speak freely, fully, fearlessly and without inhibition whenever they are engaged in debates and other proceedings in Parliament. It is not permissible to go behind the statements which are

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[19] E.g. the Hon. Aaron Stonehouse SCB 577.
[20] *R v Eliot, Holles and Valentine* (1629) 3 St Tr 294.
[21] *Pepper v Hart* [1993] AC 593, 638 (Lord Browne-Wilkinson); *Prebble v Television New Zealand Ltd* [1995] AC 321, 334.

made in such proceedings and, in the language of Article 9, seek to have such statements *"impeached or questioned in any Court or place out of Parliament"*. What is permissible, however, is to refer to and rely upon such statements as objective evidence of the purpose of an Act. The history and purpose of Article 9 must be borne in mind whenever the executive seeks to use Parliamentary privilege as a shield, in a manner which has nothing to do with protecting freedom of speech in a Parliament. Thus, when the British Government sought to argue that the prorogation of the Parliament of the United Kingdom was a Parliamentary proceeding and that its validity could not be questioned by a court, the Supreme Court of the United Kingdom, in a unanimous decision of 11 Law Lords, looked to the core business of Parliament and the protection of freedom of speech and rejected the government's argument.[22]

14. It is respectfully submitted that this Court can and should interpret and apply Article 9 in a manner consistent with the judicial power of the Commonwealth, particularly as that is defined in sections 75 and 76 of the Constitution. Under the Constitution, no State Parliament enjoys a status greater than this Court, which is the entrenched federal supreme court under section 71. By the same token, no State Parliament or executive can use a claim of Parliamentary privilege to inoculate itself against scrutiny by this Court in a matter involving the Constitution or its interpretation. Any such claim must be trumped by the constitutional mandates for such a claim to be brought under a provision such as section 117 of the Constitution (or section 75(iv), see below). The obvious requirement is for justice to be done under Chapter III of the Constitution.

15. Article 9 (and the Western Australian provision which picks it up) must be given an interpretation which promotes, rather than hinders, the ability of Chapter III courts to perform their functions under the Constitution, including by reviewing and adjudicating upon the validity or otherwise of the actions of a State Parliament. Previous authority indicates that Article 9 does not preclude a Chapter III court from receiving evidence of what occurred during Parliamentary proceedings to determine whether a Parliament exceeded its powers.[23] In this case, the contention that the Defendant's Parliament exceeded its powers by enacting unconstitutional legislation, is appropriate. I should be permitted to rely upon the statements recorded in *Hansard*. Finally, the Defendant submits that nothing precludes a State from enacting *"parochial"* laws *"which are perceived to be in the interests of the State (rather than*

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[22] *R (on the application of Miller) v Prime Minister* [2019] UKSC 41, [68].
[23] *Egan v Chadwick* (1999) 46 NSWLR 563; *Egan v Willis* (1998) 195 CLR 424.

necessarily the 'national interest in national unity')": DS [23]. That submission should be rejected. That is because, as I said in my original submissions, "*localism of a kind corrosive to national unity*" is a step too far and section 117 should strike against it: PS [29]-[34]. The Defendant's submissions on this issue (particularly DS [12]-[16]) overlook the fact that section 117 is concerned with substance, not form.[24] A corollary of this is that there may be disability on the basis of State residence even where the law does not, in terms, make State residence the criterion of its operation.[25]

16. The small number of decided cases on section 117 concern laws of general application which, in form or substance, have operated to impose discriminatory burdens on out-of-State residents. In those cases, in order to test whether there is a discriminatory burden, it has been sufficient to ask how the law would operate on the plaintiff if the plaintiff had been an in-State resident.[26] The Amending Act differs fundamentally from the laws in issue in those cases relied upon by the defendant at DS [12]-[16]. The Amending Act is not a law of general application. It is, as the Defendant accepts (DS [8]), "an ad hominem law". It is a law which specifically targets me.

