IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

NO S163 OF 2012

BETWEEN

FORTESCUE METALS GROUP LIMITED
First Plaintiff

CHICHESTER METALS PTY LIMITED
Second Plaintiff

FMG PILBARA PTY LIMITED
Third Plaintiff

FMG MAGNETITE PTY LIMITED
Fourth Plaintiff

FMG NORTH PILBARA PTY LIMITED
Fifth Plaintiff

AND

THE COMMONWEALTH OF AUSTRALIA
Defendant

SUBMISSIONS OF THE COMMONWEALTH OF AUSTRALIA

Filed on behalf of the Commonwealth by:

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PART I PUBLICATION

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

PART II ISSUES

2. The primary issues are correctly identified in the plaintiffs' submissions (**PS**) at [3].

PART III JUDICIARY ACT 1903, SECTION 78B

3. Notices have been issued by the plaintiffs pursuant to s 78B of the *Judiciary Act 1903* (Cth).

PART IV RELEVANT FACTS

4. The Questions Reserved have been referred to the Full Court on the basis of the pleadings and the documents referred to in the pleadings. The brief factual summary at [6] of the plaintiffs' submissions is accurate, although it will be necessary to deal in more detail below with the likely factual operation of the legislation. The plaintiffs' short chronology is accurate.

PART V ARGUMENT

Introduction

5. Some key, high level points should be made at the outset. *First*, the plaintiffs and interveners, correctly, do not mount any challenge to the ability of the Commonwealth Parliament to use the taxation power under s 51(ii) to impose a tax which chooses as its subject matter a category of profits, namely above normal profits as defined, made by persons carrying on particular businesses, namely the mining of certain, finite, non-renewable resources: see *Minerals Resource Rent Tax Act 2012* (Cth) (**MRRT Act**) s 1-10. Their only complaint is about the manner in which Parliament has chosen to define one element in the identification of the above normal profits to which the uniform rate of tax is to be applied, namely the royalty allowance in Part 3-1.

6. *Secondly,* the exercise of defining what are the above normal profits of a particular enterprise necessarily requires an identification of both the revenues and the expenditures of the enterprise, and also some means to distinguish between that part of a profit that is 'normal' and free of Minerals Resource Rent Tax (**MRRT**) and that part of a profit that is 'above normal', to which the tax will apply.

7. *Thirdly,* the notion that, in determining a Commonwealth tax base, regard will be had to related imposts at a State, Territory or Commonwealth level - whether imposts by way of taxation, royalty or otherwise - is hardly new. Nor is it new that such imposts will at times vary between the polities charging them, for reasons thought good by the various polities, and that the Commonwealth tax base will recognise such imposts, in the form and the amount that each polity may choose to charge them. None of this has ever been thought to 'discriminate' against the States or to attack some central element of their functioning. Rather it has always been seen to be both fair to the taxpayer to allow for the various imposts, in whatever form and amount they may be imposed, and respectful of the decisions made by the various polities within the Commonwealth so to do.

8. *Fourthly,* a clear example of having regard to State imposts in determining the tax base for a Commonwealth tax lies in the income tax regime. That regime permits a deduction against Commonwealth income tax for the amount of payroll tax, land tax, State royalties and indeed any State impost that is an expense or outgoing incurred by a taxpayer in the circumstances identified in s 8-1(a) or (b) of the *Income Tax Assessment Act 1997* (Cth) (***ITAA***). These imposts often vary from State to State and from time to time. It has never been suggested, and is not suggested in the present case, that Commonwealth provision for the deduction of the amount of such imposts in determining liability for income tax offends against the Constitution. The plaintiffs do not challenge the ability of miners to deduct the amount of applicable State imposts, including State royalties, when calculating their Commonwealth income tax liabilities, yet they seek to challenge a related ability in the context of the MRRT. The reason why one case is permissible and the other constitutionally invalid is never squarely addressed by the plaintiffs (and Queensland's attempt to suggest that taxable income is a 'legal construct' that can be validly made up by deducting State royalties whereas net profit for MRRT purposes is a creature subject to different constitutional rules[1] makes no obvious sense).

9. Once a Commonwealth tax recognises that some allowance needs to be made for relevant imposts incurred at State level, it becomes simply a matter of crafting the tax structure in the manner thought desirable. The allowance might be by way of straight deduction, as in the conventional income tax case. It might be by way of enhanced deduction or a percentage credit against the amount of the tax otherwise payable.[2] In the United States, the concept of a federal credit for amounts paid in State imposts has been expressly upheld.[3] Whether a State impost is treated within a Commonwealth tax as a deduction or a credit (in full or at some percentage rate), it remains arithmetically true that 'everything else being equal' (to adopt the plaintiffs' approach) an increase in the State impost may lead to a reduction in the amount of Commonwealth tax, and conversely a reduction in the State impost may lead to an increase in the amount of Commonwealth tax. How this might affect taxpayers in their business decisions is simply one of a raft of variables a State, or any other polity, might properly factor into a prudential judgment as to the structure and level at which to set the State impost. A State can have no cause for constitutional complaint if, having weighed all the factors, it sets its imposts in a different manner and amount to other States, and this leads to a Commonwealth tax imposed at a uniform rate producing a different ultimate incidence in the burden on taxpayers in different localities.

10. *Fifthly,* there is a distinct and heretical 'reserved powers' flavour in the submissions put, particularly by Queensland, which the Court should be astute to reject. The scope of the Commonwealth's taxation power, including its express and implied limits, is not to be discerned from observing that control of mining and minerals rests primarily with the States. The State royalty and the Commonwealth tax rely on different sources of power to achieve different ends.

11. *Sixthly,* the cases of the plaintiffs and the interveners hinge on two factual propositions which the highly limited evidentiary record simply does not support: (a) that it is a real, significant and continuing

1 Queensland submissions (**QS**) fn 44.

2 See,eg the 40% 'producer offset' for 'qualifying Australian production expenditure' (which includes State payroll tax) on Australian feature films: ss 376-55 – 376-75 of the *ITAA*.

3 *Florida v Mellon* 273 US 12 (1927) at 17; *Steward Machine Co v Davis* 301 US 548 (1937).

feature of the functioning of the States within the modern Commonwealth that they will effect *reductions* in royalty *rates* for the purpose of encouraging miners to invest and build infrastructure for general community benefit; and (b) that the MRRT Act substantially impedes that ability because any reduction in royalty will lead to an *automatic and proportionate increase* in MRRT liability.

12. However: (a) the evidence that States may have reduced royalties in the past is limited and ancient, with the recent experience being to the contrary, as the States, understandably, seek to cash in on high ore prices in global markets;[4] (b) even if a State did reduce its royalties, the MRRT Act does *not* produce an automatic and proportionate increase in MRRT, for a variety of reasons which emerge from the structure of the Act but are glossed over by the plaintiffs;[5] (c) to the extent that the MRRT Act might have a dampening effect on the incentive arising from the (unlikely) reduction in royalty, it does so equally across all polities that might engage in such behaviour, as would occur under the *Income Tax Acts*; (d) how that dampening effect, should it arise, might impact on the decisions of the plaintiffs or other investors, and in turn on the outcomes for the States, would depend on a variety of economic and competitive factors of which the plaintiffs have led no evidence, and on which no conclusions can safely be drawn.[6] Accordingly, the case that the MRRT 'effectively prevents a State from reducing or giving concessions in respect of royalties payable' (PS [108]), that 'a State's capacity to reduce royalty rates as an economic incentive is significantly curtailed', or that the 'ability to reduce royalties to promote other governmental goals is entirely neutered' (PS [122])[7] must fail on the state of the evidence alone.

13. In the end, this case should be seen for what it is. The plaintiffs do not like the MRRT Act because they *may* have to pay more for the ability to harness above normal profits from carrying on mining in Australia. The interveners would like to be able to assert that the Commonwealth taxation power cannot extend to the activity of mining which they see as lying in their exclusive domain. None of the three identify an argument directly to that end. Instead, they are forced to attack one part of the integrated definition of what are the above normal profits in the MRRT Act. Yet that part operates on miners, and indirectly (if at all) on States, uniformly across Australia. Further, the miners avoid what they might otherwise view as a form of double impost. The States remain free to set, collect and retain as much or as little in royalty as they wish. To assert that there is discrimination or a *Melbourne Corporation* breach from treating miners and the States in this way is to turn the Constitution on its head.

The MRRT legislation

Overview

14. The starting point is to identify what the MRRT legislation does, and does not, do; rather than to refer to matters of pure economic theory that are not the subject of evidence in these proceedings (such as the 1817, 1975 and 1983 works referred to by Queensland at QS [9]-[16]).[8]

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4 See further [45] below.

5 See further [36]-[44] below.

6 See further [43]-[47] below.

7 Repeated in analogous terms by the interveners: eg QS [41]; Western Australia submissions (**WAS**) [51], [52].

8 Cf *Woodside Energy Ltd v Federal Commissioner of Taxation (No 2)* (2007) 69 ATR 465 at 512-513 [202]-[206] (French J).

15. The MRRT Act seeks to tax the 'above normal profits' derived by miners from the extraction of 'taxable resources' (relevantly, iron ore): ss 1-10, 20-5. Section 1-10 makes clear that 'economic rents' are understood by the MRRT Act as these above normal profits, not in the looser sense of the 'rent' or reward which a landowner derives simply by being a landowner; compare the Queensland approach which derives from the works it cites an elision between the concepts of economic rent and rent generally, which then infects the whole way it seeks to set up the central issue: see QS [1] and [10].

