HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY B54 of 2020

BETWEEN

MINERALOGY PTY LTD (ACN 010 582 680)
First Plaintiff

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

AND

STATE OF WESTERN AUSTRALIA
Defendant

SUBMISSIONS OF THE ATTORNEY GENERAL FOR NEW SOUTH WALES, INTERVENING

Part I Form of Submissions

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

Part II Basis of Intervention

2. The Attorney General for the State of New South Wales ("NSW Attorney") intervenes pursuant to s 78A of the Judiciary Act 1903 (Cth) in support of the defendant.

Part III Argument

3. In summary, the NSW Attorney submits:

   (a) that the enactment of the Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020 (WA) ("the Amending Act"), which amended the Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002 (WA) ("the Act"),

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did not involve the exercise of judicial power by the Parliament of Western Australia ("WA Parliament");

(b) that, as a consequence, it is unnecessary for the Court to reach the plaintiffs' argument that the WA Parliament cannot validly exercise judicial power. If, however, that argument is reached, the NSW Attorney submits that it is permissible for a State Parliament to exercise judicial power. No new implication that State Parliaments are precluded from exercising judicial power should be drawn from Ch III of the Constitution;

(c) that s 118 of the Constitution does not operate to invalidate the Amending Act. The plaintiffs' novel interpretation of s 118 – which is unsupported by Australian and United States jurisprudence, is a reversion to the theory that s 118 dictates a choice of law rule for Australia and would place a significant limitation on State legislative power – should not be entertained; and

(d) that s 64 of the Judiciary Act does not operate to prevent the Act from being picked up by s 79(1) of the Judiciary Act where federal jurisdiction is exercised.

The Amending Act does not involve an exercise of judicial power

4. Judicial power is not susceptible to an exhaustive or exclusive definition: Precision Data Holdings Ltd v Wills (1991) 173 CLR 167 at 188-189 (the Court); R v Davison (1954) 90 CLR 353 at 366-367 (Dixon CJ and McTiernan J). Attempts to define judicial power often commence with the definition advanced by Griffith CJ in Huddart, Parker and Co Pty Ltd v Moorehead (1909) 8 CLR 330 ("Huddart Parker") at 357, where his Honour stated that the concept means:

> the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision … is called upon to take action.

5. Since Huddart Parker, it has been consistently recognised that the core characteristic of judicial power is the determination of controversies about existing rights and liabilities according to existing law: see, for example, Bass v Permanent Trustee Company Ltd (1999) 198 CLR 334 at 355-359 [45]-[56] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); Attorney-General of the Commonwealth v Alinta Ltd (2008) 233 CLR 542 at 577 [94] (Hayne J) and 592-593

[153]-[155] (Crennan and Kiefel JJ); Minister v Home Affairs v Benbrika (2021) 95 ALJR 166 at 221-222 [220] (Edelman J). In R v Gallagher; Ex parte Aberdare Collieries Pty Ltd (1963) 37 ALJR 40, Kitto J stated that judicial power consists of the "giving of decisions in the nature of adjudications upon disputes as to rights or obligations arising from the operation of the law upon past events or conduct" (at 43). Thus, the exercise of judicial power involves "the application of a pre-existing standard rather than … the formulation of policy or the exercise of an administrative discretion": Brandy v Human Rights and Equal Opportunity Commission (1995) 183 CLR 245 ("Brandy") at 268 (Deane, Dawson, Gaudron and McHugh JJ).

6. The Amending Act does not involve a determination of a controversy about existing rights according to existing law, an adjudication upon a dispute as to rights or obligations arising from the operation of the law upon past events or conduct, or an application of a pre-existing standard. Nor does it involve the "non-consensual ascertainment and enforcement of rights in issue between private parties": Duncan v New South Wales (2015) 255 CLR 388 ("Duncan") at 407 [41]; see also TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia (2013) 251 CLR 533 ("TCL") at 553-554 [28] (French CJ and Gageler J).

