



HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 16 Jun 2021 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number: B54/2020
File Title: Mineralogy Pty Ltd & Anor v. State of Western Australia
Registry: Brisbane
Document filed: Form 27F - Outline of oral argument
Filing party: Defendant
Date filed: 16 Jun 2021

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

**IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY**

No. B54 of 2020

B E T W E E N:

MINERALOGY PTY LTD (ACN 010 582 680)
First Plaintiff

10

INTERNATIONAL MINERALS PTY LTD (ACN 058 341 638)
Second Plaintiff

AND

STATE OF WESTERN AUSTRALIA
Defendant

20

DEFENDANT'S ORAL OUTLINE OF SUBMISSIONS

Date of Document: 16 June 2021

Filed on behalf of the Defendant by:
State Solicitor for Western Australia
David Malcolm Justice Centre
28 Barrack Street
PERTH WA 6000

Tel: (08) 9264 1874
Fax: (08) 9264 1440
Ref: 3402-20 (A Tan)
Email: a.tan@ss0.wa.gov.au

PART I: SUITABILITY FOR PUBLICATION

1. This outline is in a form suitable for publication on the Internet.

PART II: OUTLINE OF SUBMISSIONS

Factual Context

2. There was a dispute between the plaintiffs and the State over the First Balmoral South proposal submitted for a development pursuant to the State Agreement annexed to the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002 (Act)*. The plaintiffs claimed damages, and said that they were entitled to arbitrate these claims. The State enacted Part 3 of the Act, by passing the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020 (Amending Act)*, to prevent claims of about \$30 billion.

Operation of Amending Act: Cascading Layers of Protection

3. Part 3 of the Act contains cascading layers of statutory protection for the State. They are:
 - (a) first layer - the **Declaratory Provisions** in ss 9(1)-(2), 10(4)-(7), which effectively declare that the Balmoral South proposals, arbitral awards and underlying arbitration agreements are of no legal effect for any purpose. Certain "protected matters", concerning the decision to enact the Amending Act, are also declared to have no legal effect: s 18(1)-(3);
 - (b) second layer - the **No Liability Provisions**. Sections 11(1)-(2) and 19(1)-(2) provide that the State has no liability for any claim in the arbitrations, or anything connected with a disputed or protected matter;
 - (c) third layer - the **No Proceeding Provisions**, which operate in the context of rights and liabilities which have been declared not to exist. These provisions terminate proceedings which were incomplete when the Amending Act commenced (**Incomplete Proceeding Provisions**) and prohibit new proceedings after commencement (**Post Commencement Provisions**): ss 11(3)-(4), (7), 19(3)-(4), (7). They also prevent enforcement of remedies from proceedings commenced after introduction of the Bill but before the Amending Act was passed (**Interim Proceeding Provisions**): ss 11(5)-(6), 19(5)-(6). The **Administrative Law Provisions** (ss 12(1)-(2), 20(1)-(2)) prevent proceedings for judicial review;
 - (d) fourth layer - the **Admissibility and Discovery Provisions**. Section 18(5)-(7) prevent document discovery or oral testimony against the interests of the State in proceedings connected with a "protected matter";
 - (e) fifth layer - the **Indemnity Provisions** in ss 14-16 and 22-24 operate to achieve a similar commercial effect to the position if the previous layers of protection do not operate;
 - (f) sixth layer - the **Remedial Provisions**. Sections 17 and 25 deny the State funds to pay any liability connected with a disputed or protected matter, and prevent execution against the State's assets;
 - (g) seventh layer - the **Henry VIII Provisions** in ss 30-31. These allow the Executive to make orders to perfect the operation of the legislative regime.
4. The rights and liabilities in some of these provisions may be affected due to the antecedent operation of other Part 3 protections. The operation of the Indemnity, Remedial and Henry VIII Provisions does not depend on the efficacy of the previous layers.

5. Section 20(8) also declares that any conduct of the State that is connected with a "protected matter" does not constitute a criminal offence: the **No Offence Provision**.

Hypothetical Questions

6. The operation of some provisions will never arise. Eg, there are no Interim Proceedings.

Fundamental Errors

7. The plaintiffs make a fundamental error in their constructional approach. They challenge the No Proceeding Provisions, the Admissibility and Discovery Provisions and the Administrative Law Provisions without recognising that the subject matter of these provisions are the non-existent rights declared not to exist by the Declaratory Provisions. The operation of individual provisions of the Act cannot be construed in isolation.
8. There are four further underlying errors in the plaintiffs' analysis:
- (a) the **ad hominem error** - the original Act and the State Agreement are confined to specific parties. This necessarily means that the Amending Act is so confined. That is not a basis which supports or contributes to any constitutional challenge;
 - (b) the **scope error** - the terms of the No Proceeding Provisions, Admissibility and Discovery Provisions and other consequential provisions align with, and are not wider than, the primary declaratory provisions. They all serve the same purpose;
 - (c) the **State Agreement Error** - the State Agreement is contractual, not statutory;
 - (d) the **Arbitral Power Error** - the first and second awards, and any other exercise of arbitral power is the exercise of a private consensual power, not judicial power.