16. The MRRT Act operates by rendering a miner liable to an amount of MRRT, for an MRRT year, equal to the sum of its 'MRRT liabilities' for each of its 'mining project interests' for that year: s 10-1. A 'mining project interest' is an entitlement to share in the output of a mining venture in which the miner participates: s 15-5. Where a mining venture has two or more 'production rights' (relevantly, mining leases: s 15-5(1)), the mining venture has a separate mining project interest in relation to each production right: s 15-5(2).

17. Section 10-5 of the MRRT Act sets out four steps by which a miner's MRRT liability for a mining project interest in an MRRT year is determined. Those steps involve: (i) the calculation of a miner's 'mining profit' for the mining project interest; (ii) the calculation of a miner's 'MRRT allowances' for the mining project interest; (iii) the subtraction of MRRT allowances from mining profit; and (iv) the application of the 'MRRT Rate' to the remaining amount of profit. Each step is considered below.

'Mining profit'

18. A mining profit for a mining project interest for an MRRT year is worked out by subtracting a mining project interest's 'mining expenditure' from its 'mining revenue': s 25-5. If a mining project interest's mining expenditure exceeds its mining revenue, the miner's mining profit for the interest is zero: s 25-5.

19. 'Mining revenue' for a mining project interest is determined in accordance with Div 30 of the MRRT Act and is confined to the 'upstream' component of the ultimate revenue; that is, the component attributable to the value of the resource in its form at the valuation point: s 30-25.

20. 'Mining expenditure' is determined in accordance with Div 35. Subject to certain exceptions, a mining project interest's 'mining expenditure' includes all expenditure necessarily incurred in the MRRT year in the carrying on of 'upstream mining operations' for a mining project interest, notably whether it be of a capital or revenue nature: s 35-10. 'Upstream mining operations' are a subset of mining operations, being those that occur before a taxable resource leaves the 'valuation point'.[9] They will include, among other things, exploration for taxable resources, constructing the mine and associated facilities, extraction of the resources, crushing and weighing the taxable resources, and transportation of the resources to the valuation point.[10]

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9 See s 35-15. 'Valuation point' is defined in s 40-5. In relation to resources stored on a run-of-mine stockpile, the valuation point is just before the taxable resource is moved from the stockpile. See also [2.12]-[2.13] of the Explanatory Memorandum to the Minerals Resource Rent Tax Bill 2011 (**EM**) (Parties' Relevant Documents Book (**PRD**) 2098-2100).

10 See the examples at s 35-15 and the mining operations listed in s 35-20(2). See also EM [5.19]-[5.26] (PRD 2016-2019).

21. Importantly, 'mining profit' does not include revenue that is reasonably attributable to downstream mining operations.[11] Thus, miners undertaking significant downstream beneficiation are less likely to earn above normal profits for MRRT purposes and may still benefit from a reduction in royalty rates for products whose value derives largely from downstream processing (such as beneficiated ore): cf WAS [46]-[47].

22. With the exception of 'Royalties' (which are dealt with separately as a category of mining allowance), mining expenditure includes State-based taxes and charges incurred by a miner in carrying on an upstream operation – for example, State payroll tax paid on employees who extract iron ore from a mine. No complaint is made by the plaintiffs that the ability of a miner to reduce its 'mining profit' in this way renders the MRRT Act invalid.

'MRRT allowances'

23. The MRRT Act provides for seven categories of 'MRRT allowance': s 10-10. The categories are designed to ensure that it is only the above normal profit (see s 1-10) to which the MRRT rate is applied to determine an MRRT liability.

24. One of those categories of MRRT allowances is a 'Royalty allowance': Pt 3-1. The immediate object of the royalty allowance is made clear in ss 60-1 and 60-5 of the MRRT Act – namely, to permit a miner to reduce its MRRT liability to the extent that it has made payments of Commonwealth, State or Territory royalties in relation to taxable resources extracted from a mining project interest.

25. A miner's royalty allowance for a mining project interest is so much of the sum of available 'royalty credits' as does not exceed the miner's mining profit: s 60-15. A royalty credit arises, relevantly, where a miner incurs a liability to pay a 'mining royalty' in relation to a taxable resource extracted under the authority of a 'production right' to which the interest relates: s 60-20(1). 'Mining royalty' is defined, in uniform fashion, to comprise royalty payments made under Commonwealth, State or Territory law in relation to a taxable resource under authority of a production right: s 35-45(1).

26. The amount of the royalty credit enjoyed by a miner is calculated under s 60-25. That section provides for the gross-up of the royalty payments by the MRRT rate, thereby ensuring that such payments are allowed in full against a miner's ultimate MRRT liability.[12]

27. In addition, royalty credits that have not been applied by a miner to reduce its mining profit in a particular year may be applied against profits in later years: see s 60-25(2). In such circumstances, the amount of the royalty credit is uplifted in order to take into account the time value of money: see the methodology in s 60-25. A similar process of 'uplifting' occurs with other allowances: ss 70-1, 75-1, 80-1 (etc). The uplift rate is the Long Term Bond Rate (**LTBR**) plus 7%. This is designed to allow a reward on investment which reflects a 'normal' return for the risk and effort involved. The link between s 75-1 (carry

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11 See the definition in s 255-15, read with s 30-25. See also EM [4.47]-[4.51] (PRD 1992-1993); [9.30]-[9.32] (PRD 2098-2100).

12 A miner which pays a State royalty of $22.5 million in an MRRT year enjoys a royalty credit of $100 million (being the royalty payment divided by the MRRT rate of 22.5%).

forward of mining losses at an uplifted rate) and s 35-10(2) (capital expenditure may be deducted in full as incurred) should be observed. This is another part of the process of identifying 'above normal profits'. Loss allowances can also be transferred between projects in common ownership: Part 3-7.

MRRT rate

28. The MRRT rate is provided for in s 4 of each of the Imposition Acts.[13] The MRRT Rate is 22.5%.[14] Although the plaintiffs cavil with this proposition at various points in their written submissions, any attempt to suggest that the MRRT Act imposes differing *rates* of MRRT is incorrect (see further [51]–[57] below).

Offsets

29. The MRRT Act establishes a 'low profit offset' regime in Pt 2-4. The effect of that regime is that a miner enjoys a 100% offset from MRRT if the miner's group mining profit is $75 million or less: s 10-15, read with s 45-5. The offset tapers for group mining profits between $75 million and $125 million: ss 10-15 and 45-10. The full amount of MRRT is therefore not payable until the offset is reduced to zero.

Conclusions to be drawn from structure of the MRRT Act

30. The structure of the MRRT legislation makes it clear that MRRT: is geographically neutral; is imposed at a uniform rate; and operates in a uniform fashion, including in relation to the royalty allowance. *First*, it applies to certain categories of miners, and mining project interests, irrespective of their location within Australia. This is not a case in which Parliament has sought to legislate only in relation to residents or areas of a particular State.

31. *Secondly*, the MRRT legislation imposes a single uniform rate of tax on a relevant miner in respect of its applicable mining profits from a mining project interest. This is not a case in which Parliament has prescribed differing rates at which a Commonwealth tax is payable by reference to a taxpayer's location or residence.

32. *Thirdly*, the MRRT Act crafts a whole series of deductions and allowances, which operate in an identical manner wherever the project is located in Australia. Royalties are but one of the allowances. They are the subject of uplift, like other allowances. Their only difference from other allowances is that they are grossed up, and are used up first in time. Critically, the allowance for royalties operates in an identical manner, whether the royalties are charged at Commonwealth,[15] State or Territory level. Whichever polity charges the royalties, and whatever decisions it makes as to royalty, the allowance is for the amount paid, grossed up, on the same uplifted basis of LTBR plus 7%.

33. *Fourthly*, royalty and MRRT do different things, although they may overlap in effect: (a) Miners have the potential to make above normal profits (which the MRRT Act conceives of as economic rent) from the mining, processing and sale of ore into global markets; and the source of the economic rent

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13 The *Minerals Resource Rent Tax (Imposition-General) Act 2012, Minerals Resource Rent Tax (Imposition-Customs) Act 2012*, and *Minerals Resource Rent Tax (Imposition-Excise) Act 2012.*

14 PS [12]. The formula in s 4 of each Imposition Act requires the multiplication of 30% by (1 - 25%), giving 22.5%.

15 See EM [6.25] (PRD 2040) for examples of Commonwealth royalties.

lies in the character of the resource – as a finite, non-renewable and quality resource, in great demand on global markets; (b) Royalties represent a charge for the exercise of the right to take the minerals from the land; they are usually (but not always) payable by reference to the amount or value of the minerals extracted, often after downstream beneficiation, rather than on the profitability of the miner or mining project interest.[16] Charged as such, the goal of the royalty is not *per se* to identify the above normal profit earned by a miner and take a percentage of it; but indirectly and imperfectly, the royalty may allow the polity charging it to claim some or all of it. This is because of the co-incidence between that which the royalty charger controls – the finite, non-renewable quality resource – and that which is in great demand; (c) By contrast, the MRRT is a true tax – a compulsory exaction of monies by a public body for a public purpose – and its subject is directly the above normal profit that arises from the conduct of a business activity which involves the deployment of capital, skills and labour to the minerals.

34. That the royalty and the tax may overlap in attaching to aspects of the same activity is unsurprising. The potential for overlap simply calls for a rule of reconciliation in the tax structure. No rule of reconciliation is going to be perfect from every perspective. The plaintiffs do not identify how the Commonwealth tax could have adopted a rule of reconciliation that they would regard as permissible. And given this understanding of the difference between royalty and tax, Queensland's attempt (at QS [1(a)]) to assimilate each of royalty and MRRT as capturing the same 'economic rent', one at a 'low level' and one at a 'high level', fails.