7. Rather, the Amending Act alters and terminates rights and liabilities. By enacting the Amending Act, the WA Parliament has expressed, and given effect to, its own determination that it is in the public interest that the arbitral awards made on 20 May 2014 ("the First Award") and 11 October 2019 ("the Second Award") be declared as having no effect (ss 10(4) and 10(6) of the Act). The WA Parliament has also given effect to its determination that it is in the public interest that the State be restored so far as possible to the position it would have been had the two proposals for the Balmoral South Iron Ore Project ("the Balmoral South proposals") not been made and the Iron Ore Processing (Mineralogy Pty Ltd) Agreement ("the Agreement") not been repudiated (ss 8(2), 9(1), 11, 12 and 14 of the Act). In that sense, the Amending Act is analogous to the legislation considered in Duncan, in which this Court held that the termination of a right conferred by statute was not a function which, by its nature, pertained exclusively to judicial power: see at 409 [45].

8. There is no constitutional impediment to the WA Parliament altering or terminating rights and liabilities in this manner. It is well settled that State and Commonwealth legislation which alters substantive rights and duties does not constitute an exercise of

– or impermissible interference with – judicial power, even where the legislation has an effect on pending litigation: see Australian Education Union v Fair Work Australia (2012) 246 CLR 117 at 140 [47] (French CJ, Crennan and Kiefel JJ) and 150 [78] (Gummow, Hayne and Bell JJ); Duncan v Independent Commission Against Commission (2015) 256 CLR 83 at 98 [26] (French CJ, Kiefel, Bell and Keane JJ); Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth (1986) 161 CLR 88 ("BLF (Cth)") at 96 (the Court). As the two examples outlined below demonstrate, "Chapter III contains no prohibition, express or implied, that rights in issue in legal proceedings shall not be the subject of legislative declaration or action": R v Humby; Ex parte Rooney (1973) 129 CLR 231 at 250 (Mason J).

9. In Nelungaloo Pty Ltd v The Commonwealth (1948) 75 CLR 495, this Court dismissed a challenge to the validity of the Wheat Industry Stabilization Act (No 2) 1946 (Cth), which provided that an executive order for the acquisition of wheat "shall be deemed to be, and at all times to have been, fully authorised" by the relevant regulation. Dixon J found that the Act was "simply a retrospective validation of an administrative act and should be treated in the same way as if it said that the rights and duties of the growers and of the Commonwealth should be the same as they would be, if the order was valid" (at 579). Although the legislation in that case declared that an invalid act was *valid*, as opposed to declaring that a valid act was *invalid*, Dixon J's observations suggest that the declaration in the Amending Act that the First and Second Awards are "of no effect … and taken to have never had any effect" does not involve any uniquely judicial concept that is beyond the scope of legislative power.

10. Legislation of a different nature was found to be valid in BLF (Cth). The Australian Conciliation and Arbitration Commission had declared, pursuant to the Building Industry Act 1985 (Cth), that it was satisfied that the Federation had engaged in conduct that constituted a contravention of certain undertakings and agreements. The Minister was, as a result, empowered to order the deregistration of the Federation. The organisation applied to the High Court to quash the Commission's declaration. Before the hearing of that application, the Parliament passed the Builders Labourers' Federation (Cancellation of Registration) Act 1986 (Cth), s 3 of which provided that "The registration of [the Federation] under the Conciliation and Arbitration Act 1904 is, by force of this section, cancelled". The plaintiffs submitted that the legislation

was an exercise of judicial power or an impermissible interference with it. The Court concluded that Parliament may legislate so as to affect and alter rights in issue in pending litigation without interfering with the exercise of judicial power in a way that is inconsistent with the Constitution (at 96). In doing so, the Court noted there was "nothing in the nature of deregistration which makes deregistration uniquely susceptible to judicial determination … Nor is there anything in the nature of deregistration which makes it unsusceptible to legislative determination" (at 95).

11. Similarly, in the present case, there is nothing about the question of the legal significance or effectiveness of the First and Second Awards that makes "it uniquely susceptible to judicial determination" or "unsusceptible to legislative determination". By providing that the First and Second Awards are of no effect, the Amending Act terminates the plaintiffs' rights under the First and Second Awards such that there is no award for a court to enforce or liability for a court to adjudicate. This is not to confer an exclusively judicial function on another branch of government. Rather, it is to remove a party's cause of action in a particular case. The Amending Act does not interfere with judicial power in so doing, given that the arbitrator was not exercising judicial power in making the First and Second Awards. Rather, the arbitrator was exercising arbitral authority based on the voluntary agreement of the parties: TCL at 553-554 [28]-[31] (French CJ and Gageler J) and 566 [75] (Hayne, Crennan, Kiefel and Bell JJ); Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission (2001) 203 CLR 645 at 658 [31] (the Court).

