

FORTESCUE METALS GROUP LTD & ORS v THE COMMONWEALTH OF AUSTRALIA (S163/2012)

Date questions reserved for the Full Court: 5 November 2012

The *Minerals Resource Rent Tax Act 2012* (Cth) (“the Act”) commenced operation on 1 July 2012. Three Acts related to that Act also commenced on that date. They are the *Minerals Resource Rent Tax (Imposition – Customs) Act 2012* (Cth), the *Minerals Resource Rent Tax (Imposition – Excise) Act 2012* (Cth) and the *Minerals Resource Rent Tax (Imposition – General) Act 2012* (Cth) (together, “Imposition Acts”). This suite of legislation imposes a tax (“the MRRT”) on a miner’s total mining profits above \$75M derived from the extraction of iron ore, coal and coal-seam gas. That tax is levied at a rate of 22.5% on the amount resulting after deducting “MRRT allowances” from mining profit. Mining profit consists of mining revenue less mining expenditure. Mining expenditure excludes mining royalties, but MRRT allowances include certain amounts for mining royalties. (Mining royalties are payable on the values of iron ore and other minerals pursuant to various Acts and regulations made in each of Australia’s States.) Section 45-10 of the Act provides a partial tax offset for profits between \$75M and \$125M.

The First Plaintiff heads a group of mining companies which includes the other four plaintiffs. The Second to Fifth Plaintiffs are liable to pay mining royalties on iron ore to the State of Western Australia. They will also each be liable for the MRRT. The First Plaintiff may elect, pursuant to s 215-10 of the Act, to be consolidated with the Second and Third Plaintiffs for MRRT purposes.

On 22 June 2012 the Plaintiffs commenced proceedings in this Court to challenge the validity of the Act and the Imposition Acts (together, “the legislation”) on the basis of alleged contraventions of the *Constitution*. Also on that date the Plaintiffs filed a Notice of a Constitutional Matter in accordance with s 78B of the *Judiciary Act 1903* (Cth). The Attorneys-General of both Western Australia and Queensland are intervening in this matter.

The Plaintiffs claim that the legislation contravenes s 51(ii) of the *Constitution*, on the basis that the MRRT will be levied differently in each State (all other things being equal). This is due to the variation from State to State of the calculation of mining royalties, the amounts of which affect a miner’s liability for the MRRT.

The Plaintiffs submit that such inequality also gives rise to a contravention of s 99 of the *Constitution*, as the legislation’s provisions are laws both of revenue and of trade and commerce. With respect to the latter characterisation, the Plaintiffs further submit that the legislation impairs a State’s ability to differentiate itself from competitor States or countries, as any reduction in royalties would attract a corresponding increase in the MRRT.

The Plaintiffs claim that the legislation is invalid for contravening s 91 of the *Constitution*, as it will curtail a State’s ability to grant aid to mining of iron ore. This is on the basis that any aid given in the form of a reduction of, or

exemption from, royalties would be negated by a corresponding increase in the MRRT.

The Defendant contends that the MRRT is imposed at a uniform rate irrespective of a mining project's location within Australia. Royalties are merely one type of allowance for which a miner can make deductions in calculating its liability for the MRRT. The Defendant submits that a variation of a royalty, which is a charge on the extraction of minerals from land, would not necessarily give rise to a countervailing change in any MRRT payable by a miner. The reduction of a royalty would result in a definite saving for the miner irrespective of its profits. However, the miner's liability (if any) for the MRRT would arise at a later time, after the deduction from profits of any other MRRT allowances available. The Defendant further submits that any inequality in amounts of MRRT payable by miners in different States would be caused by the imposts of a State, not by some discriminatory attribute of the Act.

The Defendants contend that the MRRT is imposed only on miners, not on any persons at the higher levels of government. The Defendants submit that the MRRT does not fetter a State's freedom to make choices, including as to any encouragement of economic development (for which numerous means are available). The Defendants further submit that s 91 of the *Constitution* cannot render a Commonwealth law invalid, as that section is concerned only with provisions in the *Constitution*. Alternatively, it cannot be said that the MRRT Act prohibits a State from granting aid to mining.

On 5 November 2012 Chief Justice French reserved certain questions for determination by the Full Court. Those questions include:

- Are any or all of s 3 of each of the Imposition Acts 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?