17. In a case such as this, one does not ask how the Amending Act would operate on me if I were to become a resident of Western Australia. Instead, the constitutional fact of discrimination arises because the Amending Act singles out one named individual (me), an out-of-State resident. The Amending Act discriminates against me on the basis of State residence by its legal operation: it directly and expressly targets an out-of-State resident (me) for special disabilities. It does not directly and expressly target any in-State resident. Accordingly, the Amending Act burdens me significantly but the Defendant cannot point to a single in-State resident who is burdened by it at all. This amounts to discrimination of a kind which section 117 makes impermissible.

18. To hold that the Amending Act does not fall foul of section 117 would be inconsistent with the fundamental objects of section 117. Section 117 is a fundamental constitutional guarantee of national unity and "equal treatment under the law".[27]

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[24] *Sweedman v Transport Accident Commission* (2006) 226 CLR 362, [59] (Gleeson CJ, Gummow, Kirby and Hayne JJ); [156] (Heydon J).
[25] See, for example, *Street v Queensland Bar Association* (1989) 168 CLR 461, 487-488 (Mason CJ), 509-510, 517-518 (Brennan J), 525, 428, 529-530 (Deane J), 543-546 (Dawson J), 552 (Toohey J), 568-570 (Gaudron J), 580-582 (McHugh J).
[26] See, for example, *Street v Queensland Bar Association* (1989) 168 CLR 461, 486-489 (Mason CJ), 506-508 (Brennan J), 525 (Deane J), 544-546, 548-549 (Dawson J), 555, 559 (Toohey J), 566-567 (Gaudron J), 589 (McHugh J); *Goryl v Greyhound Australia Pty Ltd* (1994) 179 CLR 463, 474 (Brennan J), 494-495 (McHugh J).
[27] *Goryl v Greyhound Australia Pty Ltd* (1994) 179 CLR 463, 493 (McHugh J); *Street v Queensland Bar Association* (1989) 168 CLR 461, 512 (Brennan J), 485 (Mason CJ), 522 (Deane J), 554 (Toohey J).

Unlike many other constitutional guarantees, section 117 is a guarantee of *individual* rights.[28] It is to be construed liberally.[29] A State law such as the Amending Act, which specifically targets a named citizen, who is an out-of-State resident, for discrimination and for the imposition of significant disabilities, is fundamentally inconsistent with the requirement of equal treatment under the law for each citizen in the federation, which is necessary to make the federation fully effective.[30]

19. Finally, DS [17] asserts that, if discrimination is established under section 117 *"it would be of a kind that was appropriate and adapted to the attainment of a proper objective"*. For the reasons outlined elsewhere in these submissions, and in my principal submissions, that is not the case. The Amending Act is not proportionate to any constitutionally permissible end. Refer paragraph [8] above.

PART IV: SECTION 75(IV)

20. The submissions in DS [25] (and submissions of interveners which duplicate or expand on them)[31] should be rejected. Judicial power is not susceptible to an exhaustive or exclusive definition.[32] The *Duncan* case[33] is entirely distinguishable on its unique facts, and the Amending Act constituted an exercise of judicial power, in each case for the reasons set out in detail in PS [40]-[51]. In its pleadings the Defendant has admitted the allegation in paragraph 105 of my third further amended statement of claim (**3FASOC**) that the diversity jurisdiction in section 75(iv) "applies to courts only".[34] The Defendant admitted the allegation in paragraph 106 of the 3FASOC that a State is not empowered to invest adjudicative authority in bodies other than Chapter III courts in respect of matters falling within the diversity jurisdiction.[35] Most of paragraphs 102 to 106 of the 3FASOC have been admitted by the Defendant, the State's denial of the allegations in paragraphs 107 to 112 and 115 of the 3FASOC is not tenable.