12. The plaintiffs also submit that the determination of actions for breach of contract and for civil wrongs is an "exclusive" and "inalienable" judicial function, relying on H A Bachrach Pty Ltd v Queensland (1998) 195 CLR 547 ("Bachrach") at 562 [15]. In that case, the Court stated that "the *trial* of actions for breach of contract and for civil wrongs are inalienable exercises of judicial power" (at 562 [15], emphasis added), citing Polyukhovich v The Commonwealth (1991) 172 CLR 501 at 706 and Brandy at 258 and 269. In the latter case, Mason CJ, Brennan and Toohey JJ said that the validity of this proposition rested not only on history and precedent, but also on the principle that "the process of the trial results in a binding and authoritative judicial determination which ascertains the rights of the parties. So, when A alleges that he or she has suffered loss or damage as a result of B's unlawful conduct and a court

determines that B is to pay a sum of money to A by way of compensation, there is an exercise of judicial power" (at 258-259).

13. To say that the function of conducting a trial for breach of contract is exclusively judicial is not to say that the alteration by the legislature of a party's contractual rights or liabilities involves the exercise of judicial power. As outlined above, there is no constitutional impediment to Parliament altering or terminating the contractual rights of parties, even where those rights are the subject of pending litigation. If, as appears to be asserted by the plaintiffs, any determination regarding a breach of contract constitutes judicial power, then the making of an arbitral award concerning a contractual breach would involve an exercise of judicial power. It plainly does not do so. Even though the making of an arbitral award "has legal significance in respect of the parties' dispute and their rights and liabilities", is "final and conclusive" and "imposes new obligations on the parties in substitution for the rights and liabilities which were the subject of the dispute referred to arbitration", an arbitrator does not exercise judicial power: TCL at 566-567 [75]-[8] (Hayne, Crennan, Kiefel and Bell JJ). It is the enforcement of an arbitral award by a competent court in accordance with judicial process – which "necessarily involves a determination of questions of legal right or legal obligation at least as to the existence of, and parties to, an arbitral award" – which is an exercise of judicial power: TCL at 555 [32] (French CJ and Gageler J); see also at 566 [75] (Hayne, Crennan, Kiefel and Bell JJ).

14. These authorities demonstrate that an Act such as the Amending Act which alters existing rights and liabilities and declares an arbitral award to be of no effect does not constitute an exercise of judicial power.

Any exercise of judicial power by the WA Parliament is not inconsistent with Ch III

15. In view of the submissions above that the Amending Act does not involve the exercise of judicial power, it is unnecessary for this Court to reach the plaintiffs' argument that the WA Parliament cannot validly exercise judicial power because to do so would be inconsistent with Ch III of the Constitution. As this Court recently reaffirmed in a unanimous judgment, quoting Lambert v Weichelt (1954) 28 ALJ 282 at 283, "[i]t is not the practice of the Court to investigate and decide constitutional questions unless there exists a state of facts which makes it necessary to decide such a question in order to do justice in the given case and to determine the rights of the parties": Zhang v

Commissioner of Police (2021) 95 ALJR 432 at 437 [21]. This Court should therefore decline to deal with this question.

16. If, however, the Court considers it necessary to consider the plaintiffs' argument, it should be rejected. This Court has consistently declined to find that there is a separation of powers at the State level: see, for example, Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51 ("Kable") at 65 (Brennan CJ), 77-78 (Dawson J), 93-94 (Toohey J), 109 (McHugh J) and 137 (Gummow J); Kirk v Industrial Court (NSW) (2010) 239 CLR 531 ("Kirk") at 573 [69] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); Condon v Pompano Pty Ltd (2013) 252 CLR 38 at 53 [22] (French CJ) and 89-90 [125] (Hayne, Crennan, Kiefel and Bell JJ).

