IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S163 of 2012

BETWEEN

Fortescue Metals Group Limited
ACN 002 594 872
First Plaintiff

Chichester Metals Pty Limited
ACN 109 264 262
Second Plaintiff

FMG Pilbara Pty Limited
ACN 106 943 828
Third Plaintiff

FMG Magnetite Pty Limited
ACN 125 124 405
Fourth Plaintiff

FMG North Pilbara Pty Limited
ACN 125 154 243
Fifth Plaintiff

AND

The Commonwealth of Australia
Defendant

PLAINTIFFS' SUBMISSIONS

PART I. PUBLICATION

1. The plaintiffs certify that these submissions are in a form suitable for publication on the internet.

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PART II. ISSUES

2. The mineral resource rent tax (**MRRT**):

   (a) is provided for by the *Mineral Resource Rent Tax Act 2012* (***MRRT Act***);

   (b) is imposed by s.3(1) of one of three Acts (collectively the ***Imposition Acts***) - the *Mineral Resource Rent Tax (Imposition – Customs) Act 2012*, the *Mineral Resource Rent Tax (Imposition – Excise) Act 2012*, or the *Mineral Resource Rent Tax (Imposition General) Tax Act 2012.*

3. The issue is whether, as the plaintiffs contend, the *Imposition Act*s are invalid. The plaintiffs rely on four contentions in that regard, namely, that the *Imposition Acts*:

   (a) are laws with respect to taxation which discriminate between States contrary to s.51(ii) of the *Constitution*;

   (b) are laws or regulations of trade, commerce or revenue which, contrary to s.99 of the *Constitution*, give preference to one State over another State;

   (c) are laws which contravene the *Melbourne Corporation*[1] doctrine;

   (d) insofar as they purport to apply the MRRT to the mining of iron ore in an Australian State, or derive such application from treating iron ore as a "taxable resource" within the meaning of the *MRRT Act*, are laws which are not consistent with s.91 of the *Constitution.*

Part III. *JUDICIARY ACT 1903*, s.78B

4. Notices pursuant to s.78B have been given. The Attorneys-General for Western Australia and Queensland have indicated an intention to intervene. The Attorneys-General for New South Wales, Tasmania and the Northern Territory have indicated an intention not to intervene.

PART IV. RELEVANT FACTS

5. 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 pleadings are the Further Amended Statement of Claim (**FASOC**), Further Amended Defence (**FAD**) and Amended Reply.

6. Without seeking to repeat the pleadings, the basic facts are:

   (a) The second to fifth plaintiffs hold registered mining leases in Western Australia, granted pursuant to the *Mining Act 1978* (WA)[2], entitling them to mine for iron ore[3].

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1 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31.

2 FASOC [14]-[15], FAD [14]-[15].

(b) The second to fifth plaintiffs are obliged to pay mining royalties to the State of Western Australia in respect of iron ore mined from their mining leases[4], which once mined becomes the property of the second to fifth plaintiffs and ceases to be the property of the Crown in right of the State of Western Australia.

(c) The second to fifth plaintiffs are persons to whom the MRRT legislation, if valid, is applicable in financial years from 1 July 2012 onwards.

(d) The State legislative regimes for mining royalties are (and as at the commencement of the *MRRT Act* and *Imposition Acts* were) different, and the States have the capacity to vary those regimes from time to time, either generally[5] or by determining a specific rate applicable to specific miners (which was often done in State Agreements ratified by State legislation)[6].

PART V. CHRONOLOGY

7. A short chronology is contained in Annexure A.

PART VI. ARGUMENT

(i). The *MRRT Act* and the *Imposition Acts*

8. Each *Imposition Act* provides in s.3(1) that MRRT payable under the *MRRT Act* "is imposed". The *Imposition Acts* operate in the alternative: see each s.3(2). The *Minerals Resource Rent Tax (Imposition General) Act 2012,* if valid, appears that most likely to apply.

9. MRRT is payable pursuant to s.10-1 of the *MRRT Act* for an MRRT year[7] by a miner in an amount equal to the sum of its MRRT liabilities for each of its "mining project interests" for that year.

10. The essential operation of the MRRT involves the following elements.

11. The "mining project interest" must be identified.[8] A "mining project interest" is inextricably connected to a "production right", which relevantly[9] is a State-granted right in respect of a particular geographical part of a State: ss 15-5(2), 15-15.

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3 FASOC [17], FAD [17].

4 FASOC [19], FAD [19].

5 FASOC [52], FAD [52].

6 FASOC [54]-[54R], FAD [54]-[54R].

7 Each MRRT year commences on 1 July: s.10-25.

8 There are provisions in Div 115 of the *MRRT Act* for the combination of "integrated" mining project interests relating to the same kind of taxable resource (see, e.g. FASOC [27]) and provisions in Div 215 of the *MRRT Act* for elective deemed consolidation of mining project interests in the head company of a tax consolidated group.

9 Leaving aside mining leases in Commonwealth Territories, and situations where no legislative authority is required to undertake mining (e.g. private land held in fee simple where no minerals are reserved to the Crown).

12. The amount of a miner's liability to pay MRRT for each mining project interest is calculated in accordance with s.10-5 of the *MRRT Act*. It is arrived at by applying the MRRT rate[10] to the miner's "mining profit" after deducting from such mining profit the amount of the miner's "MRRT allowances" (in each case referable to the mining project interest).

13. The miner's "mining profit" is calculated by deducting from the miner's "mining revenue" its "mining expenditure": s.25-5. "Mining revenue" for each mining project interest is determined in accordance with the provisions of Division 30 of the *MRRT Act*. "Mining expenditure" for each mining project interest is determined in accordance with Division 35 of the *MRRT Act*.

14. The amounts to be deducted from mining revenue as being "mining expenditure" do not include "excluded expenditure": s.35-5(2). Mining royalties payable to a State are excluded expenditure: s.35-40(1)(a).

15. Mining royalties payable to a State, however, are to be deducted from mining profit in calculating MRRT liability[11], because mining royalties form part of "MRRT allowances" for each mining project interest: s.10-10. Indeed they are, in priority of application, the first MRRT allowance to be so deducted: s.10-10.

16. A liability to pay mining royalty gives rise to a "royalty credit": s.60-20(1)(a). The "royalty credit" attributable to payment of a "mining royalty" is arrived at by dividing the liability for the mining royalty by the MRRT rate: s.60-25(1). A "royalty allowance" is so much of the "royalty credits" as do not exceed the mining profit: s.60-15(1).

17. The mining project interests to which the *MRRT Act* applies are interests in relation to iron ore and coal, and some related substances (which are called "taxable resources"): ss.15-5(4) and 20-5.

18. MRRT does not become payable until the miner's "group mining profit" exceeds $75 million (ss.10-15, 45-5(1) and (2)) and the full amount of MRRT does not become payable until the group mining profit exceeds $125 million (ss.45-10(1) and (2)).

19. Also, if available "royalty credits" are not needed to offset the mining profit in any one year, they can be used in subsequent years: s.60-25(2). When available in subsequent years, the amount of the "royalty credits" is uplifted (to take account of the time value of money) as provided by s.60-25(2). And available "royalty credits" may be used with other mining project interests if the interests are "integrated": Division 65, Part 3-2.

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[10] Effectively 22.5 per cent: see s.4 of each *Imposition Act*.

[11] *MRRT Act*, s.10-5.

20. While:

(a) MRRT is not payable unless "group mining profits" exceed $75 million;

(b) "royalty credits", if they are not needed to offset mining profits in one year, may be used in subsequent years in an uplifted amount; and

(c) "royalty credits" may be used with other "integrated" mining project interests,

there is no escape from the conclusion that a miner's MRRT liability, when payable, is either inversely proportional to the miner's liability for State mining royalties or is directly related to the extent of a miner's liability for State mining royalties. The *MRRT Act* is expressly designed so that, if more State royalties are payable, less MRRT is payable. And *vice versa.*

21. In the result, in circumstances where MRRT is payable, a miner's actual liability to MRRT will vary from State to State, depending on the royalty rate applicable in that State. This is because the miner's liability depends on making the calculation in s.10-5 of the *MRRT Act*, and this involves the deduction of MRRT allowances.

22. It also has the effect that a State cannot reduce the royalty payable in respect of mining for iron ore, nor can it give a concession in respect of its royalty rate, nor can it change, favourably to the miner, the basis of calculating royalty without the miner becoming liable to pay to the Commonwealth, as MRRT liability, the amount by which its liability to pay royalty to the State has been reduced. That this is the operation of the *MRRT Act* is confirmed[12] by s.60-1.

(ii). Example of the application of the royalty credit regime in the *MRRT Act*

23. A worked example is useful to demonstrate the operation of the *MRRT Act* and the royalty credit mechanism as between miners in different States (a matter relevant to the ss.51(ii) and 99 issues). Table 1 below sets out the situation of two hypothetical mining companies each extracting 5 million tonnes of beneficiated iron ore valued at $100/tonne, where the "mining expenditure" is $40/tonne. The first miner is assumed to have its mining project interest in Western Australia (where royalties are 5%) and the second miner is assumed to have its mining project interest in a jurisdiction where royalties are 1.25% (e.g. Qld).[13]

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12 Sections 4-5(2) and 245-10(2)(b)

13 The royalty rates are derived from FASOC [52] and Annexure E. The example does not take into account allowances other than royalty credits, which in any event are applied first.

TABLE 1

Miner A (WA)	Miner B (Qld)
Step 1: Determine "mining profit"	
= Mining revenue – Mining expenditure (5,000,000 x $100) – (5,000,000 x $40) $500,000,000 – $200,000,000 $300,000,000	= Mining revenue – Mining expenditure (5,000,000 x $100) – (5,000,000 x $40) $500,000,000 – $200,000,000 $300,000,000
Step 2: Determine "Royalty payable"	
= Tonnes x price x royalty rate 5,000,000 x $100 x 5% $25,000,000	= Tonnes x price x royalty rate 5,000,000 x $100 x 1.25% $6,250,000
Step 3: Determine "MRRT liability"	
MRRT rate x (Mining profit – MRRT allowances) $(0.3 \times (1 - 0.25)) \times \left(\text{mining profit} - \frac{\text{royalty payable}}{0.3 \times (1-0.25)}\right)$ $0.225 \times \left(\text{mining profit} - \frac{\text{royalty payable}}{0.225}\right)$ $(0.225 \times \text{mining profit}) - \left(\frac{0.225 \times \text{royalty payable}}{0.225}\right)$ (0.225 x mining profit) – royalty payable (0.225 x $300,000,000) – $25,000,000 $67,500,000 – $25,000,000 **$42,500,000**	MRRT rate x (Mining profit – MRRT allowances) $(0.3 \times (1 - 0.25)) \times \left(\text{mining profit} - \frac{\text{royalty payable}}{0.3 \times (1-0.25)}\right)$ $0.225 \times \left(\text{mining profit} - \frac{\text{royalty payable}}{0.225}\right)$ $(0.225 \times \text{mining profit}) - \left(\frac{0.225 \times \text{royalty payable}}{0.225}\right)$ (0.225 x mining profit) – royalty payable (0.225 x $300,000,000) – $6,250,000 $67,500,000 – $6,250,000 **$61,250,000**

24. In this example, it can be seen that the miner in the higher royalty State pays *less* MRRT than the miner in the lower royalty State and if the higher royalty State were to reduce its royalties, this would result in an automatic and proportionate increase in MRRT.

25. A worked example is also useful to demonstrate the operation of the *MRRT Act* and the royalty credit mechanism in circumstances where a State decides to reduce its royalty rates or grant a concessional royalty rate to a particular miner, a matter relevant to the *Melbourne Corporation* and s. 91 issues.