35. *Fifthly*, the reason for the MRRT conferring an allowance for royalties is then no more and no less than being faithful to its goal of identifying and then levying an appropriate rate of tax on the above normal profit. The full allowance for royalty, in whatever amount is actually charged and paid, co-operates with the other integers of the MRRT referred to in [19]-[21], [27] and [29] above to ensure the tax base catches the whole of, but no more than, the profit defined to be above normal.

36. *Sixthly*, the structure of the MRRT legislation means that, contrary to the major premise underlying the submissions of the plaintiffs and interveners, there is no *necessary and proportionate* correlation between variations in the amount of State royalties paid by a miner and variations in the amount of MRRT to which the miner is ultimately liable. Nor is it true to say that a reduction in royalty will always, or even generally, lead to *no benefit* to a miner. This is so for the following reasons:

(a) A miner will be liable for State royalties irrespective of whether it may have an MRRT liability at that time or some future time. Further, State royalties are usually payable on or about the time of extraction of the applicable resource from the ground.[17] In contrast, MRRT is payable only when a miner derives an applicable above normal profit, after taking into account all deductions for expenditure (including capital), all allowances (including those carried forward at uplifted rates) and any applicable tax offsets. This may, depending on the project, take some years and for some projects it may never occur. And even if a mine reaches a point of mature operation where it is making above normal profits

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16 See eg *Mining Regulations 1981* (WA), reg 86, read with the Further Amended Statement of Claim (**FASOC**) at [50]–[52] (Questions Reserved Book (**QRB**) 23-24); see also *Stanton v Federal Commissioner of Taxation* (1955) 92 CLR 630 at 642; cf WAS [46]-[47]. Cf the profit element in some Tasmanian royalty rates: Annexure E to FASOC (QRB 77).

17 See eg *Mining Regulations 1981* (WA), reg 86A(2), which *prima facie* requires royalties to be paid within 30 days after the end of the quarter in which the relevant amount of mineral was produced or obtained.

and has used up all non-royalty allowances, the extent to which the royalty allowance has an impact on the amount of MRRT paid is going to depend on two further variables: whether global ore prices remain sufficiently high, and costs sufficiently low, to sustain those above normal profits, and the number of years left in the mine at which such profits are earned.

(b) What follows from (a) is that a reduction in royalty will always have an immediate cash flow benefit for a miner, except for those mature years in the lifecycle of a mine where the mine is making, and continues to make, the above normal profits;

(c) The benefit to the miner may extend beyond cash flow to the enhancement of the value of the project. A reduction in royalty offers the certainty of an immediate saving in royalty in the given year, as against the mere possibility that in a future year the miner might make the above normal profits which trigger an increased MRRT liability referable to the saving in royalty in the earlier year;

(d) How these value implications are going to play out will depend on all the variables of the particular project, including the quantum and timing of allowances other than the royalty allowance. As some illustrations: (i) a reduction in royalties might be thought to be particularly beneficial, even in the presence of the MRRT Act where the reduction is itself tailored to the first few years of the project;[18] (ii) because the MRRT is confined to upstream revenue and expenditure, a reduction in royalty rates for products whose value derives largely from downstream beneficiation may still benefit a miner engaged in such beneficiation; and (iii) because mining losses can be transferred between projects in common ownership, a reduction in royalty on one project might have limited MRRT implications if losses from a second project soak up what would otherwise be above-normal profits on the first.

The plaintiffs' worked examples

37. The plaintiffs' various examples as to how the MRRT Act is said to work - while arithmetically correct within their own limited universe - do not convey an accurate understanding of the practical operation of the legislation and thus how it might impact on the investment decisions of miners: PS [23]-[26].

38. The plaintiffs' Table 1 has limited real world significance because the only allowance taken into account is the royalty allowance. The Table ignores the numerous other allowances that will reduce a miner's MRRT liability and which will inevitably vary from mine to mine, both in quantum and in the time at which they are used up. It is almost impossible to conceive of a situation in which, for example, the mining loss allowances and (where applicable) starting base allowances of two mining project interests in different States would coincide.[19] In addition, Table 1 does not specify the point in the life cycle of a mining project interest at which the Table is directed. That omission is significant because of the matters in [36(a)] above. At most, Table 1 could be informative as to those years later in the life cycle of two successful projects where both miners are actually paying MRRT, and are paying it at a point after all allowances have been exhausted and for so long as the mine continues both to operate and earn above

[18] See eg the discounted regime created by the *Mining (Royalty No 2) Amendment Act 2005* (SA), which is mentioned at PS [112(c)].

[19] See also Further Amended Defence (**FAD**) at [58(d)] (QRB 95-96).

normal profits. The Table does not demonstrate that a reduction in royalty would result generally in an 'automatic and proportionate increase in MRRT' (cf PS [24]).

39. Further on Table 1, there is nothing in the MRRT Act which necessitates that Miners A and B be in different States or that, if they are, those States adopt differing royalty rates as assumed in the Table. One could equally, so far as the Act goes, locate both Miners A and B in the same part of the same State, and the same arithmetic difference would emerge; or one could leave both miners in different States and harmonise the royalty rates and that arithmetic difference would disappear. Accordingly the Table does not demonstrate that the MRRT Act creates any difference based on State locality.

40. And finally on Table 1, it contains a suppressed assumption that the differing royalty rates are being applied to what is otherwise a right of identical value being obtained in the two difference places. That may well not be so. If ore in one location costs more to mine to an equivalent standard than in another, the 'price' for the right to mine could be expected to be lower, as the ore is less valuable to the miner. A lower royalty rate might simply reflect the differing physical qualities of the ore in a different location. The plaintiffs do not begin to explore at an evidentiary level *why* royalty rates in Western Australia and South Australia tend to be similar, and those in Queensland lower.[20]

41. The plaintiffs' Table 2, and the submissions made at [27] of the plaintiffs' submissions, suffer from even greater difficulties. The Table repeats the omissions in Table 1 and fails to acknowledge the import of the matters identified at [30]–[36] above. Those matters make clear that an increase or decrease in State-based royalty payments will have an immediate impact on the financial position of every miner because the royalty payments arise irrespective of the miner's profits, in contrast to MRRT which, as far as the miner is concerned, may or may not be payable in some future year depending on the mining project interest's profitability. The submission that a general reduction in royalty rates, or the grant of a concessional rate of interest to a particular miner, would confer *no* financial benefit on miners is a gross overstatement. Such a miner obtains the benefit of a guaranteed reduction in a category of outgoing that, unlike MRRT, must be paid, irrespective of the miner's profitability, if it wishes to extract iron ore from the ground. That certainty may be expected to be worth value (and potentially great value) to a miner when determining in which State to commence mining.

42. Moreover, the plaintiffs' two Tables (and analogous submissions by Queensland, at [24] and [34]) wrongly seek to add royalty payments and MRRT liabilities together in order to calculate a so-called 'total burden' of taxation with respect to mining. However, while there can be no dispute that royalties and MRRT, despite their differing characters, may overlap to some degree in their effect, the conduct of upstream mining operations are also likely to be subject to additional Commonwealth and State taxes, the most obvious of which are income tax, payroll tax and land tax. In any event, the purported addition of royalties and MRRT to determine a total amount of tax ignores both the absence of any necessary temporal correlation between the two liabilities as well as the very different bases on which they are usually charged: the former on the value of the minerals extracted (potentially at a downstream/post-beneficiation level) and the latter on a proportion of the upstream above normal profits (if any) obtained by reason of extraction.

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[20] Annexure E to the FASOC simply sets out royalty rates as they were at the time of filing (QRB 76-77).

43. A real world investor contemplating, in the face of MRRT, different projects potentially impacted by differing royalty rates might be expected to factor varying assumptions into a Net Present Value (**NPV**)[21] or similar valuation methodology to see whether, and to what extent, reductions in royalty on offer might improve the value of the project, taking into account its full life cycle and the manner in which *all* allowances and their uplifting will occur. For the plaintiffs to make out their factual case that a reduction in royalty rates would confer *no* financial benefit on a miner, it would be necessary for the plaintiffs to show how this assertion about the effect of the MRRT Act could be squared not only with the terms of the MRRT Act noted above, but also with standard valuation approaches.

44. Yet the plaintiffs do not even assay this task, in the pleadings or evidence. They do not even assert, let alone prove, that the presence within the MRRT Act of the royalty allowance has impacted or is likely to impact on any investment decision *they* will make. They have made a deliberate decision to eschew the leading of evidence about their own position,[22] or about how rational investors would behave in the face of the royalty allowance, preferring to rest their case on arithmetic tables which do not establish that the royalty allowance has a real, substantial tendency to deter investment decisions.

Further evidentiary gaps in the plaintiffs' case

45. There are two further areas where the plaintiffs' evidence is deficient. First, recent experience contradicts the assumption that there is a real likelihood of States seeking to *reduce* royalty rates – generally or as ad hoc concessions – for the purpose of encouraging miners to invest or build infrastructure. Quite to the reverse, in the context of the mining boom, States have been tending to *increase* not decrease their royalty rates.[23] Further, the various State agreements relied on tend to be quite ancient. And while some of them may deal with royalty and infrastructure development, that is along with a whole host of other matters, such that one cannot detect any strong or clear pattern of States reducing royalty rates as a quid pro quo for the miner bearing the cost of infrastructure.[24]

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21 A methodology recognised as 'familiar' in *East Australian Pipeline Pty Limited v Australian Competition and Consumer Commission* (2007) 233 CLR 229 at 233 [11] (Gleeson CJ, Heydon and Crennan JJ).

22 If the plaintiffs seek to make submissions on this point, the Commonwealth will seek leave to tender the 2012 Annual Report for the Fortescue Metals Group.