17. In Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations (1986) 7 NSWLR 372 ("BLF (NSW)"), the NSW Court of Appeal held that the NSW Parliament was competent to exercise judicial power. In that case, the relevant Minister had made a declaration under the Industrial Arbitration (Special Provisions) Act 1984 (NSW) ("the 1984 Act"), the effect of which was to bring s 3(2) of that Act into force. That subsection provided that, by operation of that Act, the registration of the Federation under the Industrial Arbitration Act 1940 (NSW) ("the 1940 Act") was cancelled. The Federation's application for judicial review of the declaration was dismissed. The Federation appealed. Before the appeal was heard, the NSW Parliament passed the Builders Labourers Federation (Special Provisions) Act 1986 (NSW) ("the BLF Act"), s 3(1) of which provided that the registration of the Federation under the 1940 Act shall, for all purposes, be taken to have been cancelled on a specified date by the operation of, and pursuant to, the 1984 Act. Section 3(2) provided that the Minister's certificate should be treated as valid. Section 3(3) provided that subsections (1) and (2) had effect notwithstanding any proceedings instituted before the commencement of the BLF Act. Section 3(4) provided that "the costs of or incidental to the proceedings incurred by a party to the proceedings shall be borne by the party, and shall not be the subject of any contrary order of any court".

18. It might be doubted, in the light of BLF (Cth), whether the legislation was an exercise of judicial power, despite two members of the Court so finding: Street CJ at 379-381 and Kirby P at 395. But all members of the Court considered that the NSW legislature

could exercise judicial power and that the BLF Act was valid: BLF (NSW) at 381 and 387 (Street CJ), 406 (Kirby P), 413 (Mahoney JA) and 420 (Priestley JA, Glass JA agreeing). In particular, Mahoney JA noted at 407-408 that the form of government set up in New South Wales by legislation of the United Kingdom Parliament followed the form that existed in the United Kingdom so that there was nothing that effected a separation or segregation of judicial powers from legislative powers. In Kable at 93-94, Toohey J referred to BLF (NSW) with approval in rejecting an argument that the NSW Parliament could not exercise judicial power. That argument was also rejected, in effect, by Brennan CJ at 65 and Dawson J at 77-78 (both of whom were in dissent in the result, but not on this issue) and by McHugh J at 109.

19. The plaintiffs seek to distinguish BLF (NSW) and identify a new limit on State legislative power by relying on an implication said to be found in Ch III of the Constitution. The plaintiffs refer to ss 73(ii) and 77(iii) of the Constitution and claim that the exercise of judicial power by State legislatures is precluded by the principle, identified by Gummow J in Kable at 138, that Ch III requires the maintenance of an "integrated national judicial system" under the "final superintendence" of this Court (plaintiffs' submissions ("PS") [60]-[61]). The plaintiffs also submit that the exercise of judicial power by a State legislature diminishes this Court's superintendent function and "frustrates" the constitutionally mandated supervisory jurisdiction of State Supreme Courts which is exercised according to a single but composite body of common law principles that in the end are set by this Court (PS [62]-[65]).

20. Any legislative exercise of judicial power by State Parliaments does not – and could not – undermine or offend the maintenance of an integrated national judicial system. The enactment of such legislation does not, by definition, involve the application of common law principles and, as a consequence, could not frustrate or interfere with this Court's superintendence over the common law as administered by the courts.

21. The plaintiffs also rely on Kirk to argue that the WA Parliament is precluded from exercising judicial power because the exercise of that power by the Parliament is not amenable to appeal or review for jurisdictional error (PS at [62]-[64]).

22. The fact that a State Parliament may pass laws that involve the exercise of judicial power does not mean that State laws are immune from review. In accordance with well-established principles dating back to Marbury v Madison (1803) 5 US 137, courts

may review legislation for compliance with the constitutional limitations on the legislature: see Australian Communist Party v The Commonwealth (1951) 83 CLR 1 at 262-263 (Fullagar J); New South Wales v Kable (2013) 252 CLR 118 at 137 [50] (Gageler J). If legislation exceeds those limits, courts have the power to declare the legislation invalid or, in the case of s 109 of the Constitution, inoperative.