26. Table 2 sets out the situation of a hypothetical mining company extracting 5 million tonnes of beneficiated iron ore valued at $100/tonne, where the "mining expenditure" is $40/tonne. Table 2 shows the effect of a reduction in the royalty rate from 5% to 2.5%.

TABLE 2

Miner A (5% royalties)	**Miner A (reduced royalties (2.5%))**
Step 1: Determine "mining profit"	
= Mining revenue – Mining expenditure (5,000,000 x $100) – (5,000,000 x $40) $500,000,000 – $200,000,000 $300,000,000	= Mining revenue – Mining expenditure (5,000,000 x $100) – (5,000,000 x $40) $500,000,000 – $200,000,000 $300,000,000
Step 2: Determine "Royalty payable"	
= Tonnes x price x royalty rate 5,000,000 x $100 x 5% $25,000,000	= Tonnes x price x royalty rate 5,000,000 x $100 x 2.5% $12,500,000
Step 3: Determine "MRRT liability"	
MRRT rate x (Mining profit – MRRT allowances) $(0.3 \times (1-0.25)) \times \left(\text{mining profit} - \frac{\text{royalty payable}}{0.3 \times (1-0.25)}\right)$ $0.225 \times \left(\text{mining profit} - \frac{\text{royalty payable}}{0.225}\right)$ $(0.225 \times \text{mining profit}) - \left(\frac{0.225 \times \text{royalty payable}}{0.225}\right)$ (0.225 x mining profit) – royalty payable (0.225 x $300,000,000) – $25,000,000 $67,500,000 – $25,000,000 $42,500,000	MRRT rate x (Mining profit – MRRT allowances) $(0.3 \times (1-0.25)) \times \left(\text{mining profit} - \frac{\text{royalty payable}}{0.3 \times (1-0.25)}\right)$ $0.225 \times \left(\text{mining profit} - \frac{\text{royalty payable}}{0.225}\right)$ $(0.225 \times \text{mining profit}) - \left(\frac{0.225 \times \text{royalty payable}}{0.225}\right)$ (0.225 x mining profit) – royalty payable (0.225 x $300,000,000) – $12,550,000 $67,500,000 – $12,500,000 $55,000,000
Total burden (royalties + MRRT)	
= $25,000,000 + $42,500,000 **$67,500,000**	= $12,500,000 + $55,000,000 **$67,500,000**

27. In the example in Table 2, it can be seen that:

(a) if a State reduced its royalties, this would result in an automatic and proportionate increase in MRRT paid (such that the miners in that State would obtain no financial benefit from a royalty reduction); and the State's capacity to achieve policy objectives by lowering royalty rates is curtailed;

(b) if a State granted a concessional rate of royalty to a miner by way of financial assistance, that would result in an automatic and proportionate increase in MRRT paid (such that the miner would obtain no financial benefit from the concession).

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(iii). Section 51(ii)

28. The legislative powers conferred on the Commonwealth by s.51 of the *Constitution* include the power to make laws with respect to:

> "(ii) taxation; but so as not to discriminate between States or parts of States."

29. As is apparent from its terms s.51(ii) consists of a grant of legislative power to the Commonwealth, but a power constrained by an express limitation on the manner of its exercise.

30. Conferral on the Commonwealth of a power to tax was an important aspect of the
20 new polity. It lay at the heartland of federation, but so too did the restriction on the manner of its exercise provided for by the words "but so as not to discriminate between States or parts of States".[14]

31. As was said by the Court in *Bourke v State Bank of New South Wales* (1990) 170 CLR 276 at 284, while the paragraphs of s.51 are plenary grants of power to be construed with all the generality which the words will admit, that principle "is naturally subject to such express limitations on Commonwealth legislative power as the Constitution contains". The words of s.51(ii) were recognized by five Justices as containing a "positive prohibition or limitation" in the *Work Choices Case* (2006) 229 CLR 1 at 127, [219], [220].

30 32. It is clear, of course, that the laws imposing MRRT are laws with respect to taxation. They contravene the limitation to that power set out in s.51(ii), however, in that *in terms* they provide for MRRT to be payable at rates higher in some States than in others. It is a case where the Commonwealth legislation overtly imposes a tax calculated and payable at a different rate for each State. It is not a case when a Commonwealth tax is imposed at a uniform rate throughout Australia but the amount actually payable may happen to vary because of the circumstances in a particular State.

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14 Quick and Garran, *Annotated Constitution of the Australian Commonwealth* (1991) at 549.

33. It is quite incorrect to say that because s.4 of each *Imposition Act* provides for an "MRRT rate" of 22.5%, the MRRT is imposed at a uniform rate in every State. The MRRT payable in any State is the result of a calculation in a formula, an essential variable or component of which is State royalties. In dealing with constitutional restrictions and limitations on power such as those in s.51(ii), the Court looks to the substance, not merely the form, of the impugned law.[15]

34. In *W R Moran Pty Ltd v Deputy Federal Commissioner of Taxation (NSW)* (1940) 63 CLR 338 at 345-6, it was observed that the "real substance and effect", not just the "form", of the impugned tax had to be considered, in order to determine whether in terms of s.51(ii), it "discriminated between States".

35. It is also submitted that the course of decisions in the Court supports the view that if a tax is *imposed* so that taxpayers are treated differently in different States because of the non-uniform levy of the tax in their States, the tax is applied unequally and thus discriminates in terms of s.51(ii). See *R v Barger* (1908) 6 CLR 41 at 70-80, 105-111; *Cameron v Deputy Federal Commissioner of Taxation for Tasmania* (1923) 32 CLR 68 at 72, 76-77, 78, 79, 80; *W R Moran Pty Ltd v Deputy Federal Commissioner of Taxation (NSW)*[16] (1939) 61 CLR 735 at 755-7; *South Australia v Commonwealth (First Uniform Tax Case)* (1942) 65 CLR 373 at 413, 426, 436, 440-1, 456, 462; *FCT v Clyne* (1958) 100 CLR 246 at 264-8; *Conroy v Carter* (1968) 118 CLR 90 at 95-6. See also *Austin v The Commonwealth* (2003) 215 CLR 185 at 247 [117]-[119], dealt with below.

36. Thus, in *Cameron* v *DFCT* (1923) 32 CLR 68, regulations that provided for *different values* for livestock in different States (for the purposes of determining profit the subject of the imposition of income tax) were held invalid as contravening s.51(ii). It did not matter that a "fair average value" had been selected for the livestock in each State apparently to reflect then local conditions and local values (esp. at 76-7, 79).

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15 As was said in *Ha v New South Wales* (1997) 189 CLR 465 at 498 by Brennan CJ, McHugh, Gummow and Kirby JJ:

> "When a constitutional limitation or restriction on power is relied on to invalidate a law, the effect of the law in and upon the facts and circumstances to which it relates – its practical operation – must be examined as well as its terms in order to ensure that the limitation or restriction is not circumvented by mere drafting devices. In recent cases, this Court has insisted on an examination of the practical operation (or substance) of a law impugned for contravention of a constitutional limitation or restriction on power."

See too the cases referred to in *Ha* at fn (124); *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27; *Re Wakim* (1999) 198 CLR 511 at 571, [103]; *New South Wales v The Commonwealth (Work Choices Case)* (2006) 229 CLR 1 at 121, [197]; *Bodruddaza v Minister for Multicultural and Indigenous Affairs* (2007) 228 CLR 651 at 671, [54]; *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 56, [151].

16 The result in cases like *W R Moran* (1939) 61 CLR 735; (1940) 63 CLR 338 and the *First Uniform Tax Case* (1942) 65 CLR 373 arose because the Commonwealth relied on s.96 of the *Constitution* which gives the Commonwealth power to grant financial assistance to any State (even on condition) in a discriminatory manner. The taxes imposed in those cases were uniform even though the grant of financial assistance to the States was not.

37. It may be however, that there is not proscribed discrimination between States if the tax is imposed uniformly but it happens to extract different amounts of tax in different States because of local conditions: *Austin v The Commonwealth* (2003) 215 CLR 185 at 247 [117]; *W R Moran* (1939) 61 CLR 735 at 764; (1940) 63 CLR 338 at 349; *Conroy v Carter* (1968) 118 CLR 90 at 101 (Taylor J, not in the statutory majority). In *Conroy v Carter* at 101, Taylor J explained that "a law with respect to taxation cannot, in general, be said to discriminate if its operation is general throughout the Commonwealth, even though, by reason of circumstances existing in one or other States, it may not operate uniformly".

38. The distinction is between the structure of a measure imposing taxation and practical operation of that measure in different States. If by the terms of the measure the tax is imposed in a differential manner in different States, it falls foul of the restriction found in terms in s.51(ii). If, however, the tax is not designed that way and is imposed uniformly but it happens practically to operate differently in different States, the tax may not fall foul of s.51(ii).[17]

39. By way of example, an income tax imposed at the rate of 45% on iron-ore companies throughout Australia does not discriminate, even though it may operate differently in the States (WA iron-ore companies would contribute the largest amount of tax, WA having the largest source of iron-ore). An income tax imposed, however, at different rates (say 40% in NSW, 45% in Qld and 50% in WA) would contravene the constitutional limitation on power in s.51(ii) because it would impose different rates of taxation based on the location of the subject of taxation in one State or another.

40. In particular if the structure of a Commonwealth tax is that it imposes tax at different rates in different States and the differences in rates arise because they are arrived at by taking into account the levels of State taxes in different States, there has been discrimination contravening the restriction in s.51(ii). Put another way if the Commonwealth tax is structured so that it is inversely proportional, or directly related, to the rate of State taxes, so that taxpayers pay different rates of Commonwealth tax depending on the State tax rate, the Commonwealth tax is levied in a manner contrary to s.51(ii).

41. This is precisely what was noted, at an early point after federation, by the majority in *Barger* (1908) 6 CLR 41.[18] In *Barger* the majority (in discussing *Colonial Sugar Refining Company Ltd v Irving* [1906] AC 360) explained that if excise duty "had been made to vary in inverse proportion to the Customs duties in the several States so as to make the actual incidence of the burden practically equal, that would have been a violation of the rule of uniformity" required by s.51(ii) (at 70-71).

42. Thus a Commonwealth tax cannot be imposed even when the total tax paid by the taxpayer in each State is the same (having regard to the cumulative sum of the

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17 The term "may not" is used because of the possibility that, looked at as a matter of substance, a law expressed to operate uniformly may yet discriminate in a manner which offends s.51(ii).

18 The case has been criticised from time to time for the reliance of the majority on the reserved powers doctrine, but the majority's remarks on the restriction in s.51(ii) were not based on that doctrine.

Commonwealth and State taxes) if the result is achieved by the Commonwealth law imposing a different tax rate on different taxpayers in different States. To permit such an imposition of Commonwealth tax would render nugatory the constitutional limitation in s.51(ii).

43. *Colonial Sugar Refining Company Ltd v Irving* [1906] AC 360 is not against this proposition. There, Lord Davey said at 367 that the "fact that it operates unequally in the several States arises not from anything done by the Parliament, but from the inequality of duty imposed by the States themselves" (at 367.8). That case, however, was concerned with the Commonwealth's first imposition of uniform excise duties and with the excise duty on sugar. The duty was made payable on all sugar on which customs or excise duty had not been paid (pursuant to State laws) before 8 October 1901. The use of that criterion thus identified the goods in respect of which excise duty was payable, and applied uniformly.

44. The apparent aim of the legislation was to provide a "transitional provision" giving credit to those who had already paid State customs or excise duty on the same goods. Lord Davey explained this: "The substance of the enactment ... is that goods which have already paid customs or excise duties shall not pay over again, and some such provision is obviously necessary in the transition from the old order to the new" (at 367.7, and see at 367.9-368.1).