21. DS [25] describes the Amending Act as having *"declared the rights and obligations of various parties"*. With respect, that is euphemistic "doublespeak", which could equally

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[28] *Alqudsi v R* (2016) 258 CLR 203, [186] (Nettle and Gordon JJ); *Street v Queensland Bar Association* (1989) 168 CLR 461, 485-491 (Mason CJ), 502-503, 506 (Brennan J); *Goryl v Greyhound Australia Pty Ltd* (1994) 179 CLR 463, 495 (McHugh J).
[29] *Street v Queensland Bar Association* (1989) 168 CLR 461, 485 (Mason CJ), 554 (Toohey J).
[30] *Goryl v Greyhound Australia Pty Ltd* (1994) 179 CLR 463, 493 (McHugh J).
[31] See in particular: Submissions for New South Wales, intervening, in B54/2020, [4]-[14]; Submissions for Queensland, intervening, in B54/2020, [22]-[26]; Submissions for Queensland, intervening, in B52/2020, [12].
[32] As New South Wales concedes in its submissions in B54/2020 at [4]. See the authorities cited there.
[33] *Duncan v New South Wales* (2015) 255 CLR 388.
[34] SCB 640, SCB 687.
[35] SCB 640, SCB 687.

be applied to some of the most unjust laws in history. What the Amending Act did, in truth, was to declare that rights and obligations of certain parties, which had already been declared one way following a quasi-judicial process of arbitration conducted over a period of some 8 years by a highly respected arbitrator, should be declared the opposite way. The Amending Act purports to declare that the arbitrator was wrong and that the original unlawful decision of the Minister in 2012 was right. The Amending Act purports to do what an appellate court or tribunal might do in reversing the judicial or quasi-judicial decision of a primary decision maker. It thus involved a quintessentially judicial exercise of power.

22. I was not a party to the arbitral proceedings: DS[26], but that does not alter the fact that, for reasons already mentioned in PS [35]-[39], the purpose and effect of the Amending Act is to quell a matter between the Defendant and a resident of another State (namely me). The matter was not limited to the arbitral proceedings and my two companies. The Defendant concedes earlier in its submissions, at DS [19(b)(I)], that the Amending Act reflected *"the Government's approach to dealing with the plaintiff"* (i.e. me). That is indeed an accurate description, and one which reflects the fact that the Amending Act sought to resolve, determine, erase or quell a dispute between the State of Western Australia and me.

23. As the statements in *Hansard* demonstrate, and as the Defendant's submissions at DS [19(c)] recognise, that dispute not only involved the arbitral proceedings but also involved other proceedings, in which I was the plaintiff and the State of Western Australia was a defendant. Further, as acknowledged in DS [7], the arbitral proceedings arose out of a State Agreement which also conferred rights and obligations on me (as the beneficial owner of the shares in those companies). The companies are relevant to the Amending Act inter alia because of my ownership and control of those companies. The purpose of the Amending Act was to target me not only directly but also indirectly (through the two companies which I control and beneficially own): PS [8(h)] and [22]. The Amending Act imposes penalties on me <u>personally</u> (in the form of indemnities) if I cause those companies to take any further steps to vindicate rights that were conferred by that State Agreement – an agreement that the Defendant had not just entered into but enacted. I repeat these reasons, and my earlier submissions (at PS [36]-[39]). The purpose of the Amending Act was to resolve a "matter" between the Defendant and a resident of another State (me). In the end it is me who pays. It is all aimed at me. Contrary to the submissions in DS [27], reference to the statements

in *Hansard* is permissible for the same reasons set out above in relation to the section 117 claim. In addition to the matters existing prior to the enactment of the Amending Act, the Amending Act creates and quells matters between me and the State.