23 For example, the WA royalty rates for fine ore in Annexure E to the FASOC (QRB 76), which increase for shipments after 1 July 2012 and again for shipments after 1 July 2013. See also the increases to royalty rates under certain State Agreements effected by the *Iron Ore Agreements Legislation Amendment Act 2010* (WA) (see also Explanatory Memorandum, Iron Ore Agreements Legislation Amendment Bill 2010 (WA)) and the *Iron Ore Agreements Legislation (Amendment, Termination and Repeals) Act 2011* (WA) (see also Explanatory Memorandum, Iron Ore Agreements Legislation (Amendment, Termination and Repeals) Bill 2011 (WA); Western Australia, *Parliamentary Debates*, Legislative Assembly, 10 November 2011, 2345-2347, (Colin Barnett)); and the agreement ratified by the *Iron Ore (FMG Chichester Pty Ltd) Agreement Act 2006* (WA) (extract at PRD 1166) (see also Western Australia, *Parliamentary Debates*, Legislative Assembly, 5 April 2005, 1166-1168 (John Bowler)), under which there is no concessional royalty rate. In Queensland, see the *Resources Legislation and Another Regulation Amendment Regulation (No 1) 2012* (Qld) (and the Explanatory Notes), which recently increased the royalty rate for coal sold at an average price of more than $150 per tonne (s 11).

24 Further, development of infrastructure is often required without any concessional royalty rate. See, eg the *Iron Ore (FMG Chichester Pty Ltd) Agreement Act 2006* (WA) (extract at PRD 1166), under which extensive infrastructure is to be developed, but no concessional royalty rate is offered; the *Collie Coal (Griffin) Agreement Act 1979* (WA) (extract at PRD 164), *Collie Coal (Western Collieries) Agreement Act 1979* (WA) (extract at PRD 169) and *Iron Ore Beneficiation (BHP) Agreement Act 1996* (WA) (repealed), under which the miners provide most infrastructure and concessional royalty rates are not mentioned; the *Central Queensland Coal Associates Agreement Act 1968* (Qld) at issue in

46. Secondly, let it be assumed that State A is contemplating reducing royalty rates by X%, either across the board or for particular projects, as an incentive to investors. The world advanced by the plaintiffs is one of a measure of competition between States to win these investors. In market terms, there are a limited number of sellers competing for the custom of a limited number of buyers.[25] State B would have an incentive to match, or improve on, the royalty reduction offered by State A. There may be other factors going into the competition on price, including the pricing of other goods or services bundled into the transaction (eg infrastructure construction by or for the investor). Which State ultimately wins the custom of this investor, and at what royalty rate, will depend on a whole raft of competitive factors. The plaintiffs have not led economic evidence to show that the full allowance for royalties as actually paid operates to distort the competitive process between States that the plaintiffs advance. If there is no proven distortion to competition, it is difficult to see that any State has suffered anything of consequence from the intrusion of the MRRT into the marketplace.

47. Three ultimate conclusions can be drawn as to the legal and practical operation of the MRRT Act. *First,* even if the Act has a tendency, in some loosely defined manner, to soften or weaken the incentivising effect of a polity reducing royalty (should that currently unlikely event occur), that result is not dissimilar to what would occur with income tax, and the precise extent to which this will occur or be relevant to an investment decision of a miner will depend on all the circumstances of the case. The plaintiffs' sweeping proposition that the effect of the incentive will be 'entirely neutered' by the MRRT is false. *Secondly,* to the extent the Act may bear that tendency, it does so in a uniform manner wherever the project might be located in the nation. Each State (and each potential investor) knows that the allowances (whether for royalties, or for any of the other matters) will operate in the same way wherever the project goes ahead in Australia. A given increase or decrease in royalty will have the same consequence for MRRT whichever State offers it. *Thirdly,* the asserted negative effect, even if it were to arise, is no more than an incidental by-product of the MRRT's primary statutory object of identifying and taxing above normal profits. It in no way discriminates against particular States or targets any or all States.

Section 51(ii)

Introduction

48. It is common ground that the MRRT Act is a law with respect to taxation (see PS [32]). Accordingly, the question is whether the Act discriminates between States or parts of States. In *Austin v The Commonwealth* (2003) 215 CLR 185 (***Austin***), Gaudron, Gummow and Hayne JJ observed (at 247 [117]):

> A law with respect to taxation, in general, does not discriminate in the sense spoken of in s 51(ii) if its operation is general throughout the Commonwealth even though, by reason of circumstances existing in one or more of the States, it may not operate uniformly.

49. It followed that the legislation under challenge in that case did not contravene s 51(ii) merely because the Act would impact differently on judges depending on the terms of the State-based pensions

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Seamen's Union of Australia v Utah Developments Co (1978) 144 CLR 120; and the *Mount Isa Mines Limited Agreement Act 1985* (Qld) (see para [54J] of the FASOC (QRB 32)), which specified a range of infrastructure tasks as purposes of the mining lease, but required payment of royalties at the rate in the State Act and Regulations (cl 17).

25 In reality, the market would include overseas 'sellers' also.

schemes to which they were subject.[26] As Menzies J had earlier recognised, 'in determining whether a law imposes ... a discriminatory burden, it is to the law itself that attention must be paid, not to the laws of any State or States.'[27]

50. The following authorities underpin and make good this conclusion and will be addressed orally:

(a) *WR Moran Pty Ltd v Deputy Federal Commissioner of Taxation (NSW)* (1940) 63 CLR 338 (***Moran***) at 347-348;

(b) Taylor J in *Conroy* at 101, specifically recognising that the Commonwealth income tax regime does not discriminate when it allows for a deduction for state land tax which may vary between States;[28]

(c) the US case law on Art 1 s 8 of the US Constitution[29] – both at the time of Australian Federation and since. Note specifically, *Florida v Mellon* 273 US 12 (1927) at 17.[30]

The MRRT legislation is not discriminatory

51. **Allegedly different MRRT rates.** Contrary to the plaintiffs' primary contention that the *rate* at which MRRT is imposed on mining profits differs from State to State,[31] supported by Queensland,[32] the MRRT Act, in form and true effect, imposes a single rate of 22.5% on mining profits net of MRRT allowances (as defined), irrespective of where the miners or their mining project interests are located. It is no doubt for this reason that the calculations in Table 1 of the plaintiffs' submissions apply a single MRRT rate of 22.5% notwithstanding that 'Miner A' is located in WA and 'Miner B' in Queensland.[33] To speak in these circumstances of differing 'rates' of MRRT, and to call in aid hypothetical legislation that is structured in a completely different way, is unhelpful and apt to mislead.

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26 *Austin* at 247 [117].

27 *Conroy v Carter* (1968) 118 CLR 90 (***Conroy***) at 103.

28 See also Kitto J (at 96) and Windeyer J (at 104) agreeing with Taylor J. Although Barwick CJ, McTiernan J and Menzies J reached a different view on one aspect of the facts as to the application of s 51(ii), their Honours also expressed their agreement with the reasons of Taylor J (at 96 and 104 respectively).

29 Art 1 s 8: 'The Congress shall have power to lay and collect Taxes, Duties, Imposts and Excises ... but all Duties, Imposts and Excises shall be uniform throughout the United States'. The relevance of US jurisprudence on Art 1 s 8 to s 51(ii) of the Commonwealth Constitution has been accepted by the Court: see eg *Deputy Federal Commissioner of Taxation v Brown* (1958) 100 CLR 32 at 39.

30 'The contention that the federal tax is not uniform, because other states impose inheritance taxes while Florida does not, is without merit. Congress cannot accommodate its legislation to the conflicting or dissimilar laws of the several states, nor control the diverse conditions to be found in the various states, which necessarily work unlike results from the enforcement of the same tax. All that the Constitution (Art. I, § 8, cl. 1) requires is that the law shall be uniform in the sense that, by its provisions, the rule of liability shall be alike in all parts of the United States' (emphasis added); see also *Gottlieb v White* 69 F (2nd) 792 (1934); *United States v Ptasynski* 462 US 74 (1983) and Brandeis J in *Phillips v Commissioner* 283 US 589 at 602 (1931).

31 PS [32]; [39], [46] (fn19). Paragraph [32] of the plaintiffs' submissions makes clear that they are using 'rate' to refer to the rate of tax imposed on miners, not 'the amount actually payable' by miners.

32 QS [24], [25]. Western Australia has made no submissions concerning s 51(ii).

33 PS page 6.

52. The plaintiffs' bare assertion at [33], that because 'MRRT payable' results from a formula which includes as a component State royalties, then as a matter of substance it is 'quite incorrect' to say the MRRT is imposed at a uniform rate, does not withstand even cursory scrutiny. Virtually all taxes result from calculation under assessment provisions before a rate is applied. Assessment provisions include elements that vary significantly from location to location and from State to State. To take the most obvious examples, different land tax or payroll tax rates in different States, different development charges, higher fuel costs in States remote from refineries and different revenues flowing from divergent profit margins in different regional markets may all affect the calculation of the amount of 'taxable income' against which an applicable tax rate pursuant to the *ITAA* is applied. Mining profit net of MRRT allowances is no more or less a legal construct, made up of integers each defined in a uniform manner, than is 'taxable income'.[34] An assertion that the application of a uniform rate results in discrimination where the applicability and/or quantum of integers in a calculation of tax may vary from State to State is without foundation in authority or principle.