45. The "new order" was the coming into operation of the Commonwealth's exclusive right to impose customs or excise duties under s.90 of the *Constitution*. A transitional provision was necessary and such a provision was not discriminatory. If the position were otherwise, credit could not have been given to those who had already paid State excise. That is the basis on which the majority in *Barger* analysed *Irving* but, as already mentioned, said that a Commonwealth tax which levies tax in inverse proportion to State tax, discriminates contrary to s.51(ii).

46. In short, in *Irving*, the transitional exemption from the uniform Commonwealth sugar excise was held not to discriminate. Unlike the MRRT the excise was in terms a uniform measure. It was not structured to exact the excise differently in different States.[19]

47. The MRRT is imposed in a non-uniform manner as between the States. That is because the MRRT liability is determined for taxpayers in different States by applying the MRRT rate of 22.5% to different amounts in these States depending on the quantum of the MRRT allowances, the first of which is State royalties. The quantum of MRRT allowances will *necessarily* be different because of the different State royalty regimes. The amount of tax payable (and the effective rate of tax) by the application of the formula in s.10-5 of the *MRRT Act* will differ in different States. The example in Table 1 above illustrates this.

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[19] Also, the MRRT is a *superadded* tax exacted at different rates, not a replacement for State mining royalties as was the case in *Irving*.

48. This is not a case where MRRT happens to be payable by taxpayers in different amounts because of "local circumstances". Rather MRRT is exigible at different rates as between taxpayers, because of the location of their projects in different States.

49. It is submitted that, consistently with the above, s.3(1) of each of the *Imposition Acts* discriminates between States, contrary to the express limitation on legislative power contained in s.51(ii), and is invalid.

50. The view that a tax *imposed non-uniformly* in different States is not valid is consistent with the view of s.51(ii) and its limitations at the Convention Debates.

10 51. In this regard s.51(ii) was first drafted so that the limitation read "so that all taxation shall be uniform throughout the Commonwealth ..."[20]. The wording was changed to ensure that the use of "uniform" did not also entail a conclusion that an excise could only be levied if it also practically *operated* equally (in addition to being *imposed* uniformly) as between the States. This was because in *Pollock v Farmers' Loan & Trust Co* 157 U.S. 429 (1895) at 593, Field J appears to have thought that "uniform" entailed the conclusion that a tax was valid only if the same proportion of tax was extracted from each US State.

52. The selection of the words "but so as not to discriminate between States or parts of States" in s.51(ii) instead of "uniform", however, did not ameliorate the requirement
20 that a tax, to be valid, must be *imposed* uniformly or equally in each State. Quick & Garran makes the point[21] that the limitation in s.51(ii) has the same effect as Art 1, s.8, sub-s.1 of the US *Constitution* and means that the same rate has to be imposed on the same article "wherever found".

53. The Commonwealth has suggested - FAD paragraphs 60(d)(xxvi) and (xxvii) – that any differential treatment or unequal outcome between States alleged in the FASOC was reasonably appropriate and adapted to the attainment of the objectives listed in paragraphs 60(d)(xxvi) and that each such objective was a proper objective of the Commonwealth Parliament that is not prohibited by s.51(ii).

54. This contention seeks to apply, to the limitation in s.51(ii), concepts derived from
30 other provisions of the *Constitution*, and from human rights jurisprudence. Those concepts are inappropriate to s.51(ii), a simple provision empowering laws with respect to taxation.

55. Laws with respect to taxation deal with a subject matter the content of which, at least so far as concerns the imposition of tax, is entirely statutory. The limitation on that power contained in s.51(ii) is inevitably that a statute imposing taxation must not *itself* discriminate between States, or parts of States.

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20 Quick & Garran, *Annotated Constitution of the Australian Commonwealth* (1901) at 549.9.

21 Quick & Garran, *Annotated Constitution of the Australian Commonwealth* (1901) at 550.8, referring to the *Head Money Cases* 112 U.S.580.

56. It is accepted, of course, that Parliament, by laws imposing taxation (including laws altering the rates at which taxation is imposed), may seek to achieve aims other than raising revenue. It may, for example, seek to encourage imports of particular goods, to discourage conduct (such as smoking) regarded as unhealthy, or to aid environmental protection. All those may be aims sought to be achieved by laws imposing taxation, but the terms of s.51(ii) do not allow laws seeking to achieve those aims to differ in imposition from State to State.

57. No decision of the Court has applied "reasonably appropriate and adapted" and "proper objective" tests to laws imposing taxation and made under s.51(ii). The inappropriateness of seeking to do so can be seen from consideration of the notion of "discrimination" as referred to in earlier decisions.

58. In *Street v Queensland Bar Association* (1989) 168 CLR 461 at 566-74, Gaudron J explained, with respect to s.117 of the *Constitution*, that in human rights jurisprudence, there is discrimination if equals are treated unequally or if unequals are treated equally; *but* that there is no discrimination if the different treatment is justifiable on the basis that it is "appropriate and adapted" to achieve a non-discriminatory purpose. The terms of s.51(ii) require that States, whether in relevant respects "equals" or "unequals", be treated equally. That there may be a non-discriminating *purpose* in imposing the tax is immaterial.

59. It is also, with respect, quite inappropriate to treat States as either "equals" or "unequals" in this sense. As the Privy Council said in *W R Moran*[22], speaking of the limitations contained in s.51(ii) and s.51(iii):

> "...no one can suppose that these qualifying sentences were ever regarded as affording protection against inequality as between the States in the incidence of taxation or in the advantages to be gained from bounties. The Commonwealth is very rich in minerals of many kinds, but they are, of course, unequally distributed between the States. Moreover, the climatic and soil conditions and the state of development are very different in these various areas. Uniform taxes on selected metals or, for example, on the coal produced in the States may impose a heavy burden on some States whilst leaving other States wholly untouched or only slightly affected; and the same remark is true as to the agricultural produce or the products of stock-raising in the various States: See *R v. Barger*. This was and is obvious, and it would be mistake to regard the restrictions contained in sec 51(ii.) and (iii.) as providing for equality of burden as regards taxation or equality of benefit as regards bounties. That could perhaps have been achieved by provisions of a very different nature which would have had regard to the amounts raised by taxation or the amounts of the bounties received in the different States. There was no attempt to do this in the Constitution, and sub-sec. ii. provides only that taxation shall be such that it does not discriminate between States."

Section 51(ii), as the Privy Council said in *W R Moran* is not concerned with providing for equality of burden. But s.51(ii) *is* concerned to prohibit any tax which is unequally imposed among the States even if it has a proper objective.

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22 (1940) 63 CLR 338 at 347-348; See also *Cameron v. The Queen* (2002) 209 CLR 339 at 343-4 [15].

60. In *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, Gaudron and McHugh JJ, in dealing with s.92 of the Constitution, said at 478:

> "A law is discriminatory if it operates by reference to a distinction which some overriding law decrees to be irrelevant or by reference to a distinction which is in fact irrelevant to the object to be attained; a law is discriminatory if, although it operates by reference to a relevant distinction, the different treatment thereby assigned is not appropriate and adapted to the difference or differences which support that distinction. A law is also discriminatory if, although there is a relevant difference, it proceeds as though there is no such difference, or, in other words, if it treats equally things that are unequal — unless, perhaps, there is no practical basis for differentiation."

61. That concept, it is submitted, insofar as it permits a measure to be imposed differently on the supposition that the measure serves a proper objective, can have no relevance for present purposes, for reasons similar to those adverted to above. Further the essential aspect of s.51(ii) in relation to laws imposing taxation is that there is one limitation on the ambit of the power, namely that it must not be exercised so as to discriminate between State or parts of States. The power to attain "objects" by laws which impose taxation is clear, but those are the only objects which may be achieved. To "equalise the burden of taxation" by imposing tax at different rates in different States is the very discrimination proscribed by s.51(ii).

62. The notion of "discrimination" as used in relation to ss.117 and 92 has been said to be that there is no discrimination, even if there is differential treatment of equals, if that differential treatment is "appropriate and adapted" to some other "proper objective", but such a notion cannot apply to s.51(ii).

63. If a Commonwealth tax law is structured so as to impose taxation non-uniformly as between taxpayers in different States, it contravenes the qualification to the otherwise plenary power in s.51(ii). The law cannot be saved on the basis that the Commonwealth Parliament had in mind some other beneficial purpose. If the position were otherwise, any Commonwealth tax could be asserted to be valid, even if imposed non-uniformly in different States, on the basis that some other purpose is served by the differential imposition of the tax. Parliament cannot decide for itself that a non-uniform tax is valid because it appropriately meets a different or higher purpose: *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 193.

64. *Austin v The Commonwealth* (2003) 215 CLR 185 was decided on the basis that the superannuation tax levied on State judges was prohibited by the *Melbourne Corporation* doctrine, ie. not on the basis of the limitation in s.51(ii) (see at 207 [6], 245 [111]). But s.51(ii) was referred to by Gaudron, Gummow and Hayne JJ to distinguish the specific reference in s.51(ii) to "discrimination". It was there observed that there can be no "discrimination *between*" States under s.51(ii) if there is no *comparative* differentiation *between States* and that such a notion was distinct from the notion that underpinned the *Melbourne Corporation* doctrine (at 247-9 [117]-[124]). In that context, they said (at 247 [118]):

> "The essence of the notion of discrimination is said to lie in the unequal treatment of equals or the equal treatment of those who are not equals, where the differential treatment is not the product of a distinction which is appropriate and adapted to the attainment of a proper objective."

65. Their Honours did not go on to apply an appropriate and adapted criterion to s.51(ii). *Austin* does not undermine the established position as to the meaning and effect of "discrimination between" when used in s.51(ii). There is no room for a further enquiry about whether the law is appropriate and adapted to meet a separate "proper objective". It may also be noted that there is in any event an express comparative differentiation between States in the manner in which the MRRT is calculated and levied under the legislation impugned in these proceedings.

66. The concept of "discrimination", as used in some provisions of the *Constitution* and elsewhere, does not always have the same meaning. In particular it does not always involve the concepts of equal treatment of unequals, unequal treatment of equals, and "appropriate as meeting another objective", in the sense referred to in *Street* and *Castlemaine Tooheys*. The ambit and content of the concept depends on the context.

67. "Discrimination", as Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ explained in *Bayside City Council v Telstra Corporation Ltd* (2004) 216 CLR 595 at 629-30 [40]:

> "... is a concept that arises in a variety of constitutional and legislative contexts. It involves a comparison, and, where a *certain* kind of differential treatment is put forward as the basis of a claim of discrimination, it *may* require an examination of the relevance, appropriateness, or permissibility of some distinction by reference to which such treatment occurs, or by reference to which it is sought to be explained or justified. In the selection of comparable cases, and in forming a view as to the *relevance*, appropriateness, or permissibility of a distinction, *a judgment may be influenced strongly by the particular context in which the issue arises*. Questions of degree may be involved. [Emphasis added.]

68. Thus, the conception of discrimination does not always require or permit an enquiry about whether the law does not (in truth) discriminate because some other proper objective is sought to be served. There is no scope for any principle that a tax law does not discriminate because it meets some other purpose if the tax law *differentiates* between States in the *imposition* of Commonwealth tax. Section 51(ii) does not permit *any such* differentiation. To treat it as doing so is to diminish, effectively to nothing, a constitutional guarantee to the States.

69. For the above reasons it is submitted that:

(a) Section 3 of the relevant *Imposition Act* is invalid as imposing a tax that discriminates between States by imposing MRRT at a different effective rate in different States.

(b) The notion that there is no discrimination if the differential treatment is justifiable by reference to some proper objective does not apply to the concept of "discriminates between States" in s.51(ii).

(iv). Section 99

70. The *Constitution* provides in s.99 that:

> "The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof."

10 71. The *Imposition Acts* are clearly laws "of revenue". See *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vic)* (2004) 220 CLR 388 at 422 [84].