23. In circumstances where there is no dispute that State legislation is reviewable for constitutional invalidity, the plaintiffs' submission must be that, in order to maintain the federal system judicial power established by Ch III of the Constitution, it is necessary for all exercises of judicial power to be amenable to a particular kind of review, namely, review by way of appeal or review for jurisdictional error.

24. In Kirk, this Court found that the defining and constitutionally entrenched characteristic of State Supreme Courts is the supervisory jurisdiction by which those Courts enforce "the limits on the exercise of State executive and judicial power by persons and bodies other than that Court": Kirk at 581 [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). The plurality observed that to "deprive a State Supreme Court of its supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power by persons and bodies other than that Court would be to create islands of power immune from supervision and restraint" (at 581 [99]). The Court concluded that legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power (at 581 [100]).

25. The key conclusion in Kirk was that limits on power that apply to bodies exercising executive and judicial power must be enforced by courts exercising supervisory jurisdiction which are themselves subject to the appellate jurisdiction of the High Court. This principle cannot sensibly be understood as extending to State legislatures. The laws made by State Parliaments themselves define and limit State executive and judicial power. To the extent that State Parliaments are subject to limits, those limits are enforced by judicial review of State legislation for constitutional invalidity. No new implication under Ch III is required to safeguard this type of judicial review.

26. Of course, it is not the role of State Supreme Courts to undertake appellate review of State legislation or review of such legislation for jurisdictional error. State legislatures have the authority to make such laws as they see fit. The doctrine of parliamentary

supremacy is "a doctrine as deeply rooted as any in the common law": Kruger v The Commonwealth (1997) 190 CLR 1 at 73 (Dawson J). As this Court stated in Union Steamship Company of Australia Pty Ltd v King (1988) 166 CLR 1 at 10:

> Just as the courts of the United Kingdom cannot invalidate laws made by the Parliament of the United Kingdom on the ground that they do not secure the welfare and the public interest, so the exercise of its legislative power by the Parliament of New South Wales is not susceptible to judicial review on that score.

27. The plaintiffs submit that, once the significance of s 73 of the Constitution is recognised, it is a "short, logical step to the proposition that a State Parliament cannot exercise judicial power" (PS [65]). This submission should not be accepted. It is a radical and insupportable step to conclude that because inferior courts and tribunals must be subject to the supervisory jurisdiction of the Supreme Court, it is necessary for all exercises of judicial power to be amenable to judicial or appellate review and that, as a consequence, it is impermissible for a State legislature to exercise judicial power.

28. There is no proper basis for drawing a new implication from Ch III of the Constitution that State Parliaments are precluded from exercising judicial power and none should be drawn.

Section 118 of the Constitution does not invalidate the Amending Act

29. The plaintiffs assert that, when enacting the Amending Act, Western Australia was required to give full faith and credit to s 35 of the uniform Commercial Arbitration Acts, the effect of which is to recognise domestic arbitral awards as binding. The purported failure of the WA Parliament to do so is said to invalidate the Amending Act in whole or in part (PS [126] and [132]). This amounts to a startling new interpretation of s 118 of the Constitution which would place a significant limitation on State legislative power. This novel interpretation of s 118 should not be entertained.

30. There is no suggestion in the Convention debates that s 118 of the Constitution was intended to limit State legislative power in the manner proposed. There was only one discussion of the clause. Sir Edmund Barton referred to the "similar section" in the United States Constitution, namely, Article IV, s 1 ("the Full Faith and Credit Clause"). He quoted Baker's Annotated Constitution of the United States to the effect

that the record of a judgment in one State is conclusive evidence in another and that the article "did not mean to confer any new powers upon the States, but simply to regulate the effect of their acknowledged jurisdiction over person and things within their territory. It did not make the judgments of other States domestic judgments for all intents and purposes, but only gave a general validity, faith and credit to their evidence": Official Report of the National Australasian Convention Debates at 1005 (Adelaide session). Quick and Garran similarly regarded s 118 as containing "a constitutional declaration in favour of inter-state official and judicial reciprocity which the federal Parliament and the States may assist to effectuate but which they cannot prejudice or render nugatory": John Quick and Robert Garran, The Annotated Constitution of the Australian Commonwealth (1976 ed.) at 961.