53. The fact that the MRRT *rate* imposed on miners is uniform means that the plaintiffs' reliance (PS [35]-[38]) on *Cameron v Deputy Federal Commissioner of Taxation* (1923) 32 CLR 68 is misplaced. In that case, regulations required the Commissioner of Taxation, in calculating the profits made on the sale of live-stock, to apply a different prescribed value to the live-stock depending on where it was located in Australia (eg, a horse in NSW was to be valued at 8 pounds while a horse in Victoria was to be valued at 16 pounds). That the regulations offended s 51(ii) is unsurprising. As Isaacs J recognised, the only *discrimen* for the different values placed on live-stock was the State in which they were located.[35]

54. Nor can the plaintiffs and Queensland derive any comfort from the observation in *The King v Barger* (1908) 6 CLR 41 (***Barger***) at 70-71 quoted at PS [41]. Contrary to the hypothetical situation there considered, the MRRT Act is not structured so that the rate of MRRT is inversely proportional to the rate of State royalties, in an attempt to equalise some overall burden of taxation on the same subject matter: see [36]-[44] above. The reliance placed on the observation therefore fails at the outset.

55. Moreover, the observation was made after the majority had correctly recognised that a Commonwealth law of taxation may validly have an unequal effect in different States due, among other things, to 'conditions which nature has made unequal' and 'the operation of State laws previously existing'.[36] Far from assisting the plaintiffs, this recognition is consistent with both the later observations in *Moran* and *Conroy*, the earlier observations in *Colonial Sugar Refining Company Ltd v Irving* [1906] AC 360 (***Irving***), and the approach adopted in analogous circumstances in the United States.

56. The plaintiffs' and Queensland's attempts to explain away the result and reasoning in *Irving* is also unpersuasive: PS [43]–[46]; QS [27]–[28]. In *Irving*, a Commonwealth law that allowed an exemption from excise duty for goods on which such duty had already been paid under State legislation was held by the Judicial Committee not to breach s 51(ii) or s 99:

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34 Cf QS at fn 44.

35 (1923) 32 CLR 68 at 71, 76.

36 (1908) 6 CLR 41 at 70.

> The rule laid down by the [Commonwealth] Act is a general one, applicable to all the States alike, and the fact that it operates unequally in the several States arises not from anything done by the Parliament, but from the inequality of the duties imposed by the States themselves.[37]

57. This reasoning remains good law.[38] It is squarely against the plaintiffs' central proposition: cf PS [43]. In deciding whether the MRRT Act gives rise to differential treatment, it is not a basis of distinction that the legislation in *Irving* had a 'transitional' quality, transitional discrimination being caught by s 51(ii) as much as any other (PS [44]-[45]). Nor is there anything in the suggested difference between 'a *superadded* tax' and a 'replacement' (PS fn 19). Nor is it an answer that the Act imposed duty on goods that 'answered the statutory description' (QS [28]) or criterion (PS [43]), being goods not already subject to State excise. The question of discrimination is to be assessed as a matter of substance, as the Board recognised at 367. In any event, whether or not the goods the subject of the duty met the statutory description varied from State to State.

58. **Allegedly different amounts of MRRT payable in different States.** To the extent that the plaintiffs make a separate, second contention that s 51(ii) is offended because a miner in one State will (allegedly) pay a different amount of MRRT than a miner in another State due to the allowance afforded by the MRRT Act to State royalty payments (see PS [47]), the contention suffers the same flaws as the first.

59. *First*, the contention cannot be accepted in the face of the authorities identified above. The MRRT Act has general operation throughout the Commonwealth. The Act operates uniformly in identifying three matters: the persons liable to pay the tax (miners as defined); the subject matter of the tax (their mining profits net of allowances as defined) and the rate of the tax. The location of miners in a particular State, or part of a State, is not a criterion for the Act's application or for determining the 'amount' of MRRT to be paid. The fact that miners in different States *may* nevertheless pay different amounts of MRRT does not render the legislation discriminatory.

60. *Secondly*, the premise underlying the plaintiffs' assertion of a discriminatory outcome – that different State royalty regimes will alter the actual amount of, and thus the 'effective rate' of, MRRT for which miners in different States are liable – is, in any event, apt to mislead: see [51]-[57] above.

61. *Thirdly*, the critical point is that (save for grossing up) the MRRT Act treats the allowance for royalty in the same way as it treats all other allowances it recognises. For each miner, and each project, wherever located across the nation, a full allowance is given for the defined cost or expense, whatever the amount it comes to in that location. Location may influence amount for a multitude of reasons: decisions taken by the polity in question; quality or quantity of the resource in each place; physical constraints such as distance from suppliers; the whole raft of differing market conditions in each location. The Act does not create any 'necessity' (cf PS [47]) that, for a given amount of mining profit (as defined), the royalty allowance, or any other allowance, must differ in amount in different States or parts

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37 At 367 (emphasis added). See also, to similar effect, the reasons of Griffith CJ below (1903) St R Qld 261 at 277: 'If the imposition of these duties leads to an inequality, it is not a defect in the Federal law; it arises from the fact that the laws of the States were different, which is quite another thing.'

38 See *Permanent Trustee Australia Limited v Commissioner of State Revenue (Victoria)* (2004) 220 CLR 388 (***Permanent Trustee***) at 434 [128] (Gleeson CJ, Gummow, Heydon, Hayne and Callinan JJ): the rule in *Irving* 'has not been doubted since'.

of States in Australia. Whether differences in 'amounts' of any components of the MRRT will arise, and their nature and extent, depends not on anything in the Act, but on the variety of those local conditions.

62. Just because royalty rates may have varied historically over time and place does not make it 'necessary' that they will differ between States (or parts of States). The actual rate in a State (or part thereof) at any point in time – in general or for a particular project – may be a function of a variety of factors: decisions of the relevant State; negotiating positions (and bargaining power) of miners; competitive forces generally in Australian and world-wide markets; and the pricing of bundled goods and services (such as infrastructure construction). Royalty rates might be thought to converge as markets become more competitive. In some cases and times, rates might be substantially the same across States, in which event the Act will produce uniformity of outcome, measured against just this criteria but not necessarily others. In other cases, rates may differ. But the non-discriminatory character of the MRRT Act does not depend on what may play out in any particular case.

63. In conclusion, the purpose of the allowance afforded under the MRRT Act to royalty payments rests in the considerations of economic efficacy, fairness and justice that are committed to Parliament under the taxing power. The fact, if it be a fact, that the different States may impose such liabilities at different levels, or may change those levels from time to time for whatever reasons seem fair and just to them, does not render the Commonwealth Act discriminatory.

64. **Reasonably appropriate and adapted.** Even if, contrary to the above submissions, the MRRT legislation somehow had a relevant differential treatment or unequal outcome, it does not follow that the legislation is discriminatory between States.

65. In *Austin* and *Permanent Trustee*, this Court held that the essence of the notion of discrimination for constitutional purposes (ss 51(ii), 102, 117 and 91) lies 'in the unequal treatment of equals or the equal treatment of those who are not equals, where the differential treatment and unequal outcome is not the product of a distinction which is appropriate and adapted to the attainment of a proper objective'.[39]

66. The plaintiffs have not submitted, in addition to any differential treatment or unequal outcome, that these results are not the product of a distinction that is appropriate and adapted to the attainment of a proper objective. That is unsurprising.

67. The MRRT has two particular features that are significant in the present context. The first is that the MRRT is a tax on profits, not revenue. Parliament was entitled to conclude that the profits of a miner could not accurately be identified without having regard to the costs and outgoings incurred in the course of deriving its revenue.

68. There are, no doubt, multiple ways in which regard might properly be had to a miner's outgoings and expenditure. In the case of royalties, Parliament determined to allow a miner to credit royalty

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[39] *Austin* at 247 [118] (Gaudron, Gummow and Hayne JJ); *Permanent Trustee* at 424 [89] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ); see also *Street v Queensland Bar Association* (1989) 168 CLR 461 at 510-1, 548, 571-573, 582 and *Cameron v The Queen* (2002) 209 CLR 339 at 343-344 [15] (Gaudron, Gummow and Callinan JJ).

payments via the allocation to the miner of royalty credits. Several other categories of outgoing are dealt with via the regime for mining expenditure in Div 35, which expenditure includes other charges and taxes incurred in carrying out upstream operations (be they charged at a Federal, State or local level).

69. The second relevant feature is that the MRRT is a tax on a certain category of profits – namely, above normal profits (or economic rents). The MRRT Act proceeds on the basis that royalties may, indirectly and at least in part, constitute charges on the economic rents which the Act makes subject to taxation.[40] If no regard were had to State royalties in calculation of a miner's MRRT liability, the Act would be at risk of imposing a tax either on economic rents at a higher rate than was intended or on profits that, rather than being above normal, are merely necessary to preserve the economic viability of a mining project.[41] (That would not make the Act invalid, but would alter the subject of the taxation.) The Act operates in the uniform way described in [47] above, in pursuit of the objectives set out in s 1-10 of the Act.

70. For these reasons, the Commonwealth submits that any differential treatment or unequal outcome (which is denied) was the product of a distinction which is appropriate and adapted to the attainment of the objectives just identified, each of which is a proper objective of Parliament. The plaintiffs' submissions to the contrary should not be accepted. The plaintiffs' submissions are contrary to the authorities set out above. Further, the plaintiffs have not explained why it is appropriate to adopt a different meaning of 'discriminate between' when used in s 51(ii) than when used in ss 102 and 117 of the Constitution. The plaintiffs obtain no succour in this regard from the observations of the plurality in *Bayside City Council v Telstra Corporation Ltd* (2004) 216 CLR 595 at [40].[42] Their Honours there recognised that there will be situations in which it is unnecessary to proceed to consider the appropriateness of the differential treatment identified. However, in the succeeding paragraph of the judgment, their Honours observed:

> As Gibbs J pointed out in *Victoria v The Commonwealth* (the *Payroll Tax Case*), it is in the nature of taxing statutes that not all taxpayers are treated with absolute equality, and the fact that some taxpayers enjoy exemptions that are not available to others does not necessarily involve discrimination. It may involve nothing more than differentiation based upon criteria within its constitutional power which it is well open to the legislature to regard as appropriate.