72. As submitted earlier, the effect of the *MRRT Act* and the relevant *Imposition Act* is that the amount payable as MRRT will vary depending on the amount payable by way of mining royalty in any State. The MRRT payable will be lower in some States than in others because the royalties payable are higher.

73. There is thus a preference given to some States, having regard to the subsisting rates of royalties at the time the *MRRT Act* commenced. It is a preference because miners in some States pay MRRT at a lower rate than miners in others. The preference given is embedded in the very structure of the legislation.

20 74. In *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vic)* (2004) 220 CLR 388, the Court held by majority that s.6(2) of the *Commonwealth Places (Mirror Taxes) Act 1998* (Cth), in providing that State taxing laws (otherwise inapplicable to Commonwealth places by reason of s.52 of the *Constitution*) applied and had effect, did not give preference because the differential and unequal treatment arising from the application of different State taxing laws in the different States was the product of distinctions that were appropriate and adapted to a proper objective. It may be noted that the Court did not apply this reasoning to s.51(ii) because it also held that the *Mirror Taxes Act* was made under the exclusive power conferred by s.52(i) of the *Constitution* and the prohibition against discrimination in s.51(ii) did not
30 apply to such a law. Thus, the majority's reasoning in *Permanent Trustee* is not applicable to s.51(ii).[23]

75. The actual result in *Permanent Trustee* may be defensible on the basis that the *Mirror Taxes Act* did not give *preference* to any State by merely replicating the *then* existing State tax position in each State, as opposed to imposing a *new* Commonwealth tax burden non-uniformly[24]. That reasoning cannot be applied to the *Imposition Acts*. They "give preference" to States which have higher State royalties, by extracting less

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23 "Preference necessarily involves discrimination or lack of uniformity, but discrimination or lack of uniformity does not necessarily involve preference": *Elliott v Commonwealth* (1936) 54 CLR 657 at 668.3 (Latham CJ).

24 The actual decision may also be defensible on the basis that to make laws imposing taxation operating in Commonwealth places in States could not amount to giving preference to one State over another.

Commonwealth tax from those States and more *Commonwealth* tax from lower taxing States.

76. Although the actual result in *Permanent Trustee* may be defensible, the reasoning of the majority, to the extent it was justified on the basis that there is no discrimination or preference if such differentiation is the product of a distinction which is "appropriate and adapted to the attainment of a proper objective", should not, with respect, be followed.

77. This is because, it is submitted, preference *is* given in terms of s.99 if there is differentiation between or against States in the imposition of a tax measure and that differentiation results in one State being given a *preferred* position, regardless of whether the differentiation is justified on the basis that it is appropriate to meet a proper objective.

78. Like s.51(ii), s.99 is a simple provision that requires the States to be treated equally (i.e. without favour). Favouritism to one or more States cannot be justified on the basis that it serves a proper objective.

79. Put another way, the different or unequal treatment of the States cannot be regarded under s.99 as irrelevant on the basis that the impugned legislation is appropriate and adapted to serve a proper objective.

80. It is submitted that the majority's reasons in *Permanent Trustee* went further than was necessary for the actual decision.

81. It is useful to summarise the majority's reasoning in *Permanent Trustee* to demonstrate why some of that reasoning should not be followed. The majority reasoned as follows:

(a) The critical phrase in s.99 is "give preference .... over". Preference involves more than making a distinction or differentiation: at 423 [87].

(b) Preference involves discrimination but even if there is discrimination there is not necessarily a preference: at 423 [88].

(c) Both in *Street* and in *Austin*, it was suggested that the notion of discrimination includes the view that there is no such discrimination if a differentiation in treatment is justified as appropriate to meet a proper objective: at 423-4 [88]-[89].

(d) This was in part anticipated in *Elliott*, where the majority held that the imposition of a licensing system at particular ports in only some States did not give preference, when the decision to impose the licensing system was based on a view as to the necessary executive action at these ports: at 424 [90].

(e) There is no discrimination between States effected by the *Mirror Taxes Act*, even though there is a differential and unequal outcome as between States on the imposition of Commonwealth tax (replicating State tax in Commonwealth places) because the differentiation meets a proper objective: at 424-5 [91].

(f) The proper objective appears to have been the desirability that there be no benefit in a Commonwealth place compared to other parts of the State where the Commonwealth place is located: at 425 [91], [94].

(g) *Cameron v DFCT* did not require a different conclusion. Even if there was a difference in the treatment of different Commonwealth places in different States, the differential treatment was justified as being appropriate and adapted to the objective of replicating relevant State taxes in Commonwealth places located in the relevant State, as contemplated by s.8(4) of the *Mirror Taxes Act*: at 425 [92]-[94].

10 82. There are a number of reasons why the above reasoning should not be followed:

(a) First, the phrase "give preference ... over" does not permit the Court to ignore the differential treatment of a tax measure in different States on the basis that the differential treatment has a proper objective. Such a concept puts a gloss on the phrase, "give preference ... over". To adopt such an approach means that, notwithstanding the terms of s.99, a law of revenue *may* give preference to one State over another if there is a good enough reason for so doing. That is not permitted by the words of s.99 of the *Constitution*. It is the antithesis of them. The phrase "give preference ... over" does not import the concept of appropriate and adapted differentiation.

20 (b) Secondly, *Elliott* was decided on the basis that no State was given preference, in the sense of being favoured. It was not decided on the basis that a differential treatment is justified if founded on a proper objective. The majority in *Permanent Trustee* erred in equating the idea that there has to be the giving of preference (i.e. favourable treatment) and a separate notion that a law does not prefer if it meets a proper objective.

(c) Thirdly, the primary objective of the *Mirror Taxes Act* was to impose Commonwealth tax in Commonwealth places in the same way as State tax was imposed in the State where the Commonwealth place was located. To suggest that this is a proper objective, namely the objective of assimilation or
30 replication, is to permit a Commonwealth tax to be imposed differentially as between States on the footing that such assimilation or replication (by differentiation) is self-justificatory. It is not a valid "proper objective".

(d) Fourthly, the majority did not sufficiently address and explain why a *Commonwealth* tax did not give preference to one State over another when it made different State tax rates applicable in different States. Replicating the difference, whilst the difference is permissible under State law, is not permissible pursuant to a Commonwealth law. This is because when it is imposed, it operates unequally and non-uniformly in the States, thereby giving a preference.

40 83. Thus, it is submitted, unless the result in *Permanent Trustee* is explained on the basis that the Commonwealth tax imposed by the *Mirror Taxes Act* did not, in fact, give

preference to any State (as already noted), the conclusion reached in the case and its reasoning are not justified. The decision adds a gloss to the phrase "give preference .... over" in s.99 which should not be maintained.

84. A number of factors are usually considered by the Court in deciding whether to overrule one of its decisions. See *Queensland v Commonwealth* (1977) 139 CLR 585 at 620-631; *Commonwealth v The Hospital Contribution Fund of Australia* (1982) 150 CLR 49 at 55-58; *John v Commissioner of Taxation of Commonwealth* (1989) 166 CLR 417 at 438-440; *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 350-353 [65]-[71]. A consideration of these factors points to the conclusion that *Permanent Trustee* should not be followed or should be overruled:

(a) *Permanent Trustee* was not the result of a line of cases carefully working out the meaning and effect of s.99. Indeed, it puts a gloss on s.99 that was not articulated before, and was not previously treated as informing the notion of "give preference". This is apparent from the very strong dissenting judgments of McHugh J and Kirby J setting out the history of decisions on s.99 (see at 433, [126]-[155]; 459, [204]-[209], 463, [217]-[226]) and discussing the meaning to be attributed to the provision (see at 446, [155]-[158]; 461, [211]-[233]).

(b) Although the error manifest in the majority's reasoning has not become explicit in authorities after *Permanent Trustee*, that is because the case dealt with a peculiar circumstance, and there have been no further cases on s.99. The case is not part of a definite stream of authorities. It has not been followed. It can be overruled or not followed without affecting an established line of cases.

(c) *Permanent Trustee* is an isolated application of the appropriate and adapted criterion to s.99. Although as already mentioned, *Permanent Trustee* can be confined to its peculiar facts, the majority's reasoning potentially affects s.99 generally.

(d) *Permanent Trustee* deals with an issue of constitutional importance with potentially far reaching implications. It is submitted that the reasoning on s.99 cannot be supported and that the Court in this case should indicate that it will not follow that reasoning.

85. For the above reasons:

(a) The *Imposition Acts* "give preference" because the *MRRT Act* is structured to exact a lesser amount of tax from miners in States with higher State royalties and *vice versa*.

(b) To the extent that *Permanent Trustee* is used to justify a conclusion that the impugned legislation does not give preference because it is apparently appropriate and adapted to meet a proper objective, such a notion cannot be imported into s.99. *Permanent Trustee* should not be followed or should be overruled, as adding an inappropriate gloss to the meaning of s.99. To the

extent that leave may be necessary to make that submission, leave should be granted.

(v). The *'Melbourne Corporation'* limitation on Commonwealth legislative power

86. Commonwealth legislation cannot curtail or interfere in a substantial manner with the exercise by a State of its powers.[25] In *Austin v Commonwealth* (2003) 215 CLR 185, the principle was stated as being whether, looking at the substance and operation of the federal law in question, there has been, in a significant manner, a curtailment or interference with the exercise of State constitutional powers.[26] That statement of principle was adopted in *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272.[27]

87. The *Melbourne Corporation* principle recognizes that while the Commonwealth has the legislative powers conferred by s.51, and whilst those legislative powers, when exercised, will prevail over inconsistent State laws, by virtue of s.109, the exercise of those powers is, as s.51 says, "subject to this Constitution".[28]

88. The inquiry whether the principle applies to invalidate particular Commonwealth legislation turns upon matters of evaluation and degree.[29] The principle may apply to invalidate legislation enacted pursuant to s.51(ii).[30] The principle does not only apply when the Commonwealth legislation applies directly to the State itself. It may invalidate legislation which imposes taxation upon persons other than the State itself.[31]

89. A State is necessarily both a territorial entity and a polity.

90. The territorial limits of the States are well-defined, by letters patent and other enactments issued prior to Federation at the time of establishment of the colonies, or excision of new colonies out of existing ones.[32] Lands in the offshore islands were

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25 *Melbourne Corporation* (1947) 74 CLR 31 at 75 (Starke J); followed in *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192 at 218; *Western Australia v. The Commonwealth* (1995) 183 CLR 373 at 476; *Re Autralian Education Union, Ex parte Victoria* (1995) 184 CLR 188; *Victoria v The Commonwealth* (1996) 187 CLR 416 at 498; *State Chamber of Commerce and Industry v The Commonwealth* (1987) 163 CLR 329 at 334.

26 (2003) 215 CLR at 249, [124]; 265, [168] per Gaudron, Gummow and Hayne JJ; 301, [281] Kirby J.

27 See at 298, [32] (French CJ); 306, [65]-[66] (Gummow, Heydon, Kiefel and Bell JJ); 312, [92] (Hayne J).

28 *Re Lee; Ex parte Harper* (1986) 160 CLR 430 at 453 per Mason, Brennan and Deane JJ; Re *Australian Education Union, Ex parte Victoria* (1995) 184 CLR 188 at 225-226 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ, citing *Re State Public Services Federation; Ex parte. Attorney-General (WA)* (1993) 178 CLR 249 at 275 per Brennan J

29 *Clarke* (2009) 240 CLR 272 at 298, [32]-[33]; 307, [66]; 312, [93].