31. Although s 118 has not received extensive judicial consideration, the section has been examined by this Court in several cases. The plaintiffs cite no majority or minority judgment in support of their proposed interpretation of s 118. The plaintiffs' construction of s 118 is also unsupported by United States jurisprudence regarding the Full Faith and Credit Clause. In Franchise Tax Board of California v Hyatt (2003) 538 US 488 ("Hyatt"), the Supreme Court of the United States confirmed that Article IV, s 1 "does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate'": at 494 (O'Connor J delivering the opinion of the Court), quoting Pacific Employers Insurance Co v Industrial Accident Commission (1939) 306 US 493 at 501 and Sun Oil Co v Wortman (1988) 486 US 717 at 722. The Full Faith and Credit Clause may, however, be violated where "a State has exhibited a 'policy of hostility to the public Acts' of a sister State": Hyatt at 499, citing Carroll v Lanza (1955) 349 US 408 at 413.

32. The plaintiffs do not articulate how their proposed limitation on State legislative power would operate in practice. The plaintiffs' argument cannot be that s 118 permits a court to invalidate a State statute simply because it conflicts with another State's statute. If the Amending Act is invalid simply because it conflicts with s 35 of the Commercial Arbitration Acts, then s 35 in each of those Acts is equally offensive to s 118 of the Constitution because it conflicts with the Amending Act.

33. Thus, the plaintiffs' submission raises the question of which State's legislation should be subordinated to the other State's legislation by virtue of s 118. The plaintiffs' argument appears to be that the WA Parliament is precluded from exercising

legislative power in relation to the effectiveness of arbitral awards either because the Commercial Arbitration Acts were enacted by the other States at an earlier time, or because those Acts "cover the field" on the subject matter. There is no principled basis upon which it could be concluded that s 118 limits State legislative power by reference to what legislation has previously been enacted by other States. If that is permitted under s 118, State legislative power would be subject to – and controlled by – the legislative whim of every other State.

34. The concept of "covering the field" is also inapt to apply in this context. The covering the field test, developed in the context of s 109 of the Constitution, does not involve an inquiry as to whether a State has infringed a limitation on its general legislative power, but whether State legislation is inoperative due to the Commonwealth exhaustively regulating the relevant subject matter. The concept presupposes that one entity has the paramount right to legislate and that where that entity has exhaustively expressed what the law shall be on a subject matter through the enactment of a statute, that statute shall prevail. The Commonwealth has power to cover the field with respect to subject matters within its enumerated heads of power. The States have no such power. The very existence of the States as distinct legal and political entities having equal status, as provided for in ss 106, 107 and 108 of the Constitution, tends against acceptance of the plaintiffs' submission.

35. The plaintiffs ask this Court to treat s 118, in effect, as a de facto paramountcy provision. Section 109 is the only constitutional choice of law provision. As this Court noted in Port MacDonnell Professional Fishermen's Association Inc v South Australia (1989) 168 CLR 340 at 374, the Constitution "contains no express paramountcy provision similar to s 109 by reference to which conflicts between competing laws of different States are to be resolved". See also State Authorities Superannuation Board v Commissioner of State Taxation (WA) (1996) 189 CLR 253 at 286 (McHugh and Gummow JJ).

36. Upon analysis, the plaintiffs' argument is a reversion to the theory that s 118 dictates a choice of law rule for Australia, an approach which has been rejected by this Court: John Pfeiffer Pty Ltd v Rogerson (2000) 203 CLR 503 at 533 [63] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); McKain v R W Miller & Co (SA) Pty Ltd (1991) 174 CLR 1 ("McKain") at 35-37 (Brennan, Dawson, Toohey and McHugh JJ). Giving a constitutional status to choice of law rules "would deny the forum State

an important legislative power": McKain at 36. As Brennan J recognised in Breavington v Godleman (1988) 169 CLR 41 at 116-117:

> [I]t would severely qualify the mutual legislative independence of the States to attribute to s 118 the effect of permitting relief to be given in another State in respect of circumstances occurring in a State the laws of which deny any cause of action arising from those circumstances or even create an offence constituted by those circumstances.