71. This reasoning is consistent not only with the constitutional concept of discrimination identified in *Austin* and *Permanent Trustee* but also with the Court's jurisprudence on s 51(ii) itself, in which it has been stressed that an absence of absolute equality and/or an inability on the part of taxpayers to equally enjoy exemptions conferred by Commonwealth law does not give rise to discrimination.

72. *Thirdly*, the plaintiffs misstate the effect of the observations made in *Austin* and *Permanent Trustee*. Those observations do not operate as some form of judicial exception to the prohibition in s 51(ii) that applies wherever Parliament is shown to have some 'beneficial purpose'.[43] Rather, they give

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40 EM p 3 (PRD 1943), [1.5]–[1.6] (PRD 1945), [1.25] (PRD 1948), [2.24] (PRD 1954).

41 EM p 3 (PRD 1943).

42 PS [67].

43 Cf PS [63].

content to the prohibition itself. There is nothing impermissible in that approach. On the contrary, it is a necessary consequence of the need to construe the Constitution and determine its meaning.

Section 99

73. It is common ground that the Imposition Acts are laws of 'revenue'.[44] Accordingly, the question for consideration is whether the Acts give, relevantly, preference to one State over another State. For the reasons set out below, that question should be answered 'No'.

74. It is also common ground that a preference, for the purposes of s 99, necessarily involves discrimination between States or parts of States (although discrimination does not necessarily involve a preference).[45]

75. To conclude that a law of taxation will not offend s 99 if it is valid under s 51(ii) is consistent with the different subject-matter of the two sections. While s 51(ii) is concerned with laws of 'taxation', s 99 is relevantly concerned with laws of 'revenue'. The latter category of legislation is wider, with the result that there will be legislation of a revenue character that will not be subject to s 51(ii) but in respect of which the Framers wished to confer protections on the States.[46]

76. For the reasons set out above in relation to s 51(ii), the MRRT Act effects no discrimination between States or parts of States. It follows that the MRRT Act cannot offend s 99.

77. Even if, contrary to *Elliott* and *Permanent Trustee*, s 99 were capable of applying to laws of taxation that were valid under s 51(ii), that would not assist the plaintiffs.

78. A 'preference' for the purposes of s 99 is some tangible advantage, here of a revenue kind, that is given to a State or part of a State.[47] The Act neither contemplates, nor provides for: (a) any transfer of funds from the Commonwealth to a State or States; (b) the payment by miners of any amount to States, let alone amounts at differing rates; or (c) the payment by miners of MRRT at different rates depending on the State in which the miner or miner's mining project interest is located.

79. Nor is s 99 enlivened merely because the scheme of a revenue statute may produce differences in revenue outcomes between States as a result of different taxation regimes applicable from State to State.[48] *Irving*, referred to above, is directly against that proposition and remains good law. The royalty

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44 Neither Queensland nor Western Australia has made written submissions concerning s 99.

45 See *Elliott v The Commonwealth* (1936) 54 CLR 657 (***Elliott***) at 668 (Latham CJ), 683 (Dixon J); *Permanent Trustee* at 423 [88]. See also PS fn 23; see also the plaintiffs' reference to the principle at PS [81(b)] without demur.

46 See Quick & Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 877: '[T]he use of the wider word 'revenue' extends the prohibition [in s 99] to all revenues other than those arising out of taxation, and prevents any preference being given by the Commonwealth in respect of any revenue charges whatsoever; such as fees for postal, telegraphic, and telephonic services, or rates on railways of the Commonwealth': quoted in *Permanent Trustee* at 422 [84].

47 Cf *Crowe v The Commonwealth* (1935) 54 CLR 69 at 92 (Dixon J); see also 83 (Rich J), 86 (Starke J); *Elliott* at 669 (Latham CJ), 683 (Dixon J).

48 Cf *Permanent Trustee* at 424-425 [91], [128].

crediting provided for under the MRRT Act cannot offend s 99 merely because the amount of credits accruing to a miner will depend, in part, on differing levels of royalties imposed by different States.

80. The balance of the plaintiffs' submissions on s 99 are directed at inviting the Court to overturn *Permanent Trustee* to the extent that it held that differential and/or unequal treatment would not offend s 99 where the treatment was the product of a distinction that was appropriate and adapted to a proper objective.[49] That invitation should not be accepted.

81. The plaintiffs mischaracterise the plurality's decision in *Permanent Trustee*. Their Honours did not hold that Parliament may give a 'preference' to one State over another State, without contravening s 99, 'if there is a good enough reason for so doing' (PS [82(a)]). Such a description of the judgment is only possible if one assumes, wrongly, that differential treatment automatically constitutes a preference for the purposes of s 99.[50] However, that assumption ignores the fact that differential treatment is a necessary, but not sufficient, requirement in order for s 99 to operate. Nor did the plurality hold that any differential treatment or unequal outcome of a Commonwealth law is 'irrelevant' (PS [80]).

82. Far from establishing a judge-made exception to an express constitutional prohibition, the plurality in *Permanent Trustee* merely observed that the case as to invalidity there asserted fell at the threshold because, even if a differential treatment or unequal outcome could be identified, it was the product of distinctions that were appropriate and adapted to a proper objective (at [91]). It was therefore unnecessary for the Court to go on to consider whether the *Mirror Taxes Act* met the requirements of a 'preference', as explained in *Elliott* and earlier cases. There was nothing impermissible in that approach. Accordingly, there is no warrant for the Court to overturn *Permanent Trustee*.

Melbourne Corporation principle

83. The concern of the implication identified in *Melbourne Corporation* is with the impairment of the capacity of a State to function in accordance with the constitutional conception of the Commonwealth and States as constituent entities of the federal structure.[51] But that constitutional conception cannot be equated with every matter that may be 'important' or 'significant' to a State, or which may provide a State with a revenue stream that enables the State to develop infrastructure and other amenities for its residents.[52]

84. Nor is there any authority for the proposition that *Melbourne Corporation* guarantees to a State untrammelled authority over 'the most appropriate means to finance the development of communities in the [State], the construction of infrastructure for those communities, the mining and development of

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49 Cf PS [74]-[85].

50 Paragraphs PS [82(a)-(d)] are premised on just such an assumption.

51 See *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 (***Melbourne Corporation***) at 70 (Starke J), 75 (Dixon J); *Austin* at 289-290 [24] (Gleeson CJ); *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272 (***Clarke***) at 289-290 [16] (French CJ), 306 [65] (Gummow, Heydon, Kiefel and Bell JJ); *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192 at 218 (Mason J).

52 Cf QS [35], [36], [66]. See *Austin* at 257 [141] (Gaudron, Gummow and Hayne JJ), referring to *Victoria v Commonwealth **(Pay-roll Tax Case)*** (1971) 122 CLR 353 and *State Chamber of Commerce and Industry v Commonwealth **(Second Fringe Benefits Tax Case)*** (1987) 163 CLR 329.

natural resources owned by the State and the construction of infrastructure necessary for such mining and development'.[53] Such an extraordinary claim takes no account of: (a) express restrictions on State power in the Constitution, eg ss 90 and 92;[54] (b) the paramouncy of valid Commonwealth laws over inconsistent State laws under s 109;[55] and (c) the impact which valid exercises of Commonwealth legislative or executive power will then have over State activity.[56]

85. In *Western Australia v Commonwealth* (***Native Title Act Case***), as cited with approval in *Austin*, Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ explained:[57]

> For constitutional purposes, the relevant question is not whether State powers are effectively restricted or their exercise made more complex or subjected to delaying procedures by the Commonwealth law. The relevant question is whether the Commonwealth law affects what Dixon J called the 'existence and nature' of the State body politic. As the *Melbourne Corporation Case* illustrates, <u>this conception relates to the machinery of government and to the capacity of its respective organs to exercise such powers as are conferred upon them by the general law which includes the Constitution and the laws of the Commonwealth. A Commonwealth law cannot deprive the State of the personnel, property, goods and services which the State requires to exercise its powers and cannot impede or burden the State in the acquisition of what it so requires.</u>

86. In determining whether Commonwealth legislation breaches the *Melbourne Corporation* principle, a court may consider various factors.[58] These include whether the Commonwealth law is a law of general application or whether it singles out State governments and places special burdens upon the exercise of their constitutional powers or the functions that constitutionally belong to them.[59] A law that imposes a burden on a State or interferes with a State's constitutional functions, however, must do so 'in a significant manner' or to a 'substantial degree' in order to breach the implication.[60]

87. The application of these principles demonstrates that the MRRT Act does not breach the *Melbourne Corporation* principle.

88. *First*, the MRRT Act does not 'single out' a State in any way or place a special burden upon a State.[61] The Act imposes no tax liability upon States or their instrumentalities, nor requires a State to act in a particular way or refrain from doing a particular thing.[62] On the contrary, each State *remains* free to increase or decrease the amount of mining royalties that they choose to charge for the extraction of iron ore within their territory, and to make whatever agreements with miners they wish. Nor does the MRRT Act impede or regulate the power of a State, in its capacity as regulator of minerals within its

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[53] WAS [8]; see also [59], [66] and PS [102]-[103], [112], [121]-[122].

[54] It is also clear that the Commonwealth may acquire State land and resources pursuant to laws enacted under s 51(xxxi) of the Constitution: see *Commonwealth v New South Wales* (1923) 33 CLR 1 (***Royal Metals Case***).

[55] *AEU* at 229-230 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

[56] See further [90]-[96] below.

[57] (1995) 183 CLR 373 at 480 (emphasis added); *Austin* at 259 [146] (Gaudron, Gummow and Hayne JJ).

[58] *Austin* at 249 [124] (Gaudron, Gummow and Hayne JJ); *Clarke* at 299 [34] (French CJ).