30 See *Austin* (2003) 215 CLR at 257, [142].

31 See *Austin* (2003) 215 CLR at 260, [148]-[158].

32 See *New South Wales v Commonwealth (Seas and Submerged Lands Case)* (1975) 135 CLR 433 at 459 per Mason J. New South Wales, letters patent dated 2 April 1781; Tasmania, letters patent dated 16 July 1825; Western Australia, letters patent dated 4 March 1831; South Australia, letters patent dated 19 February 1836, Victoria, *Australian Constitutions Act 1850* (13 & 14 Vict, c 59) and letters patent dated

specifically included, but the land territory of the colonies ended at the low water mark leaving the territorial sea, its subjacent soil and superjacent airspace to the Imperial Crown.

91. The establishment of a colony ought be regarded as the act of the Crown consigning a particular territory to the government by particular persons responsible for that territory. It was not, of course, until at or after the advent of responsible government that the waste lands of the Crown came under the control of the self-governing colonies.[33]

92. The constitutions of the colonies vested legislative power in the colonial legislatures to make laws for the peace, order and good government of the colony, and the Imperial enabling acts vested control of the Crown's waste lands in the colonial legislature. As Barwick CJ stated in *Bonser v La Macchia*[34] (in relation to what was and was not part of the territory of the States):

> "I think it is essential to bear in mind that when colonies were formed all that relevantly occurred was that a specified land mass was placed at the outset under governorship, and later, under the control of a legislature. ... The progression was from the condition of governorship with near absolute powers to a state of self-government with plenary powers to make laws for the peace, order and good government of that land mass.
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> ...
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> The colonial government's largest claim could only be to make laws for the peace, order and good government of the actual territory assigned by the British authority as the territory of the colony."

93. The grant to colonies of the management and control of the waste lands of the Crown included, expressly, the right to appropriate the proceeds of sale and revenues from such land including royalties, mines and minerals in such lands.[35] The powers of the States to make laws for the peace order and good government of the State denoted that the law must in a remote and general sense have the purpose or design of promoting the welfare of the community[36], but they also denoted a territorial

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23 June 1863, Queensland, letters patent dated 6 June 1859 (issued under the *New South Wales Constitution Act 1855* s 7, letters patent dated 13 March 1962 issued under the *Australian Colonies Act 1861* s.2 (annexing the present-day Northern Territory), letters patent dated 30 May 1872 and a proclamation dated 18 July 1879 (transferring offshore islands). A history is also to be found in M.H. McClelland, 'Colonial and State Boundaries in Australia', (1971) 45 *Australian Law Journal* 671.

33 See, e.g., in New South Wales the *New South Wales Constitution Act 1855* and the *New South Wales Constitution Statute 1855* (Imp); *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404 at 425-426, 449-454. In Western Australia, see the *Constitution Act 1889* (WA) and the *Western Australian Constitution Act 1890* (Imp).

34 *Bonser v La Macchia* (1969) 122 CLR 177 at 185-186.

35 See *New South Wales Constitution Statute 1855* (Imp), s.2; *Western Australian Constitution Act 1890* (Imp), s.3.

36 See *Union Steamship Co Pty Ltd v The King* (1988) 166 CLR 1 at 12 citing *Reg v Foster; ex parte Eastern & Australian Steamship Co Ltd* (1959) 103 CLR 256 at 308 per Windeyer J.

limitation, which has only relatively recently been supervened by legislation in the form of s.2(1) of the *Australia Acts*.[37]

94. Upon Federation the respective self-governing colonies were transformed into States and the territories of the respective colonies became territories of the States which succeeded them with coterminous geographic boundaries.[38] The States then came to derive their existence from the *Constitution* itself, the constitutions of the former colonies remaining in force, subject to the *Constitution* (s.106). However, they still had a political and a territorial dimension, with the political and constitutional function of making laws for the peace order and good government within their territorial limits.

95. It had been regarded as essential to the proposed federal structure, among other things, that the territorial rights of the several existing Colonies should remain intact except to the extent they agreed to surrender it.[39] The *Constitution* reflects this concern. Accordingly, although a State retained the right to surrender any part of its territory to the Commonwealth (s.111), the territorial limits of a State could not otherwise be altered, or a new State formed by separation of territory from a State without the consent of the Parliament of the State concerned (ss.123-124). No alteration to the *Constitution* which increased, diminished or altered the territorial limits of a State could become effective unless the majority of electors in the State concerned approved it (s.128).

96. Thus, the *Constitution* recognises that the political and territorial or geographical aspects of a State are necessarily intrinsically linked.[40] The constitutional powers of a State are to make laws with respect to its territorial area and to promote the welfare of the community living within that area. A State's ownership, management and control of its territory (including, particularly, the waste lands of the Crown within that territory) is a necessary attribute of statehood. A State's ability by legislation to make laws to promote the development of its territory in the interests of, or to promote the welfare of the community of, the State is of equal importance.

97. The link between the political and territorial dimensions of the States is one that must be borne in mind when considering the implied limitation on Commonwealth power

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37 *Union Steamship Co Pty Ltd v The King* (1988) 166 CLR 1 at 13-14.

38 *Victoria v The Commonwealth (Pay-Roll Tax Case)* (1971) 122 CLR 353 at 371 per Barwick CJ. New South Wales v Commonwealth (*Sea and Submerged Lands Case)* (1975) 135 CLR 337 at 372 per Barwick CJ.

39 See resolution 1 passed by the National Australasian Convention Sydney, recorded in W.H. Moore, *The Constitution of the Commonwealth of Australia* (2nd ed, 191), pp.41-43, which stated "*That the powers, and privileges, and territorial rights of the several existing colonies shall remain intact except in respect to such surrenders as may be agreed upon as necessary and incidental to the power and authority of the National Federal Government*".; see Official Record of the Debates of the National Australasian Convention Sydney, p.23, 344.

40 In *Amalgamated Society of Engineers v Adelaide Steamship Co* (1920) 28 CLR 129 at 146-147, Knox CJ, Isaacs, Rich and Starke JJ said the expression "State" comprehended "*the strictly legal conception of the King in right of a designated territory, and the people of that territory considered as a political organism.*"

drawn from the terms of the *Constitution* itself which has come to be referred to as the *Melbourne Corporation* doctrine. The remarks of six members of the Court in *Australian Education Union*[41] (1995) 184 CLR 188 at 227, emphasised the two ways in which the doctrine has been put:

> "Although the comments of Dixon J [in *Melbourne Corporation* (1947) 74 CLR 31 at 82-84] were couched principally in terms of discrimination against States and the imposition of a particular disability or burden upon an operation or activity of a State or the execution of its constitutional powers, his Honour clearly had in mind, as did Latham CJ, Rich and Starke JJ, that the legislative powers of the Commonwealth cannot be exercised to destroy or curtail the existence of the States or their continuing to function as such."

98. The question then posed in *Australian Education Union* as to whether this means that there are two implied limitations, two elements or branches of one limitation, or simply one limitation was answered in *Austin* by three Justices in favour of the latter. Gaudron, Gummow and Hayne JJ said there is "*but one limitation, though the apparent expression of it varies with the form of the legislation under consideration*" (at 249).[42] The question, their Honours said, required assessment of the impact of particular laws on the capacity of the States to "function as governments", by reference to the form and substance and actual operation of the laws.

99. Assuming this to be correct (and it is notable that in *Austin* like the majority of cases the nature of the debate focussed on the State's capacity to function as a body politic or government because of the alleged impairment on its right to determine the terms on which judges were appointed) it by no means follows that the *only* relevant inquiry is as to the political or governmental capacity of the States. A State does not exist as a body politic exercising constitutional powers in a vacuum, and a State does not have functions for their own sake. A State carries out its functions for the purpose of making laws for the peace order and good government of the territorial area for which the State has responsibility. To ask whether something is impaired which is critical to the State's capacity to function as a government[43] requires a consideration of the purposes for which a State functions as a government.

100. Understandably in some cases this will be obvious and no further inquiry needed. In *Austin*, for example, the working of the judicial branch of government implicitly commands attention to the administration of justice within the State being the purpose for which it existed. Thus, the impairment of the State's power to determine the terms of appointment of high-level officers was sufficient. Also in *Melbourne Corporation*, the impairment of the State's ability to choose how to bank was connected with the functions of administering the finances of the State (that is, implicitly, the finances to

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41 *Re Australian Education Union; ex parte Victoria* (1995) 184 CLR 188 at 227; approved in *Austin v The Commonwealth* (2003) 215 CLR 185 at 248 per Gaudron, Gummow and Hayne JJ.

42 Kirby J agreed with this in substance (at 301); McHugh J expressly disagreed with this (at 281-282).

43 *The Commonwealth v Tasmania (Tasmanian Dams Case)* (1983) 158 CLR 1 at 139, 213-215

be used for the peace order and good government of the State), and it was not necessary to consider the reasons why the State needed such a choice. But not all cases are so clear. As Starke J said in *Melbourne Corporation*, the scope of the limitation on Commonwealth power may "*depend upon practical considerations.*"[44]

101. The following passage from the judgment of Starke J in *Melbourne Corporation* is apposite and properly reflects the scope of inquiry, which requires a consciousness of the reason why State constitutional powers exist:

> "[I]n the end the question must be whether the legislation or executive action curtails or interferes in a substantial manner with the exercise of constitutional power by the other. The management and control by the States and local governing authorities of their revenues and funds is a constitutional power of vital importance to them. Their operations depend upon the control of those revenues and funds. And to curtail or interfere with the management of them interferes with their constitutional power." (at 75).

102. That could be restated substituting the words *"natural resources"* for the words, "*revenues and funds*" and would still hold true. A thing critical to the State's capacity to function as a government is the ability of its legislature and executive to control the development of the State's territory and mineral resources (those being, among other things, a source of its revenue).

103. These mineral resources are the property of the Crown in right of the State which has the right to manage and control them and appropriate to itself revenues derived from them.

104. The importance of these matters was the subject of much discussion during the Convention Debates.[45] The *Constitution* recognizes the intrinsic geographical and territorial boundaries of States, and by its preservation in s.106 of the States' constitutions, it recognizes the consignment to them of the management and control of the waste lands of the Crown, including mines, minerals and royalties. The *Constitution* also recognizes the special role of the States in promoting the development of mineral resources of gold, silver or other metals (see s.91, dealt with in more detail below).

105. The *Constitution* does not contemplate that the States' ability to deal with their mineral resources should be constrained by taxation laws operating by reference to State royalties in the manner provided for by the legislation in issue in these proceedings.

106. The *Native Title Act Case*[46] does not stand in the way of this approach. The conception of the *Melbourne Corporation* doctrine adopted in that case was that it

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44 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 at 72, 75.

45 References in relation to this in the context of what became s.91 of the *Constitution* are collected in Footnote 71 below.

46 *Western Australia v The Commonwealth* (1995) 183 CLR 373.

concerned the existence and nature of the State body politic, and related to the machinery of government and to the capacity of the organs of government to exercise the powers conferred upon them by the general law which includes the Constitution and the laws of the Commonwealth: see 183 CLR 373 at 480. That conception, however, is too narrow a view of the ambit of the *Melbourne Corporation* doctrine: see the passages from *Austin* and *Clarke* referred to in paragraph 86 above.

107. Further, in the *Native Title Act Case* the legislation in question there was said (at 481) not to impair the capacity to exercise constitutional functions, although it might affect the ease with which those functions were exercised. Central to the reasoning in the *Native Title Act Case* that the implied limitation was not offended was that "*land subject to native title is not the unburdened property of the State to use or dispose of as though it were the beneficial owner*".[47] The situation is otherwise with the mineral resources contained in, relevantly, the waste lands of the Crown which are, as s 9 of the *Mining Act 1978* (WA) declares, the property of the Crown in right of the State of Western Australia.[48] They thus have a very close connexion to the capacity of the State to exercise its governmental functions, and the MRRT legislation impugned has a correspondingly greater degree of impact on those functions than was the case in the *Native Title Act Case*. The ability of the State to, in effect, give up part of its property rights (by reducing royalties or granting concessions) in exchange for the development of those resources in an incentivised manner can be seen to deprive the State, relevantly, of property which it requires to exercise its powers in the sense described in the *Native Title Act Case*.[49]

108. In the present case the imposition of the MRRT effectively prevents a State from reducing or giving concessions in respect of royalties payable. The amount of any such reduction or concession is picked up and payable as MRRT.