PART V: SECTION 118

24. There are critical flaws in the Defendant's arguments concerning section 118 in its response to B54 PS (**B54 DS**).

25. The Defendant places considerable emphasis (particularly at B54 DS [171]-[173]) on what it describes as the *"contractual effect"* of an arbitral award and asserts that section 35 of the *Commercial Arbitration Acts* merely recognises *"that there is an award that has been made between the parties and has contractual effect, and which replaces the disputed rights and liabilities between the parties through a process of accord and satisfaction"*. The critical flaw in this argument is that, as the Defendant states in B54 DS [171], *"when an arbitral award is made, it is the result of a contractual agreement between the parties"*. In other words, such an award *already* has contractual effect and the various State and Territory legislatures can hardly have intended to enact a provision which was patently unnecessary to achieve a purpose which had already been achieved. Upon making of an arbitral award, the contractual rights the subject of the arbitration cease to exist and the award stands independently. The Defendant does not allege that contracts exist between any of the Plaintiffs and any Australian states other than the State Agreement with Western Australia. The arbitral awards were binding, at and from the time they were made, by legislative statement (see below) in all Australian States and Territories. No State has the power to repeal another State's legislative statement. The Amending Act is invalid as it does not achieve one of its main purposes. It is not a *contract* that is binding under section 35 of the *Commercial Arbitration Act* it is the *award* that is binding. An award that is the child of the arbitration process. At the commencement of any arbitration process between parties, the award necessarily did not exist and the award when made creates new rights. The leading case on the interpretation of Art. 35 in Australia is *TCL Air Conditioner (Zhongshan) v. Judges of the Federal Court of Australia*.[36] Article 35 is in materially identical terms to s. 35.[37] French CJ and Gageler J concluded that an arbitral award:[38]

[36] (2013) 251 CLR 555.
[37] TCL at [52]. See also s. 2A(1).
[38] At [23]; see also [31].

"is binding by force of the Model Law on the parties to the arbitration agreement for all purposes, on and from the date the arbitral award is made. The purposes for which an arbitral award is recognised as binding include reliance on the award in legal proceedings in ways that do not involve enforcement, such as founding a plea of former recovery or as giving rise to a res judicata or issue estoppel."

26. Much like a court declaration, a legislative statement is conclusive in respect of the matter it determines or declares and has the full force of the law. The two awards have the full force of law under all the State and Territory arbitral acts. Consequently, the Amending Act is invalid under section 118 of the *Constitution*.

27. The second flaw in the Defendant's argument is to elide the first "limb" of section 35 (which provides legislative recognition of the binding nature of an arbitral award) and the second "limb" of section 35 which relates to enforcement and which, as the Defendant puts it, "invests the award with the effect of a curial judgment": DS [171] in B54/2020. The disjunctive "and", where it first appears in section 35, is intended to separate the two fundamentally different concepts. What the Defendant overlooks is that the first limb of section 35 invests an arbitral award with a binding nature by force of statute and not merely as a matter of contract.

28. On its proper analysis, the first "limb" of section 35 of the *Commercial Arbitration Acts* makes a legislative statement to the effect that an arbitral award, irrespective of the State or Territory in which it was made, *"is to be recognised ... as binding"*. There are obvious policy reasons supporting this construction. It means, for example, that a recipient of a favourable arbitral award cannot be exposed to an assertion by the unsuccessful party that the award is not binding for some reason (for example, because the contract from which it resulted was void or voidable) because the legislation had declared otherwise. That is the purpose and import of the first "limb" of section 35.

29. The *Commercial Arbitration Acts* represent uniform legislation in materially identical terms, applicable in every State and Territory of Australia. It is not adverted to in the Defendant's submissions. It militates against the suggestion that an individual State, having adopted and enacted uniform legislation as part of a national scheme of commercial arbitration, can break ranks with the remaining States and Territories and rend asunder the national scheme, which was established in the national interest.

30. There are other strong policy reasons for preferring this construction of section 35 of the *Commercial Arbitration Acts*. It promotes the coherence and credibility of the

national scheme of commercial arbitration and to protect Australia's reputation, both domestically and internationally, as a credible "seat" for commercial arbitrations.

31. Public policy dictates that the national scheme of commercial arbitration functions in the same way throughout the whole of Australia , as the uniform legislation intended, an arbitral award is to be recognised as binding regardless of where in Australia it was made (as opposed to arbitral awards in one particular State being liable to sudden legislative reversal if the government of the day is not pleased with them). This provides the certainty which the uniform legislation plainly intended. It promotes business confidence in the national arbitration system. If confidence is eroded or destroyed, parties will no longer trust the national commercial arbitration system and will prefer to submit all of their disputes to a court, without the risk of the fruits of a victory suddenly being snatched away from them by a State legislature. This would run contrary to the public policy of promoting commercial arbitration, and reducing the workload of the courts, which, it may safely be inferred, led to the introduction of the national commercial arbitration system in the first place.