[59] *Melbourne Corporation* at 81-82 (Dixon J); *Clarke* at 313 [96] (Hayne J).

[60] *Austin* at 265 [168] (Gaudron, Gummow and Hayne JJ), citing *Melbourne Corporation* at 75 (Starke J). See also *Austin* at 302 [283] (Kirby J), citing the *Pay-roll Tax Case* at 398 (Windeyer J); *Clarke* at 299 [32], [33] (French CJ).

[61] Cf *Melbourne Corporation* at 81 (Dixon J); *Clarke* at 299 [34] (French CJ).

[62] Cf *Melbourne Corporation Case* at 77 (Dixon J), where the effect of the *Banking Act 1945* (Cth) was to preclude the plaintiff from continuing to bank with a private entity of its choice.

territory, to grant or withhold permission to commence a mining operation (cf QS [36]). In these circumstances, Queensland correctly accepts that the ability of a State to continue to obtain revenue from mining 'remains unimpaired' (QS [41]). Accordingly, the WA contention that the Act 'excludes' the power of the State to 'finance' the development of intra-State communities and infrastructure in particular ways misstates the effect of the Act.[63]

89. *Secondly*, the MRRT is imposed on miners. Such persons do not form a class of persons 'at the higher levels of government'[64] of the type identified in earlier decisions of the Court.[65] Nor do miners perform any function intrinsic to the existence of a State as a constituent entity of the federal structure. That miners, or the mining industry, may be important to a State or its economy is not to the point.

90. *Thirdly*, contrary to the submissions of the plaintiffs and interveners in support (PS [102]-[103]), it overstates the case to say that the ability of the State legislature to control the development of its territory and its mineral resources is 'critical to its ability to function as a government'.

91. The authorities have long recognised that Commonwealth laws can adversely affect or limit the economic development of State territory or State resources. In *Murphyores Incorporated Pty Ltd v Commonwealth* (1976) 136 CLR 1, for example, the Court upheld legislation that prohibited the export of minerals unless written approval had been obtained from the Commonwealth Minister. The Minister could take into account environmental considerations in deciding whether to grant that approval. It was apparent that a refusal to grant approval might well affect the continued mining of mineral sands on Fraser Island.[66]

92. In *Tasmania v Commonwealth* (1983) 158 CLR 1 (***Tasmanian Dam Case***), the Court upheld Commonwealth legislation that prevented the construction of a dam and hydro-electric power station on land in Tasmania that was included within a list of World Heritage in Danger. The Tasmanian government had intended the dam and power station to generate electricity at low cost and thereby achieve economic growth and employment opportunities.[67] The fact that the legislation prevented the development of the land in the manner intended by the State, and thereby frustrated the State's economic plans (effects far stronger and clearer than anything proved here) did not affect its validity.[68]

93. In the *Native Title Act Case*, moreover, the Court rejected a challenge to the *Native Title Act 1993* (Cth) (**NTA**) based on the *Melbourne Corporation* principle. Among other things, the NTA potentially rendered the grant of mining leases 'future acts' that would be invalid unless there was compliance with the right to negotiate. Western Australia pleaded that the capacity and power to regulate land and other

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63 *Contra* WAS [9].

64 *Clarke* at 305 [62] (Gummow, Heydon, Kiefel and Bell JJ); see also 314-315 [97] (Hayne J).

65 See eg *AEU* at 233; *Austin*; and *Clarke*.

66 At 9 (Gibbs J, agreeing with Stephen J and Mason J), 9 (Stephen J), 15 (Mason J), 26 (Jacobs J, agreeing with Stephen J and Mason J).

67 At 60, 66-67 (Gibbs CJ), 206 (Brennan J). Indeed, Gibbs CJ noted 'further allegations of fact, made by Tasmania, regarding the economic importance to the State of the generation of electricity by means of the Gordon below Franklin scheme, and the large sums of money already spent or committed in the construction of the dam'.

68 At 139-141 (Mason J), 169 (Murphy J), 213-215 (Brennan J), 280-281 (Deane J) (rejecting the application of the *Melbourne Corporation* principle). See also *Richardson v Forestry Commission* (1988) 164 CLR 261.

resources in Western Australia and the revenue derived from it was essential to the continued existence of the State and its capacity to function as a government.[69] It claimed that the NTA would be likely to interfere significantly with mineral exploration and mining in the State. In rejecting the State's submissions, Mason CJ and Brennan, Deane, Toohey, Gaudron and McHugh JJ quoted with approval the following passage from Brennan J's judgment in *Tasmanian Dam Case*:[70]

> Waste lands of a State are to be administered by the executive government of the State according to the law which is binding upon it, including the laws of the Commonwealth that bind the State. A restriction upon the doing of specified acts in the exercise of an executive power to use and to control the use of waste lands is no invalid intrusion upon the exercise of that power.

94. Their Honours concluded (at 481):

> The Act does not purport to affect the machinery of the government of the State. The constitution of the three branches of government is unimpaired; the capacity of the State to engage the servants it needs is unaffected; the acquisition of goods and services is not impeded; nor is any impediment placed in the way of acquiring the land needed for the discharge of the essential functions of the State save in one respect, namely, the payment of compensation. The Act does not impair what Dawson J described as 'the capacity to exercise' constitutional functions though it may affect the ease with which those functions are exercised.

95. Far from being 'opaque' (cf WAS [70]), this passage clearly highlights the boundaries of the *Melbourne Corporation* doctrine consistently with prior case law, and does so in a manner that is contrary to the propositions now put by the plaintiffs and interveners in support.

96. Each of the cases identified demonstrates that Commonwealth laws may prevail over inconsistent State laws regarding natural resources and economic development on State territory. To put it another way, each demonstrates that a State's attempt to develop its territory or its resources may be made subject to a wide variety of Commonwealth laws.[71] It is therefore difficult to see how the ability to provide an 'incentive' for the development of the States' territory or resources can be described as a fundamental aspect of the States' capacity to function as governments. The contrast with the ability of the States to set the remuneration of their judges, parliamentarians and those in the higher levels of government[72] or to use a banker of their own choice[73] is stark.

97. *Fourthly*, and relatedly, the Commonwealth Parliament has long treated revenue derived by taxpayers from State mining operations as falling within the remit of the Commonwealth's taxation

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[69] At 479. A similar submission is repeated by Western Australia here: WAS [8]–[9].

[70] At 481, quoting from (1983) 158 CLR 1 at 214-215.

[71] Commonwealth laws may restrict a State's capacity to develop its territory or its resources in different ways. Examples include the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth); the *Native Title Act 1993* (Cth); the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), Pts II and III; and the *Water Act 2007* (Cth). Further, in 1938 the Commonwealth prohibited absolutely the export of haematite (other than micaceous haematite) and magnetite, and prohibited the export of iron-ore bearing minerals without the Minister's written consent (see the *Customs (Prohibited Exports) Regulations 1935* (Cth) as amended by the *Statutory Rules 1938 (No 65)* and the *Statutory Rules 1938 (No 86)*). Similar restrictions continued until 1992, when the Commonwealth repealed item 5 of Sch 7 of *Customs (Prohibited Exports) Regulations 1958* (Cth) (see the *Customs (Prohibited Exports) Regulations (Amendment) 1992* (Cth), s 4), which had prohibited the export from Australia of 'iron ore, beneficiated iron ores, iron ore concentrates and agglomerates' without the written consent of the Minister or an authorised person.

[72] *AEU* at 233 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Austin* (Supreme Court judges) and *Clarke* (parliamentarians). See also the *Second Fringe Benefits Tax Case* at 362-363 (Brennan J).

[73] As in *Melbourne Corporation* itself.

power. Since at least 1915 the Commonwealth Parliament has imposed various regimes of income tax upon mining revenue as the revenue needs of the Commonwealth have changed over time. For example, in the very first Commonwealth Income Tax Act, Parliament chose not to exempt income derived from mining from tax but did permit capital expended in carrying out mining operations, or in developing 'mining property', to be deductible.[74] In later legislation, various exemptions from income taxation were conferred in respect of certain mining income,[75] and then subsequently removed either in whole or in part.[76] Similar changes are evident in the manner in which the Commonwealth Parliament treated mining expenditure.[77]

98. Accordingly, to adopt the language of Gleeson CJ in *Austin*, the imposition of taxation burdens upon participants in State mining operations is 'familiar'.[78] That familiarity undercuts any suggestion that the States have had an ability to develop intra-State infrastructure, towns and communities in the mining industry absolutely free from the burden of Commonwealth legislation.

99. *Fifthly*, in any event, the plaintiffs have failed to establish the MRRT Act will have an effect of the *nature* and *degree* which forms the pleaded impairment of State function. The case is put at the level that the Act 'effectively prevents' a State from reducing or giving concessions in respect of royalties, because any such concession or reduction is 'automatically and proportionately' picked up in an increase in MRRT.[79] The analysis at [36]-[47] above shows this simply overstates and misstates the operation of the Act.

100. The same difficulties in the evidence confront the supporting interveners. While much reliance is placed by the interveners[80] on the existence of agreements that are said to incentivise the development by miners of infrastructure through the levying of royalties at a concessional rate, there is nothing in the MRRT Act that precludes such agreements from being entered into in the future. If such an agreement is entered into, whether and how it gives rise to categories of claimable mining expenditure[81] or relevant allowances under the Act will be given the same answer whichever State or part of a State a project is in. Nor has any evidence been adduced from which the Court could conclude that the effectiveness of these types of agreements is reduced in some relevant fashion by reason of the royalty allowance regime in the MRRT Act. In light of the matters noted in the preceding paragraph, the absence of such evidence is unsurprising.

101. Therefore it is not established as a constitutional fact that the MRRT would necessarily 'nullify' or 'neuter' any economic incentive created by reducing royalties in a particular State.