109. Whether the *MRRT Act* curtails or impairs the ability of a State to manage and control its natural resources, is to be answered, as the joint judgment in *Austin* stated, by a consideration of the substance and actual operation of the federal law.[50]

110. It has long been the case that the States have used their capacity to alter royalty rates otherwise payable as an economic lever to provide incentives for the development of mineral deposits, and the building of associated infrastructure and facilities for the exploitation of those minerals. A State, by setting a rate of royalty, establishes a cost that must be borne by the miners for the privilege of extracting the minerals belonging to the State and acquiring them. A State's ability to change that rate generally, or to grant concessional rates of royalty in specific cases, is a way for it to influence the rate and manner of economic development of its territory.

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47 *Western Australia vThe Commonwealth* (1995) 183 CLR 373 at 480 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

48 FASOC [16].

49 *Western Australia vThe Commonwealth* (1995) 183 CLR 373 at 480 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

50 *Austin v Commonwealth* (2003) 215 CLR 185 at 249; *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272 at 307.

111. The flexibility of the States' royalty regimes cannot be doubted. It can be seen from considering s.109 of the *Mining Act 1978* (WA), which provides that royalties are to be prescribed by regulation made by the Governor, including the power to prescribe how, by whom and at what rate, or differentiating rates royalties are to be paid (s.109(1)(a)), and the power to exempt a person from payment either generally or in a particular case (s.109(1)(b)), and to exercise a discretion as to the basis on which a rate of royalty shall be applied (s.109(2)(b)). The situation in other States is similarly flexible, though in differing ways.[51]

112. The State's ability to change that rate generally or to grant concessional rates of royalty is a way for a State to influence the rate and manner of economic development of the territory of the State. This can be seen, in the case of general royalty changes, from the following examples (although others could of course be cited):

(a) The history of amendment to the *Mining Regulations 1981* (WA) made pursuant to the *Mining Act 1978* (WA) in relation to royalties payable for the mining of iron ore.[52] These show a differentiation between types of iron ore, with a reduced rate of royalty for processed ore[53]:

(i) Under the *Mining Act 1904*, as at 20 May 1958, the royalty prescribed by reg 205B was 1 shilling, 6 pence per tonne according to the quantity obtained[54]. From 24 January 1967, this became $0.15 per tonne according to the quantity obtained.[55]

(ii) As originally made (No.84 of 1981), the *Mining Regulations* provided in the table to reg 86 for a royalty for "iron ore" of 7½% "of the realised value", and a royalty for "magnetite" (a form of iron ore) of 5% "of the realised value". [56]

(iii) The *Mining Amendment Regulations (No.2) 1995* (WA), by reg 3 amended the royalty rates for "iron ore" by splitting iron ore into three subcategories: (A) "lump ore", with a royalty rate of 7.5% "of the realised value", (B) "fine ore", with a royalty rate of 5.625% "of the realised value, and (C) "beneficiated ore", with a royalty rate of 5% "of the realised value.[57] It further provided that notwithstanding this, the rate

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51 **NSW**: *Mining Act 1992* (NSW), s.283; **Queensland**: *Mineral Resources Act 1989* (Q), s.321(3); **South Australia**: *Mining Act 1971* (SA), s.17(9)-(10); **Tasmania**: *Mineral Resources Development Act 1995* (Tas), s.102(3), (5), (7); **Victoria**: *Mineral Resources (Sustainable Development) Act 1990* (Vic), s.12.

52 See FASOC [53].

53 See FASOC [51], FAD [52].

54 Western Australian Government Gazette, 20 May 1958, pp.1045-1046.

55 Western Australian Government Gazette, 24 January 1967, p.176.

56 Government Gazette of Western Australia, 13 November 1981, p. 4619.

57 Government Gazette of Western Australia, 19 May 1995, p.1881-1882. There was no definition of "beneficiated ore" and "fine ore". The *Mining Amendment Regulations 2006* (WA) later specified definitions for these two categories, "beneficiated ore" referring to ore that had been "concentrated or

payable by two particular miners for all forms of iron ore obtained from the Koolyanobbing Iron Ore Project was 5.625%.

(iv) The *Mining Amendment Regulations (No.5) 2000* (WA) by reg 3 removed the separate item for "magnetite".[58]

(v) The *Mining Amendment Regulations (No.5) 2011* (WA) by reg 4 reintroduced magnetite royalties by changing the reference to "iron ore" to refer to "iron ore (including magnetite)".[59]

(b) The history of amendment to Queensland legislation in relation to royalties for coal shows a concern by the Queensland legislature with applying a reduced rates of royalties in respect of coal won and consumed in the local Queensland economy:

(i) The *Mining Acts Amendment Act 1920* (Q) which, amended the *Mining for Coal and Mineral Oil Act 1912* (Q) and the *Coal Mining Act 1925* (Q) both provided for differential rates of royalty for coal: (A) coal raised from land situated more than 100 miles from a seaport, 4 pence per tonne for the first 5 years of the term and then 8 pence per tonne; (B) coal raised from land situated less than 100 miles from a seaport, 6 pence per tonne for the first 5 years of the term and then 1 shilling per tonne;

(ii) The *Mining Regulation 1979* (Q), made pursuant to the *Mining Act 1968* (Q), provided for differential rates of royalty for coal on a different basis: (A) for coal won by open cut mining methods for purposes other than consumption within the State, the royalty was 5% of the value according to the quantity sold, disposed of or used; (B) for coal won by underground mining methods for purposes other than consumption within the State, the royalty was 4% of the value according to the quantity sold, disposed of or used; (C) for coal won for the purpose of consumption within the State, the royalty was 5 cents per tonne.

(iii) The *Mineral Resources Amendment Regulation (No 11) 1994* (Q) amended the *Mineral Resources Regulation 1990* (Q) made pursuant to the *Mineral Resources Act 1989* (Q) to increase coal royalties: (A) for export coal was 7% of value, (B) for other coal from an open cut mine the royalty was 5% of value, (C) for other coal from an underground mine, the royalty was 4 % of value.

(iv) In 1999, the *Mineral Resources Amendment Regulation (No 2)* 1999 (Q)[60] introduced by reg 13 a standard royalty on coal of 7% of the value worked out by the Minister under s.51 of the enabling Act.

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upgraded otherwise than by crushing, screening, separating by hydrocloning or a similar technology, washing, scrubbing, trommelling or drying, or by a combination of 2 or more of those processes".

58 Government Gazette of Western Australia, 30 June 2000, p.3473-3474.

59 Government Gazette of Western Australia, 11 October 2011, p.4315.

(v) In 2003, the *Mineral Resources Regulation 2003* (Q) prescribed a royalty rate for coal of 7% of the value of the coal (reg 37and Schedule 4, Part 2, Item 3).

(vi) In 2008, the *Mines and Energy Legislation Amendment Regulation (No 2) 2008* (Q) amended the *Mineral Resources Regulation 2003* (Q) by specifying the royalty rate for coal as being the higher of 7% of the value of the coal, or the rate obtained by using a particular formula, one element of which was the average price per tonne of coal sold or disposed of or used in each quarterly period (see reg 10). It further specified the royalty rate must be worked out and applied separately for coal sold, disposed of or used inside Queensland, and coal exported.

(c) The State of South Australia introduced a discounted royalty regime by the *Mining (Royalty No. 2) Amendment Act* 2005 (SA), which provided for a royalty of 1.5% for a mine's first 5 years of operation, partly in order to develop regional areas.[61]

113. The use by States of their capacity to alter royalty rates can be seen from State Agreements (ratified by legislation) providing for royalty concessions applicable to particular projects.[62] Paragraph 54B of the FASOC details some 38 State Agreements made by Western Australia between 1952 and 2011 in relation to mining. Paragraphs 54C to 54H then indicate where these provide for a specified rate of royalty payable throughout the life of the agreement *or* for a particular period of time (which may differ from the rate prevailing from time to time under the *Mining Regulations*), or provide for a concessional rate of royalty (or other reduction to royalty rates).

114. These submissions will not canvass each of the State Agreements referred to in the FASOC. The particular clauses relied upon by the plaintiffs are identified in the FASOC and will appear in the Questions Reserved Book or Parties Relevant Documents Book provided at the hearing.

115. Such Agreements also typically recite the bargain between the parties in terms which make clear that from the State's perspective the economic development of parts of the State is the reason for motivating it entering into the Agreement.

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60 Continued in the *Mineral Resources Regulation 2003* (Q).

61 In the Second Reading Speech the Deputy Premier said:

> "A key strategy of this Bill is to encourage investment in the development of new mines leading to a targeted increase in mineral production in the State to $3 billion by 2020. To do this, the Bill introduces a discounted royalty rate for new mines, as the lower royalty rate will improve the viability of a mining operation in the early years of development ...
>
> Equally importantly, the development of regional populations and economies will be stimulated through new mineral discoveries encouraged by the reduced rate of royalty payable in relation to new mines."

62 For an overview of this type of action by States, see L. Warnick, 'State Agreements' 62 *Australian Law Journal* 878.

116. In the case of Western Australia[63] there have been many State Agreements made in respect of iron ore mining in Western Australia and in the Pilbara in particular. One such agreement (or set of agreements) is the Iron Ore (Robe River) Agreement, approved by the *Iron Ore (Robe River) Agreement Act 1964* (WA). It has been varied by agreement on a number of occasions.

(a) The Agreement recited that Basic Materials Pty Ltd had conducted investigations into developing certain iron ore deposits which had a low iron content which were unsaleable without beneficiation by a pelletisation process requiring the construction of extensive additional facilities, power plants, ports, railroads and other facilities in Western Australia.

(b) The Agreement obliged the company to submit detailed proposals to the State for approval for construction of mines, railways, harbours, townsites (near the mine sites and the port and housing (cl 5(2)), and in 'Phase 2' to construct mining plant and facilities (cl 9(1)(a)), railways (cl 9(1)(c)), roads (cl 9(1)(d)), wharves (cl 9(1)(e)), and townsites with roads, housing, schools, water and power supplies and other amenities and services (cl 9(1)(f) and "*so far as reasonably and economically practicable to use labour materials plant and equipment supplies available within [Western Australia]*" (cl 9(2)(i)).

(c) Clause 3(2)(c) provided that "*no future Act of the said State will operate to increase the Company's liabilities or obligations hereunder with respect to rents or royalties*". Clause 9(2)(j) then obliged the company to pay royalties at specified rates, which differed according to the type of iron ore and whether it was "locally used"[64]. Among other things:

(i) The percentage rates prescribed for direct shipping ore and fine ore not locally used may well have been above or below the prescribed rate of 1 shilling and 6 pence per tonne in 1964 (depending on the price of ore). They certainly were, in the case of fine ore, less than the percentage rates which were later prescribed during the currency of the agreement, by the *Mining Regulations 1981.*

(ii) Clause 9(2)(j)(v) provided for a concessional royalty of one shilling per tonne for all iron ore pellets produced in Western Australia north of the 26th parallel of latitude with a combined average iron content of less than 60% in the first 15 years of operation (with a sliding scale or

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63 Note that after 1979, Western Australian State Agreements were protected by the *Government Agreements Act 1979* (WA), which by s.3(a) provided that all Government Agreements operated according to their terms notwithstanding any other Act or law, a legislative response designed to clarify uncertainty which had arisen in *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 138 CLR 54.