37. This is the outcome for which the plaintiffs contend. They seek to attribute to s 118 the effect of permitting the plaintiffs to enforce the First and Second Awards in another State, in reliance on s 35 of the Commercial Arbitration Acts, in respect of circumstances occurring in Western Australia, where ss 10(4) and 10(6) of the Act provide that the First and Second Awards are of no effect and s 11 extinguishes any liability of Western Australia with respect to those Awards. Contrary to the plaintiffs' argument that s 118 renders a State law invalid when it is inconsistent with an existing law of another State, the laws of the States are "capable of creating disparities in the legal consequences attached in the respective States to the same set of facts unless a valid law of the Commonwealth overrides the relevant State laws and prescribes a uniform legal consequence. That may or may not be thought to be desirable, but it is the hallmark of a federation as distinct from a union": McKain at 36 (Brennan, Dawson, Toohey and McHugh JJ).

Section 64 of the Judiciary Act does not have any operation in this instance

38. The plaintiffs submit that various provisions of the Act, as amended by the Amending Act, deny the requirement in s 64 of the Judiciary Act that, in any suit to which the Commonwealth or a State is a party, the rights of the parties shall as nearly as possible be the same as in a suit between subject and subject. Accordingly, it is said that s 64 has "otherwise provided" within the terms of s 79(1) of the Judiciary Act, such that the provisions of the Act cannot be picked up by s 79(1) where federal jurisdiction is exercised (PS [122]).

39. Section 64 of the Judiciary Act requires that, in every suit to which the Commonwealth or the State is a party, the rights of the parties be ascertained, as nearly as possible, by the same rules of law, substantive and procedural, as would apply if the Commonwealth or State were a subject. Accordingly, the Commonwealth and the States acquire no special privilege "except where it is not possible to give it the same rights and subject it to the same liabilities as an ordinary subject": The Commonwealth

v Evans Deakin Industries Ltd (1986) 161 CLR 254 ("Evans Deakin") at 262-263 (Gibbs CJ, Mason, Wilson, Deane and Dawson JJ).

40. There are a range of judicial statements supporting a conclusion that there are some limitations on the scope of s 64 of the Judiciary Act by virtue of the special position and functions of government. In Asiatic Steam Navigation Co Ltd v The Commonwealth (1956) 96 CLR 397 at 417, Dixon CJ, McTiernan and Williams JJ appeared to suggest that s 64 may have a limited application where "purposes or functions peculiar to Government" are in question. In Evans Deakin, the plurality left open the possibility that entering into a contract of a kind not commonly entered into by ordinary members of the public, and with respect to which the determination of rights and liabilities would be incompatible with the position of the Commonwealth or detrimental to the public welfare, might not be caught by s 64 (at 264-265). In South Australia v The Commonwealth (1962) 108 CLR 130 at 140 – a case concerning an agreement between the Commonwealth and South Australia concerning the alteration and construction of railway systems and the financing of those works – Dixon CJ stated, after concluding that the rights referred to in s 64 included substantive rights:

> [I]t is one thing to find legislative authority for applying the law as between subject and subject to a cause concerning the rights and obligations of governments; it is another thing to say how and with what effect the principles of that law do apply in substance. For the subject matters of private and public law arc necessarily different. What is in question here is an agreement assuming to affect matters which are governmental and by nature are subject to considerations to which private law is not directed. That is particularly true of financial provisions, the fulfilment of which in constitutional theory at least must be subject to parliamentary control.

See also The Commonwealth v Lawrence [1960] NSWR 312 at 315 (Else-Mitchell J).

41. More recently, in The Commonwealth v Western Australia (1999) 196 CLR 392 at 438-439, Gummow J said that the phrase "as nearly as possible" did not embrace the situation where the Commonwealth had acquired title to land for defence purposes and was thus performing a function peculiar to government. In British American Tobacco Australia Ltd v Western Australia (2003) 217 CLR 30 at 65 [82]-[83], McHugh, Gummow and Hayne JJ (Callinan J agreeing at 90 [172]) appeared to accept that s 64 preserved some of the Executive Government's privileges and immunities. In particular, their Honours seemed to consider that s 64 did not affect the

"fundamental constitutional principle" in Auckland Harbour Board v The King [1924] AC 318 ("Auckland Harbour") prohibiting the expenditure of public funds by the Executive Government except under legislative authority.