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74 *Income Tax Assessment Act 1915* (Cth), ss 11, 17.

75 *Income Tax Assessment Act 1922* (Cth), ss 5A, 14.

76 See eg *Income Tax Assessment Act 1936* (Cth), s 23.

77 See eg *Income Tax Assessment Act 1922* (Cth), s 14; *Income Tax Assessment Act 1936* (Cth), ss 122 – 124.

78 (2003) 215 CLR 185 at 215-216 [22].

79 See PS [108] and [27], amongst many places.

80 See eg WAS [46]–[50].

81 See EM, Example 5.1 (PRD 2015-2016) for an example of where an infrastructure contribution by a miner may be claimable as mining expenditure.

102. *Finally*, when placed in context, any impact on a State's ability to offer reduced royalties as an incentive would not diminish the capacity of the State to govern or function. A State's freedom to make choices remains unfettered: the MRRT does not restrict State revenue from mining, and it does not restrict access to any of the goods, services, personnel and property that a State may require to function. It does not restrict the mining leases that the State may or may not decide to grant. It does even not restrict the capacity of a State to encourage economic development otherwise than by royalties; for example, by facilitating the development of infrastructure to be used in connection with the operation of a mining project. A State could, if it wished, construct railways or harbours that would be needed for a mining project; it could provide the locomotives and railway stock required; it could give the miner's shipments of iron ore, or other minerals, priority when using the infrastructure; it could offer stamp duty concessions;[82] it could offer a nominal rent for land leased from the State for housing or other infrastructure;[83] it could exempt the miner's construction of infrastructure from State environmental or planning laws.[84] It could even make a payment to a miner equivalent to the amount (if any) of MRRT paid by the miner (as a bounty or aid saved by s 91). The means available to a State to encourage economic development remain legion.

103. The plaintiffs and supporting interveners have therefore failed to demonstrate that the commencement of the MRRT Act would have a relevant effect upon the ability of the States to perform their essential governmental functions. The asserted burden on States is 'so speculative and uncertain' as not to warrant restriction upon the Commonwealth taxing power.[85]

Section 91

104. The plaintiffs' submission that the MRRT Act is invalid because the MRRT Act and the Imposition Acts in substance operate as a prohibition on grant of aid to mining for iron[86] should be rejected.

105. In *Seamen's Union of Australia v Utah Developments Co* (***Seamen's Union***) (1978) 144 CLR 120, five members of the Court held that s 91 was directed at removing a prohibition on States granting certain kinds of aid and bounties which s 90 would otherwise impose.[87] Justice Mason (with whose reasons Jacobs and Aickin JJ agreed) stated at 147 (emphasis added):

> A prohibition is contained in the preceding provision, s. 90, arising from its conferment upon the Commonwealth Parliament of an exclusive power to impose duties of customs and excise and an exclusive power to grant bounties on the production or export of goods. The function of s. 91 is to relax this prohibition or, as the marginal note indicates, provide 'exceptions as to bounties'.

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82 Eg, amongst others, *Iron Ore (Channar Joint Venture) Agreement Act 1987* (WA); *Iron Ore (Hamersley Range) Agreement Act 1963*; *Iron Ore (Hope Downs) Agreement Act 1992* (WA) (FASOC at [54B], QRB 25-26).

83 Eg, amongst others, *Iron Ore (McCamey's Monster) Agreement Authorisation Act 1972* (WA); *Iron Ore (Mount Bruce) Agreement Act 1972* (WA) (FASOC at [54B], QRB 25-26).

84 See eg, the description of the benefits provided to the defendants under the agreement given force by the *Central Queensland Coal Associates Agreement Act 1968* (Qld) in *Seamen's Union of Australia v Utah Developments Co* (1978) 144 CLR 120 at 131-132 (Gibbs J), 149-150 (Mason J). See also *Commonwealth Aluminium Corporation Ltd v Attorney-General* [1976] Qd R 231 at 258-259 (Dunn J) (pointing out how the *Commonwealth Aluminium Corporation Pty Limited Agreement Act 1957* (Qld) overcame the statutory restrictions that would otherwise have applied).

85 Cf *Austin* at 260 [150], 262 [158] (Gaudron, Gummow and Hayne JJ).

86 Neither Queensland nor Western Australia has put submissions on this question.

87 See *Seamen's Union* at 126 (Barwick CJ), 142-144 (Stephen J), 147 (Mason J), 154 (Jacobs J), 159 (Aickin J).

> The words 'Nothing in this Constitution' refer back primarily, if not exclusively, to s. 90 because there is no other provision in the Constitution which incorporates a relevant prohibition.

106. This reasoning indicates that s 91 is concerned with provisions of the Constitution that impose prohibitions directly on the States. Accordingly, s 91 cannot render invalid a Commonwealth law such as the MRRT Act.

107. No reason exists for departing from the construction of s 91 adopted in *Seaman's Union*. The words 'nothing in this Constitution prohibits' naturally suggest that s 91 is directed to prohibitions imposed by the Constitution. The placement of s 91 immediately after the prohibition on bounties in s 90 reinforces that view. It would be strange to construe s 91 as limiting the heads of legislative power in s 51 when those heads of power do not impose any prohibition on the States granting bounties or aid.

108. The conclusion reached in *Seaman's Union*, moreover, accords with the views of Quick and Garran[88] and with the drafting history of s 91. As Stephen J pointed out at 143, s 91 originally formed part of the clause that became s 90; it was only separated by the drafting committee after the 1898 Melbourne Convention and the alteration was adopted without debate. That suggests that s 91 was not intended to have the wide construction advanced by the plaintiffs.

109. *Seamen's Union* also establishes that the expression 'aid' is confined to the grant of pecuniary payments, rather than non-pecuniary assistance provided by a State.[89] As Stephen J put it (at 140):

> The word 'aid' may have a very wide meaning, as when it describes assistance generally, but it also has other meanings much narrower and more specific in character. It is one of these more specific meanings which I regard as conveyed by its use in s. 91, namely the meaning of 'a pecuniary grant in aid; a grant of a subsidy or tax to the king for an extraordinary purpose' (*Oxford English Dictionary*). In Palgrave's *Dictionary of Political Economy* (1894) this is the only meaning given which has other than merely antiquarian interest: after describing the feudal aids paid by tenants to a knight, that work says, of 'aid', that it is 'used also in same sense as Subsidy (q.v.)', which term in turn is defined as 'an aid, tax or tribute granted by parliament to the king'.

110. A reduction in the rates at which royalties would otherwise be payable or exempting persons from the payment of royalties does not fall within the description of 'aid' within s 91. It is no different from an exemption for stamp duty for an agreement dealing with the grant of special coal mining leases, which no justice in *Seaman's Union* regarded as pecuniary 'aid'.[90] It follows that the section does not apply to the MRRT Act and the Imposition Acts.

111. Further, it is incorrect to claim, as the plaintiffs do, that the construction of s 91 adopted in *Seamen's Union* treats the terms 'aid' and 'bounty' as though they were synonymous.[91] A 'bounty', as Stephen J explained, involves some precise relationship between payments made and units of goods produced or goods exported, whereas no similar relationship exists with 'aid'.[92] In the case of mining, a bounty would refer to payments made per tonne of the metals mined or extracted. That, however, would

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88 *Annotated Constitution of the Australian Commonwealth*, 1901, pp 841-842.

89 At 126 (Barwick CJ), 135 (Gibbs J), 140 (Stephen J), 159 (Murphy J).

90 For example, *Seamen's Union* at 149 (Mason J).

91 PS [151].

92 At 141-142.

still give the term 'aid' in the sense of a pecuniary grant work to do. It would not require treating 'aid' as extending to a reduction in royalties or any tax otherwise payable.

112. But even if (contrary to the submissions above) the construction of s 91 adopted in *Seamen's Union* were too narrow, the MRRT Act and the Imposition Acts would remain valid. On any view, s 91 can only apply to 'prohibitions' on a State granting aid to or bounty on mining of gold, silver and other metals. It therefore will not affect the MRRT Act unless that law is properly characterised as prohibiting aid to mining of metals. It is well established that the characterisation of a law requires identification of the nature of the rights, duties, powers and privileges which the statute changes, regulates or abolishes.[93] The MRRT Act provides for a tax to be paid in respect of mining project interests in certain circumstances. Nowhere does it purport to affect the ability of any State to reduce or alter its royalties in respect of metals. Indeed, it does not oblige a miner to pay MRRT even when royalties might be payable under State law; for example, a miner will not be liable to pay MRRT if its mining profit in respect of a mining project interest for an MRRT year does not exceed the sum of its MRRT allowances, or if the miner's group mining profits are less than or equal to $75 million.[94] As that is so, as a matter of substance, the MRRT Act does not operate as a prohibition on aid to mining.

113. For these reasons, s 91 does not invalidate the MRRT Act or the Imposition Acts.

PART VI QUESTIONS RESERVED

114. The questions reserved to the Full Court should be answered as follows:

Question (i): No.

Question (ii): No.

Question (iii): The plaintiffs.

PART VII LENGTH OF ORAL ARGUMENT

115. The oral argument of the Commonwealth is estimated to take 5 hours.

Dated: 25 January 2013

JT Gleeson SC **NJ Williams SC** **DFC Thomas** **GJD del Villar**

Counsel for the Commonwealth

[93] *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 352-353 [7] (Brennan CJ and McHugh J), 372 [58] (Gummow and Hayne JJ); cited in *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 at 492 [16] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

[94] FAD at [66(c)] (QRB 107). See also [36], [99]-[101] above (pointing out that the plaintiffs have failed to demonstrate that the MRRT would neuter any incentive created by State royalties).