64 The Agreement prescribed for royalties of 7½% of f.o.b. revenue (but not less than 6/-d per tonne) on direct shipping ore which was not locally used, 3¾% of f.o.b. revenue (but not less than 3/-d per tonne) on fine ore which was not locally used, 1s. 6d /tonne on fines not locally used, and iron ore concentrates produced from locally used ore and 7½% of f.o.b. revenue on all other iron ore (without any minimum royalty.

subsequent years). The reduction in 1964 amounted to a 33% discount on the prescribed rate of 1 shilling per tonne for this category of ore.

(d) The Fifth Variation Agreement made in 1987 – which specified that the production of pellets had become uneconomic and that the pellet plant had been sold with the approval of the Minister - by cl 7(d) amended cl 9(2)(j) and provided for a discounted royalty of 3¾% for fines from 1 January 1989. That represented a 50% discount on the royalties then prevailing under the *Mining Regulations 1981.* At this time, the royalties under the Agreement for other types of iron remained below the standard rates.

(e) The Sixth Variation Agreement (made in 1990) by cl 4(7) replaced cl 9(2)(j) of the original Agreement (as amended), and obliged the company to pay royalties at rates which included a discount on royalties for fine ore and beneficiated ore until the regulations were later themselves amended to reduce royalties generally[65] In 2010, the Seventh Variation Agreement by cl 3(6)(c) increased royalty rates for fine ore and pisolite fine ore sold or shipped separately, bringing it into line with the royalties for unbeneficiated ore under the regulations[66].

117. An example of an agreement explicitly providing for a concessional rate of royalty is the Iron Ore Processing (Mineralogy Pty Ltd) Agreement, ratified by s.4(1) of the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA).

(a) The Agreement recited that Mineralogy Pty Ltd held certain mining tenements in the Pilbara and wished to develop projects incorporating the mining and processing of iron ore, the establishment of new port facilities in the Pilbara and the shipping of processed iron through them, and that:

> "The State, for the purposes of promoting employment opportunity and industrial development in Western Australia has agreed to assist the establishment of the proposed projects upon and subject to the terms of this Agreement."

(b) The Agreement provided by cl. 11(1) for rates of royalty involving concessions of up to 2 per cent, the highest concession applying to iron ore concentrates processed into steel in Western Australia.[67]

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65 The Agreement prescribed a royalty of 7.5% for lump ore, fine ore or pisolite fine ore not sold separately and for a royalty rate of 5.625% of f.o.b. value on fine ore sold separately and 5% of f.o.b. value on beneficiated ore. As at 1990, the *Mining Regulations 1981* prescribed a royalty rate of 7.5% of realised value without differentiation as to the type of iron ore. In 1995, the regulations were amended to include three categories of ore with different royalty rates (see [112(a)] above), and the rates brought broadly into line with those under the Iron Ore (Robe River) Agreement. However between 1990 and 1995, the company did have the benefit of a discounted royalty rate.

66 The increases were on a sliding scale from the base of 5.625% to 7.5% in July 2013. .

67 The concessions were described by the Minister for State Development in his Second Reading Speech on the Bill for the Act as follows (Parliamentary Debates (Hansard), Western Australia, Legislative Assembly, Hon C Brown, 19 February 2002, pp 7522c – 7257a):

118. Similarly, an amendment to the Diamond (Argyle Diamond Mines Joint Venture) Agreement was ratified by the *Diamond (Argyle Diamond Mines Joint Venture) Agreement Amendment Act 2008*. The variation included a reduction in royalty payable to assist in prolonging the life of the ore body by transition from open pit mining to underground mining operations. The Minister for State Development stated in his Second Reading Speech:

> "Argyle proposed a transition from open pit to an underground mining operation, with a view to extending mining of the ore body to at least 2017 and possibly 2024. The risk profile of the underground mine is greater than the pit operation however, and initial feasibility studies undertaken by Argyle indicated that the project economics would be marginal at best. As a consequence, Argyle sought financial assistance from the state to continue its mining operations under the state agreement by transitioning to an underground mining operation.
>
> In late 2005 the government approved in principle an offer of financial assistance, being in summary to reduce the rate of royalty payable by Argyle under the state agreement on sorted rough diamonds, and to amend Argyle's processing obligations under the state agreement
>
> Argyle's operations provide employment and local industry participation opportunities generally in the Kimberley region of Western Australia and provide real employment options for the region's Indigenous residents, who comprise the majority of the local population. Argyle is the largest single contributor to the Kimberley economy, with 25 per cent of its present full-time workforce being Indigenous people, of whom about half have been recruited locally."[68]

119. In Queensland, State Agreements were frequently made between the State and bodies seeking to engage in major projects, and these have also specified particular rates of royalty payable over the life of the Agreement.

120. By way of example, the *Thiess Peabody Coal Pty Ltd Agreement Act 1962* (Q), authorised the making of an agreement between the State and Thiess Peabody and gave it the force of law in Queensland. It related to coal deposits found in an area of 350sqm in the Bauhinia/Dawson/Ferguson/ Kimberley region (near Moura, north-west of Brisbane).

(a) Recitals 3 and 4 recited the necessity in order to bring the coal deposits into large scale production for export purposes "*to construct works for the winning,*

"In accordance with the decision made by Cabinet on 15 January 1996, standard concessions on royalty rates are allowed to the proponents. That provide for a rate reduction as an incentive for further processing [of iron ore]."

[68] Parliamentary Debates (Hansard), Western Australia, Legislative Assembly, Hon E.S. Ripper, 11 June 2008, p.3628d-3685c.

treatment and transport of large tonnages of coal (including mine installations, a high capacity washing plant, a new Railway system for transportation to the port and modern bulk handling facilities at the port" and that the companies were prepared to provide and expend capital for that purpose. Recital 6 recited that the State was satisfied this was necessary "*to ensure that the coal deposits are efficiently and economically developed for export purposes for a lengthy period*" and Recital 7 then stated that it was desirable that Thiess be granted the rights in the Agreement.

(b) Under the Agreement, the Company agreed to make certain minimum annual expenditures on prospecting (cl 14), build works of a particular capacity (cl 29), build a railway to a particular specification and to plans approved by the Minister (cl 33-35, 45) which railway the State had a right to acquire for a value determined according to a prescribed methodology (cl 38).

(c) The Agreement had a 12 year tenure (cl 10), and provided for Thiess to pay royalties on coal won at the rate of 6 pence tonne for the first million tonnes, and 3 pence per tonne for tons in excess of that (cl 25). The rate for the first million tonnes was *higher* than the prevailing rates under the *Coal Mining Act 1925* (Q) for coal won in the first 5 years, but both it and the rate for tonnages in excess of 1 million tonnes, were significantly *lower* than those prevailing royalty rates.

121. As is apparent from the foregoing States have granted royalty concessions, or locked in royalty rates at particular levels (which may be lower than rates otherwise prevailing) in order to provide an incentive for the development of the State's resources for the welfare of the State.

122. The "substance" and "actual operation" of the *MRRT Act* and *Imposition Acts*, is that a State's capacity to reduce royalty rates as an economic incentive is significantly curtailed. Any decrease by the State in royalties on minerals is immediately negated by an increase in Commonwealth taxation. While it is true the State can still change royalties so as to increase or decrease its revenue stream, the State's ability to reduce royalties to promote other governmental goals is entirely neutered by the *MRRT Act*. By reason of the *MRRT Act*, the State is constrained from turning its own property (its minerals and the right to royalties from them) to account for the governmental purpose of promoting economic development of the territory of the State. As in *Austin* and *Melbourne Corporation* itself, the federal law imposes no direct legal obligation requiring or preventing action by States, but it is effectual to induce the State to cease using royalties as a lever to promote economic development.

123. In *Austin*[69], the Court held that the effect of the federal law was to affect impermissibly the liberty of the State to vary the method of judicial remuneration, in the light of the importance of that liberty to the States.[70] The Court, it is submitted,

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69 *Austin v The Commonwealth* (2003) 215 CLR 185 at 249.

70 *Austin v The Commonwealth* (2003) 215 CLR 185 at 265 [170].

should regard the legislation impugned in the present case as similarly affecting impermissibly the States' liberty to promote economic development of their territory.

(vi). Section 91

124. The fourth issue concerns s.91 of the *Constitution,* which provides that:

> *"Nothing in this Constitution prohibits a State from granting any aid to or bounty on mining for gold, silver, or other metals*, nor from granting, with the consent of both Houses of the Parliament of the Commonwealth expressed by resolution, any aid to or bounty on the production or export of goods." [Emphasis added.]

125. There are two preliminary observations. *First*, as is apparent from its terms, s.91 has two parts. This case concerns the first part emphasised above.

126. The differential treatment between mining for gold, silver and other metals and mining for other substances - emphasised by the absence of any requirement for consent of the Houses of the Parliament for any aid to mining for gold, silver and other metals - suggests that a State's position in relation to encouraging mining of gold, silver and other metals is strong. Without seeking to revive any more general notion of "reserved powers", the terms of s.91 do appear to reserve to a State the ability to grant aid to mining for gold, silver and other metals.

127. *Secondly,* the only decision of the Court which deals in any substantive way with s.91 is *Seamen's Union of Australia v Utah Development Company* (1978) 144 CLR 120. It dealt with the second part. It casts some light, however, on the meaning of "aid" in s.91. It held that "aid" referred to financial aid, not to other forms of assistance. That aspect is accepted. There are some dicta in *Seamen's Union* which at first sight may be regarded as adverse to the plaintiffs' case on s.91. They should not be followed for the reasons set out below.

128. The plaintiffs contend:

(a) that they are engaged in mining for iron ore, an "other metal" in terms of s.91;

(b) that the concept in s.91 of "aid" to mining for gold, silver or another metal (such as iron ore) includes any of the forms of reduction of royalty or exemption from payment of royalty referred to in paragraph 76 of the FASOC;

(c) that the grant of any such reduction or exemption would have the effect that the MRRT otherwise payable by the miner is increased by the amount of such reduction or exception;

(d) that the matters referred to in (c) render the grant of such aid illusory or inefficacious because an amount equivalent to the amount of such aid becomes liable to be paid by the miner to the Commonwealth as MRRT;

(e) that as a matter of substance, if not as a matter of form, the MRRT legislation prohibits the grant of such aid;

(f) that the MRRT is imposed by laws made by the Commonwealth in the exercise of powers conferred by the *Constitution*;

(g) that insofar as the provisions of the *Constitution* might otherwise authorise the making of the MRRT, the words "Nothing in this Constitution prohibits" in s.91 limit the ambit of such legislative power. In short, by s.91, the State is permitted, or able, regardless of anything in the *Constitution,* to grant such aid. Section 91 thus prevents any Commonwealth law from taking away that ability.

129. The plaintiffs would add that the MRRT legislation operates immediately. It is, and has been since 1 July 2012, a present inhibition on the grant by a State of any exception from or reduction of the royalty rates presently applicable.

130. *Iron Ore is an "other metal".* The first part of s.91 deals with mining for gold, silver or "other metals". The reference to "other metals" includes, obviously enough, iron ore. "Other" metals, however, would not include coal. That is why paragraph D of the prayer for relief in the FASOC is framed as it is.

131. It was recognised in the Convention Debates that iron ore would, but coal would not, be an "other metal".[71]

132. *Reducing or giving exemption from royalties is the grant of aid to mining for iron ore.* Section 91 speaks of "granting any aid to or bounty on mining".

133. The use of the expression *any* aid suggests that a narrow view should not be taken of the ambit of "aid" in the first part of s.91. It supports the view, referred to below, that to reduce or grant exemption from payment of royalty, when effected by, or pursuant to, State legislation is the grant of aid to mining for gold, silver or other metals.