PART V: BILL OF PAINS AND PENALTIES OR "EXTREME LAW"

32. Contrary to the submissions in DS [31]-[32], when the Amending Act is read in the light of the extrinsic materials which explain its purpose, it is plain the Amending Act imposes punishment on me (and persons associated with me): see PS [22], [38], [71].

33. When the Amending Act is read in the light of the extrinsic materials which explain its purpose, it does much more than *"impose adverse consequences"* upon me (see DS [33]). It was enacted to exact retribution against me as someone that the Defendant's Premier had *"declared war against"*. The answer to the Defendant's submission[39] is inter alia that the Amending Act is, in substance, a calculated punishment of me for seeking to vindicate established and actually *agreed (by the State)* rights.

34. Contrary to DS [35], the Amending Act does not do anything *"in a conventional way"*. Nettle J previously described the Amending Act as *"unprecedented"* and *"extraordinary"*.[40] There are numerous statements in *Hansard* to similar effect, even including one in the second reading speech by the Defendant's Attorney-General, who

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[39] See also Submissions for Queensland, intervening, [23]-[25]; Submissions for Victoria, intervening, [11]-[12]; Submissions for the Commonwealth, intervening, [18].
[40] *Palmer v The State of Western Australia*, unreported, Nettle J, 18 November 2020 at [4].

admitted that "the bill is unprecedented".[41] In further response to DS [35],[42] the *Durham* case[43] is able to be reconsidered for reasons similar to those set out in paragraph [5] of these submissions. That is especially so given that, in my submission, the Amending Act does amount to *"an extreme affront masquerading as a State law"*.

PART VI: NON-COMPLIANCE WITH MANNER AND FORM REQUIREMENTS

35. The Defendant has refused, now resolutely, to come to grips with the import and breadth of its own law and the State Agreement that the Defendant enacted in 2002 as a Schedule to the *Iron Ore Processing (Mineralogy Pty. Ltd.) Agreement Act 2002* (WA) (***Original Act***).

36. That the Defendant was always so bound was clear from the Original Act, which stated, clearly, in section 4(1)-(3) that the State Agreement was ratified, its implementation authorised, and that "....*the Agreement operates and takes effect despite any other Act or law*". In recognition of this legislative supremacy, the Defendant adhered to the Original Act's own "*Manner and Form*" requirements by following the process set down by clause 32 when it sought the law's amendment in 2008.[44] There was – at no stage in the almost 20 years of the State Agreement – any proposed variation by the Defendant State (per clause 32) except as occurred in 2008[45]. Nor were there, in this almost 20 year period, any alleged grounds advanced by the Defendant (per clause 35) to justify a termination of the State Agreement. The most significant authority cited in opposition by the Defendant concerns an appeal brought under the *Native Title Act* 1993 (Cth) in factual circumstances that are entirely irrelevant to the Defendant's legislative annihilation of the Original Act and the obligations imposed on the Defendant by the State Agreement (which the Defendant had previously observed from 2002 until 13 August 2020).

37. Since 1952 "*State Agreements*" have been used to attract investment. The size, cost, and duration of such interests require certainty. The Original Act ratifying the State Agreement provides statutory protections under law on which investors have, historically, relied. Such a legal regime protects me, and others. Since 2002 onwards, the Original Act including the ratified State Agreement erected a juridical regime to

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[41] Western Australia, *Parliamentary Debates,* Legislative Assembly, 11 August 2020, 4599.
[42] And Submissions for Queensland, intervening, [28]-[33]; Submissions for Victoria, intervening, [13].
[43] *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399.
[44] *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2008* (No. 48 of 2008) (WA).
[45] *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2008* (No. 48 of 2008) (WA).

govern, exclusively, the Defendant's relationships with signatories of State Agreement and me.