42. In accordance with the defendant's submissions at [59] and [127]-[129], the NSW Attorney submits that s 64 will not operate if the nature of a suit between a subject and the Commonwealth or a State is not of a kind which ordinarily exists between a subject and subject, or where it would infringe a fundamental public law or constitutional principle, such as the Auckland Harbour principle and the doctrine in Melbourne Corporation v The Commonwealth (1947) 74 CLR 31. See also Graeme Hill, "Private Law Actions against the Government (Part 2) – Two Unresolved Questions about Section 64 of the Judiciary Act" (2006) 29(3) UNSW Law Journal 1.

43. In the present case, the Act ratifies, and authorises the implementation of, the Agreement, a copy of which is set out in Schedule 1 to the Act, as varied by the agreement set out in Schedule 2 to the Act (ss 4(1), 4(2), 6(1) and 6(2)). The Act is not of general application; it concerns only the rights and liabilities of the State, the first plaintiff and various "Co-Proponents" identified in the covering clause to the Agreement, including the second plaintiff. The subject matter of the Act is the development of public land for public purposes. It is a combined contractual and legislative regime designed to make general environmental and regulatory statutes inapplicable, which is reflected in a State Agreement. The matters for which the Act provides could never be the subject of a contract or suit between subject and subject.

44. In addition, the Act protects Western Australia from a significant financial claim, including by providing that no amount can be charged to, or paid out of, the Consolidated Account to meet a liability of the State (ss 17(2) and 25(2)). For the reasons already given, s 64 does not operate to preclude s 79(1) of the Judiciary Act from picking up those provisions.

Part IV Estimate of time for oral argument

45. It is estimated that 15 minutes will be required for oral argument in conjunction with the time required for oral argument in B52 of 2020, the related proceedings brought by Mr Palmer.

Dated: 28 May 2021

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY B54 of 2020

BETWEEN

MINERALOGY PTY LTD (ACN 010 582 680)

First Plaintiff

INTERNATIONAL MINERALS PTY LTD (ACN 058 341 638)

Second Plaintiff

AND

STATE OF WESTERN AUSTRALIA

Defendant

ANNEXURE TO SUBMISSIONS OF THE ATTORNEY GENERAL FOR NEW SOUTH WALES, INTERVENING

Pursuant to paragraph 3 of Practice Direction No 1 of 2019, the NSW Attorney sets out below a list of the particular constitutional provisions, statutes and statutory instruments referred to in the submissions.

	Description	Relevant date in force	Provision
1.	Commonwealth Constitution	Current	Ch III, ss 73, 77(iii), 106, 107, 108, 109 and 118
2.	United States Constitution	Current	Art IV, s 1
Statutes			
3.	Builders Labourers' Federation (Cancellation of Registration) Act 1986 (Cth)	13.08.1986	s 3
4.	Builders Labourers Federation (Special Provisions) Act 1986 (NSW)	31.10.1986	ss 3(1)–(4)
5.	Building Industry Act 1985 (Cth)	13.08.1986	
6.	Commercial Arbitration Act 2010 (NSW)	Current	s 35

	Description	Relevant date in force	Provision
7.	Commercial Arbitration Act 2011 (SA)	Current	s 35
8.	Commercial Arbitration Act 2011 (Tas)	Current	s 35
9.	Commercial Arbitration Act 2011 (Vic)	Current	s 35
10.	Commercial Arbitration Act 2012 (WA)	Current	s 35
11.	Commercial Arbitration Act 2013 (Qld)	Current	s 35
12.	Conciliation and Arbitration Act 1904 (Cth)	13.08.1986	
13.	Industrial Arbitration Act 1940 (NSW)	31.10.1986	
14.	Industrial Arbitration (Special Provisions) Act 1984 (NSW)	31.10.1986	s 3(2)
15.	Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002 (WA)	Current	ss 4(1)–(2), 6(1)–(2), 8(2), 9(1), 10(4), 10(6), 11, 12, 14, 17(2), 25(2) and Schedules 1 and 2
16.	Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020 (WA)	13.08.2020	
17.	Judiciary Act 1903 (Cth)	Current	ss 64 and 79(1)
18.	Wheat Industry Stabilization Act (No 2) 1946 (Cth)	31.05.1948	