134. It is clear from *Seamen's Union* that the term "grant any aid" in the second part of s.91 refers to monetary aid.

135. The contention advanced in that case was that the various forms of assistance provided by the State of Queensland to Utah Development Co under the agreement sanctioned by the *Central Queensland Coal Authorities Agreement Act 1968* amounted to aid to the production or export of goods within the meaning of the second part of s.91. (The forms of assistance relied on can be seen in the reasons of Mason J at 149-150). Because the consent of the Houses of Parliament to such grant had not been obtained, it was contended that the *Central Queensland Coal Associates Act* was invalid, and the activities purportedly carried on under it were unlawful.

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[71] There was much discussion in the Convention Debates of the subject matter of what became s.91 of the *Constitution*, but most of the debate related to the question of bounties on goods (the second part of s.91) and the subject of mining bounties was accepted without much comment, except as to whether it ought apply to coal as well as metals. **Adelaide Convention**: 19 April 1897 - pp 842-843 (Trenwith), 844 (Deakin), 850-851 (Cockburn), 853-854 (Peacock, Higgins, Barton), 857-858 (Isaacs, Glynn), 859 (Higgins). 22 April 1897 – pp 1203 (Higgins) **Melbourne Convention**: 11 February 1898: - pp. 871-872 (Higgins); 14 February 1898 – pp. 897 (Trenwith), 15 February 1898 - pp 952-953 (Peacock), 955 (Turner, Reid, O'Connor), 962-963 (Trenwith), 965-966 (Turner, O'Connor, Forrest, Cockburn), 967 (Higgins). 11 March 1898 - pp 2343 (Turner), 2349 (Turner, Reid), 2362 (Higgins).

136. The central basis of the decision adverse to that contention was that the term "granting any aid to" meant granting pecuniary aid.[72]

137. There are references in *Seamen's Union* to the grant of aid being a money *payment.*[73] This view, however, is too narrow and also is a very formalistic approach to the provision. A reduction in the rate of royalty payable or the grant of a concession as to royalty is as much the grant of aid ("any aid") to the miner as paying an amount to the miner calculated, for example, by reference to the quantity mined.

138. It should also be borne in mind that in *Seamen's Union* the Court was dealing with a different issue, namely the distinction between monetary aid and other forms of aid, and its observations should be read in that context.

139. *"Nothing in this Constitution".* Section 91 commences with the words "Nothing in this Constitution". The scope to be given to this phrase is very important. The words used are the broadest that could be used. They should not be read down unless there is good reason to do so. Whatever might have been the reasons for selection of those words in the drafts of the *Constitution* – a matter dealt with below - they *are* the words chosen. They should be given their full effect.

140. In giving them their full effect, it is worthwhile to observe what they do not do. In particular they do not use more limited words such as "Nothing in Chapter IV"; or "Nothing in s.90". They use a larger phrase, "Nothing in this Constitution".

141. There are two further matters in relation to that phrase. The *first* is that the expression "Nothing in this Constitution" is used sparingly in the *Constitution.* The only other provision in which the exact phrase is found is s.104. A phrase to similar effect, however, is found in s.95 – "Notwithstanding anything in the Constitution". The *second* point is that where, elsewhere in the *Constitution*, limitations on powers are sought to be imposed, less all-encompassing language is used. See:

(a) "subject to this Constitution" – ss. 10, 27, 31, 51, 52;

(b) "shall be absolutely free" – s.92;

(c) prohibition on preference – s.99;

(d) prohibition on the right of a State or the residents therein to the reasonable use of the rivers for conservation and irrigation – s.100;

(e) the various qualifications expressed in s.51 on the legislative powers of the Commonwealth – see eg. ss. 51(ii), (iii), (x), (xiii), (xiv), (xxiiiA), (xxxi), (xxxiii), (xxxiv), (xxxv), (xxxvii).

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[72] The only one of the forms of assistance referred to by Mason J which bears any resemblance to this case is the exemption from stamp duty (149.6). That exemption, however, does not have the degree of proximity to mining that a reduction in royalty would have. See Barwick CJ at 126.8; Gibbs J at 135.4-5; Stephen J at 141.7-142.2; Mason J at 148.6-150.9; Jacobs J at 154.8; Murphy J at 159.4; Aitkin J at 159.9.

[73] Mason J at 148.8

142. In *Seamen's Union* Stephen J at 142.7-144.1 expressed the view that the drafting history of s.91 lent strong support to the view that s.91 did no more than qualify the prohibition which resulted from the exclusive nature of the grant of power in s.90. To somewhat similar effect is Gibbs J at 135.2-4.

143. It seems clear enough that the concern which resulted in s.91 was that giving the Commonwealth exclusive power over bounties might affect a State's power to grant, as the Adelaide Convention said, "bounties or aids to mining for gold, silver or other metals". What also seems clear is that the Drafting Committee deliberately emphasized the importance of s.91 by the language it used and which was adopted without dissent at the Melbourne Convention as representing the intentions of those involved. It is difficult to accept that they did not appreciate the breadth of the phrase "Nothing in this Constitution".

144. The references by Gibbs J at 135.3 to Quick & Garran[74] also do not really support the proposition that s.91 is no more than an exception to s.90. See:

(a) the reference in Quick & Garran at 558.5 to Victorian "prospecting votes" and the description at 558.7 of s.91 as a section "allowing the States to subsidize mining for gold, silver or other metals";

(c) the contradiction in Quick & Garran between the reference at 839.5 to s.91 being "an exception...to both the exclusiveness of the federal power and the annulment of State laws" and the reference at 841.8-9 to the narrower view there expressed;

(d) the observations at 842.4 that "of course, the words have, *and were intended to have*, a wider scope" [emphasis added].

145. In short there is nothing in the Convention Debates, nor in the amendments made to the drafts of the *Constitution* to suggest that s.91 was concerned only with "aid" which was equivalent to bounties. Rather a consideration of both those matters leads to the view that s.91 was intended to secure to the States the ability to grant any form of monetary aid to mining for gold, silver or other metals. It may be accepted that the term "grant" conveys the notion that the "grant" is by, or pursuant to, legislation, but that is how polities such as States make financial provision.

146. Both parts of s.91 use the expression "aid to or bounty on". References to "bounties" are seen elsewhere in the *Constitution*. References to "aid to" are not.

147. Dealing first with bounties s.51(iii) gives the Commonwealth power to make laws with respect to "bounties on the production or export of goods". That phrase is also used, of course, in the second part of s.91. In s.51(iii) there is also a limitation on the legislative power, in that any bounties legislated for are to be "uniform throughout the Commonwealth".

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74 *Annotated Constitution of the Australian Commonwealth* (1901) at 558, 839, 841, 843.

148. One of the provisions upon which the words "Nothing in the Constitution" in s.91 would appear to operate is s.86. It provides that on 1 January 1901 the "control of the payment of bounties" should pass to the Commonwealth. A further provision concerning bounties to which the words "Nothing in this Constitution" have application is s.90. It provided that the Commonwealth's power to grant bounties on the production or export of goods, i.e. the s.51(iii) power, should become exclusive.

149. The terms of s.91, obviously enough, are not consistent with the exclusivity contemplated by s.90. There is also s.109. If a law of the Commonwealth were to render "invalid" in terms of s.109, i.e. inoperative, a grant of a bounty on mining for gold, silver or other metals, the broad words of s.91 would prevent that occurring.

150. To take a more specific example. A law of the Commonwealth which said in terms: "A corporation to which s.51(xx) of the Constitution applies shall not accept the grant by a State of aid, within the meaning of s.91 of the *Constitution*, to mining for metals" would surely be invalid. It challenges the very basis on which the aid was granted. So too, it is submitted, is a provision which imposes a federal tax equal to the amount of a *reduction* of royalties.

151. The fundamental difficulty which arises in relation to the view that "any aid" and "bounties" in s.91 are effectively synonymous is that there is no principled reason for treating the two provisions of s.91, expressed in different terms, as having the same meaning.

152. None of the reasons which might support the conclusion, in the case of bounties, that s.91 is an exception to the exclusivity, applies to the words "any aid to". There is no equivalent to ss.51(iii) and 90 in respect of those words[75]. And s.91 does commence with the words "*Nothing in this Constitution*".

153. The power of a State to grant aid to mining for gold, silver or other metals derives from its powers under s.107. There is no provision of the *Constitution* which *expressly* withdraws from a State its power to grant aid, other than bounties, to mining for gold, silver or other metals. So that when s.91 speaks of "Nothing in this Constitution", it is likely to be speaking of the operation of the other provisions of the *Constitution* insofar as they might otherwise allow laws to be made under them. They include s.51(ii).

Conclusion.

154. The practical operation of the *MRRT Act* and the relevant *Imposition Act* is to be looked at, as well as its formal operation. That legislation constitutes an effective prohibition on the grant by a State to a miner of aid to mining for iron ore by reducing royalties or making a concession in relation to them. It does so by increasing the MRRT otherwise payable by an amount equivalent to the reduction or concession. In doing so the relevant *Imposition Act* contravenes s.91.

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[75] So recognised in *Seamen's Union* at 134.8 (Gibbs J); 142.2 (Stephen J); 148.4 (Mason J)

(vii). Severance

155. On the plaintiff's case, the question of severance arises only if the Court takes the view that the *Imposition Acts* are invalid because, and only because, they are not consistent with the first part of s.91. In that case the appropriate ultimate relief would be as set out in paragraph D of the prayer for relief in the FASOC. That would be the case because iron ore is, but coal is not, an "other metal".

156. The plaintiffs would seek to deal in their Submissions in Reply with any contention that the *Imposition Acts* could be read down in a way which would preserve their validity.

PART VII. QUESTIONS RESERVED

157. By reason of the above, the plaintiffs submit that the questions reserved for determination by the Full Court should be answered as follows:

Question (i): Are any or all of s.3 of the *Minerals Resource Rent Tax (Imposition-Customs) Act 2012* (Cth), s.3 of the *Minerals Resource Rent Tax (Imposition-Excise) Act 2012* (Cth) and s.3 of the *Minerals Resource Rent Tax (Imposition-General) Act 2012* (Cth) invalid in their application to the plaintiffs on one or more of the following grounds:

A. they discriminate between the States of the Commonwealth of Australia contrary to s.51(ii) of the *Constitution*;

B. they give preference to one State of the Commonwealth of Australia over another state contrary to s.99 of the *Constitution*;

C. they so discriminate against the States of the Commonwealth or so place a particular disability or burden upon the operations or activities of the States, as to be beyond the legislative power of the Commonwealth?

Answer (i): Yes, s.3 of each *Imposition Act* is invalid.

Question (ii): Are any or all of the *Minerals Resource Rent Tax (Imposition-Customs) Act 2012* (Cth), the *Minerals Resource Rent Tax (Imposition-Excise) Act 2012* (Cth), the *Minerals Resource Rent Tax (Imposition-General) Act 2012* (Cth) and the *Minerals Resources Rent Tax Act 2012* (Cth) invalid in their application to

the plaintiffs on the ground that they are contrary to s.91 of the *Constitution*?

Answer (ii): Yes, s.3 of each *Imposition Act* and the *MRRT Act* are invalid in so far as they purport to impose a tax with respect to iron ore.

Question (iii): Who should pay the costs of the reserved questions?

Answer (iii) The defendant, the Commonwealth of Australia.

30 November 2012

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D F Jackson QC

B Dharmananda SC

W A D Edwards

ANNEXURE A

Date	Event
2006-2012	Plaintiffs granted Mining Leases under the *Mining Act 1978* (WA)
29 March 2012	*MRRT Act* and *Imposition Acts* assented to
22 June 2012	Plaintiffs' Writ of Summons filed, and proceedings commenced
1 July 2012	*MRRT Act* and *Imposition Acts* commence