38. The Original Act was, in all of its substance, a law that bound the Defendant to observe its "*Manner and Form*". In 2002, and at all times since, the Defendant was enacting – and preserving until 13 August 2020 – a law that explicitly limited the Defendant's powers and stipulated precise procedures for any variation. Contrary to the Defendant's submission that clause 32 of the State Agreement "does not have the force of law" (DS [94]), clause 32 forms part of a State Agreement which has been legislatively ratified and the implementation of which has been legislatively authorised[46] and, most importantly, the State Agreement "operates and takes effect despite any other Act or law".[47] The same is true of the variation agreement of 2008.

39. The State Agreement as ratified by Parliament is expressed to operate and take effect in accordance with this legislative formula, its provisions will prevail over "any other Act or law". This gives its provisions, including clause 32, a status greater than that of any ordinary Act or law of Parliament. The terms of the ratified State Agreement must in substance form part of the Original Act. The ratified State Agreement is a law amending existing legislation and grants new rights to Mineralogy: clauses 6, 9, 10, 13, 21, 41.[48] It also has a public purpose inter alia to provide third party access to ports (clause 21(3) and railways (clause 22(3)), and to establish a new town (clauses 18 and 19), something which only a law of Parliament can do. The ratified State Agreement creates new rights; it does not simply disapply existing legislation.

40. Further, a decision in favour of this "manner and form" argument would find support in considerations of public policy. It would have a positive effect on the international investment community and Australia's reputation as a safe place to invest. Specifically, it would mean that State Agreements could be relied upon by international investors, whose support is necessary to enable large scale projects to be financed and developed for the benefit of Australia. This would be consistent with free trade agreements between Australia and other countries.

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[46] Original Act, section 4(1)-(2).
[47] Original Act, section 4(3).
[48] SCB 90, 98, 102, 113, 122, 139, respectively.

41. In its submissions in both this matter and B54, the Commonwealth advances no competing construction of the *Australia Act 1986* (Cth), despite that being a law of the Commonwealth now under adjudication in this Court. The Commonwealth has simply adopted the Defendant's submissions.[49] The Court should not only reject the Defendant's construction for the reasons set out in my submissions but it should also draw appropriate inferences from the Commonwealth's unwillingness to enter into the arena of the proper construction of its own law.

42. The Defendant has from 2002 adhered to its "*Manner and Form*" obligations by way of its 2008 amendments.[50] The Defendant accepted the Original Act in 2002 and 2008 – and the Defendant remains constrained by the law it established. The Amending Act is entirely invalid.

43. A final point relates to the Defendant's response to B54 PS, where[51] the Defendant postulates a scenario involving a claim by Zeph Investments Pte Ltd against the Commonwealth. In reply, I note that the Constitution establishes that the legislative and executive power to conduct Australia's external affairs is reposed solely in the Commonwealth: see ss 51 (xxix) and 61. The Defendant cannot enact legislation which interferes with the Commonwealth's prerogative power to negotiate, enter into or perform international agreements.[52] As the Defendant's scenario shows, the Amending Act impermissibly interferes with free trade agreements made under ss 51 (xxix) and 61 of the *Constitution* and is repugnant to justice.

44. Other than the matters set out in these submissions, my principal submissions, and the Plainttiffs' submission in B54, the Interveners' submissions do not merit any further consideration.

Dated: 4 June 2021

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Plaintiff

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[49] Submissions for the Commonwealth, intervening, in B54/2020, [8].
[50] *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act* 2008 (WA).
[51] At [139].
[52] Including obligations which the Commonwealth has under Section B of Chapter 8 of the Singapore-Australia Free Trade Agreement and under The Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, 18 March 1965.

ANNEXURE

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

CONSTITUTIONAL PROVISIONS

1. Constitution (Cth), Ch III, ss 71, 75, 76, 117, 118

STATUTES

2. *Parliamentary Privileges Act 1891* (WA) (current)
3. *Bill of Rights 1689* (Imp) Art 9
4. *Commercial Arbitration Acts* s 35 (current)
5. *Australia Act 1986* (Cth), s 6 (current)
6. *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA) (as at 11 December 2008)
7. *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2008* (WA) (as made)
8. *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA) (as made)

STATUTORY INSTRUMENTS

Nil.