Ch III and Judicial Power Considerations: Common Issue 1

9. The "rights principle" is that Parliament may declare the rights of parties, even where they are in litigation. That does not impermissibly interfere with any judicial process: *Bachrach* (JBA 9/71/3520); *Duncan v ICAC* (JBA 8/63/3107). The Declaratory Provisions, the No Liability Provisions and the No Offence Provision are squarely within this principle.
10. The consequential provisions, such as the No Proceeding Provisions and the Admissibility and Discovery Provisions, should be construed as creating a defence to any remedies which the plaintiffs seek. In any event, they do not impermissibly direct a Court how to exercise judicial power, as they merely provide that the Court should make certain orders if particular conditions are satisfied. Compare *International Finance Trust* (JBA 9/72/3539).
11. The rights principle applies in federal jurisdiction. In any event, even if the provisions of Part 3 may not be applied in federal jurisdiction by s 79 of the *Judiciary Act*, they are not invalid.
12. The operation of sections 12 and 20 does not necessarily depend upon the primary provisions. These sections prevent judicial review except for jurisdictional error (section 26(6) of the Act). That is permissible.
13. The Remedial Provisions in ss 17 and 25 are consistent with ss 64-66 of the *Judiciary Act*. No execution etc can be issued against the State. As well, the Commonwealth Parliament has no legislative power to prevent the State Parliament prohibiting appropriations to pay a judgment: *Rizeq* (JBA 15/103/6041), [46]; *Auckland Harbour Board* (JBA 19/120/7584).

40 Indemnity Provisions: Common Issue 2

14. The Indemnity Provisions are not repugnant to judicial power. They do not make federal jurisdiction conditional. The indemnity provisions do not prevent the plaintiffs from bringing

any proceedings. The set-off provisions are not contrary to s 115, as a set-off occurs before any payment is made.

Interstate Proceedings: Common Issue 3

15. Provisions in Part 3 apply as the proper law to interstate proceedings. Part 3 declares rights and liabilities, and is not contrary to Ch III or *Melbourne Corporation*. Provisions in Part 3 do not impermissibly direct a Court's jurisdiction.

Section 118, and Full Faith and Credit: Common Issue 4

10 16. An arbitral award binds parties contractually. That prevents parties re-litigating the underlying dispute in a Court. It may be recognised by a positive act of an Australian court, by giving effect to an estoppel claim or by making an enforcement order. Prior to a positive act of recognising an award, ss 35 and 36 of the *Commercial Arbitration Acts* have no operation.

17. Section 118 does not limit State legislative power or invalidate any State law.

Inconsistency with Commonwealth Laws: Common Issue 5

18. There is no inconsistency between provisions of federal law which concern the exercise of federal jurisdiction and provisions of Part 3. Part 3 provisions declare rights and liabilities prior to any question about exercise of jurisdiction arising.

Rule of Law and Deeply Rooted Unwritten Principles: Common Issue 6

19. The rule of law is a constitutional assumption, not limitation.

Manner and Form and section 6 of the Australia Act: Common Issue 7

20 20. Clause 32 is not a "law made by the WA Parliament": it is contractual; and the law which was made by the WA Parliament is the Act, not the Agreement authorised by the Act.

21. Clause 32 does not prescribe any manner and form for making an Act of Parliament. It prescribes the process for parties to amend a bi-lateral contractual agreement.

22. The Amending Act is not a law respecting the "constitution, powers or procedure" of the WA Parliament which must be made in the manner and form prescribed by cl 32. Clause 32 only applies to amendments to the Agreement. The Amending Act does not affect the constitution, powers or procedure of the State Parliament, as the ability and process of Parliament to legislate is precisely the same before and after the Amending Act.

Abdication of Legislative Power: Common Issue 8

30 23. Parliament may delegate, but not abdicate, legislative power. In this case, there is simply a delegation, as Parliament retains its full legislative authority to pass laws which override any order made under ss 30 and 31.

Severance: Common Issue 9

24. Practically, there are four severance situations: (a) severance of secondary provisions; (b) partial disapplication of secondary provisions in federal and interstate jurisdiction; (c) severance of the Indemnity Provisions and (d) severance of the Henry VIII clauses.

25. Severance can apply in any of these situations. The validity of the Declaratory Provisions or the No Liability Provisions does not depend upon the other provisions which might be severed.

J A Thomson SC, S Free SC, J Shaw, Z Heger

16 June 2021