HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY No 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 THE STATE OF VICTORIA (INTERVENING)

PART I, II & III: CERTIFICATION AND INTERVENTION

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

2. The Attorney-General for the State of Victoria (**Victoria**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) (**Judiciary Act**).

PART IV: ARGUMENT

Summary of propositions

3. Certain new provisions in the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA) (**Agreement Act**), added by s 7 of the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA) (**2020 Act**), alter substantive rights and liabilities (new ss 9-12, 18(1)-(4), 19-20). Some do this by overriding accrued contractual rights and arbitral awards. Others prevent new rights and liabilities from arising in law. The remainder either bar remedies, correlative to altered State liabilities; or are adjuncts to other provisions that have extinguished rights and remedies.[1] As explained in **section A below**, all are valid:

   (1) A State Act may validly alter substantive rights and liabilities.

   (2) These provisions do <u>not</u> undermine the institutional integrity of the courts or interfere with the exercise of judicial power (whether federal or State).

   (3) These provisions do not prevent "full faith and credit" being given to the law of any State, and are not contrary to the rule of law or unwritten principles.

4. Other provisions added by the 2020 Act prevent the Plaintiffs from seeking access to certain documents (new ss 13(1)-(4) and 21(1)-(4)) and regulate the giving of evidence about certain matters (new s 18(5)-(7)).[2] These provisions are consequential on the altered substantive rights and liabilities caused by the new provisions addressed in section A below. There can no longer be any legitimate forensic purpose for obtaining such documents once the parties' underlying rights have changed. The modification of the rules of evidence by s 18 is consistent with established principles of parliamentary privilege and

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[1] These are what the Defendant (**WA**) variously describes as "Declaratory Provisions", "No Liability Provisions", "Administrative Law Provisions", the "No Offence Provision" and "No Proceeding Provisions".

[2] These correspond in part to what WA describes as the "Administrative Law Provisions" and the "Admissibility and Discovery Provisions". Sections 13(4) and 21(4) are among what WA describes as the "No Proceeding Provisions" (specifically the "Post-Commencement Proceeding Provisions").

Cabinet confidentiality. These provisions do not interfere with the exercise of judicial power, and do not undermine the independence or impartiality of the courts. Accordingly, these provisions are also valid and would, in any case, be severable from other provisions in the 2020 Act if that were necessary: **section B below**.

5. If and to the extent that the new provisions added by the 2020 Act govern the exercise of federal jurisdiction,[3] they could be picked up by s 79 of the Judiciary Act and would validly apply in federal jurisdiction: **section C below**.

6. The contractual provisions for amending the Iron Ore Processing (Mineralogy Pty Ltd) Agreement (**Agreement**) are not a "manner and form" provision within the meaning of s 6 of the *Australia Act 1986* (Cth) (**Australia Act**) that would restrict the ability of the State to enact legislation that is inconsistent with the rights and liabilities created by the Agreement: **section D below**.

7. The remaining impugned provisions not addressed in [3]-[4] above concern measures to meet or enforce the State's liability (new ss 17 and 25);[4] are directed to any proceedings commenced at or after 11 August 2020 and completed by the end of 13 August 2020 (new ss 11(5)-(6), 12(5)-(6), 19(5)-(6) and 20(5)-(6));[5] are directed to proceedings for discovery or access to certain documents commenced before 13 August 2020 but not completed by that date, or commenced at or after 11 August 2020 but not completed by the end of 13 August 2020, or costs in relation to such proceedings (new ss 13(5)-(8) and 21(5)-(8));[6] and provide for subsidiary legislation that can amend new Part 3 or the making of any other provision necessary or convenient (new ss 30-31).[7] None of these provisions are engaged on the facts of this case, and each would be severable from the remainder of the 2020 Act if that were necessary. This Court should therefore not rule on the validity of any of those provisions: **section E below**.

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3 The Plaintiffs relevantly identify new ss 11(3)-(4), (7), 12(1), (4), (7), 19(3)-(4), (7), and 20(1), (4), (7) as provisions that would need to be picked up by s 79 of the Judiciary Act to apply in federal jurisdiction: PS [118]; Third Further Amended Statement of Claim [59]-[61], [63]-[65]. The Plaintiffs also identify ss 11(5)-(6), 12(5)-(6), 13(6)-(8), 17(4)-(5), 19(5)-(6), 20(5)-(6) and 21(6)-(8). However, for the reasons set out at [46] and section E below, none of this second set of provisions is engaged and it is therefore unnecessary for the Court to determine the extent to which they operate in federal jurisdiction.

4 These are what WA describes as the "Remedial Provisions".

5 These are among what WA describes as "Interim Proceeding Provisions", which are a subset of what WA describes as the "No Proceeding Provisions".

6 These are among what WA describes as "Interim Proceeding Provisions" and "Incomplete Proceeding Provisions", which are two subsets of what WA describes as the "No Proceeding Provisions".

7 These are what WA describes as the "Henry VIII clauses".

Overview of facts

8. *Agreement:* The "Agreement" consists of the "Original Agreement" entered into in 2001, as amended by the "2008 Variation Agreement" entered into in November 2008.[8] Clause 32 provides for variation of the Agreement, with provision for a proposed variation to be disallowed by a House of Parliament (cl 32(2)-(3)): **SCB 197-198**. Clause 42 provides that any dispute or difference between the parties arising out of, or in connection with, the Agreement shall in default of agreement be referred to and settled by arbitration: **SCB 205**. By cl 46, the governing law is the law of Western Australia: **SCB 207**.

9. *Agreement Act:* Before its amendment in 2020, the Agreement Act provided:

10 (1) the Original Agreement "is ratified" (s 4(1)); the implementation of that agreement "is authorised" (s 4(2)); and that agreement "operates and takes effect despite any other Act or law" (s 4(3)); and

(2) the 2008 Variation Agreement "is ratified" (s 6(1)); the implementation of that agreement "is authorised" (s 6(2)); and that agreement "operates and takes effect despite any other Act or law" (s 6(3)).

10. *Disputed proposals (2012, 2013):* In August 2012 and June 2013, the Plaintiffs made two submissions to the State Minister in relation to the Balmoral South Iron Ore Project. There was a difference of view between the parties as to whether the August 2012 submission was a proposal submitted pursuant to cl 6 of the Agreement, which was referred to
20 arbitration.[9]

11. *First award (May 2014):* The arbitrator made an award on 20 May 2014 (**First award**). The arbitrator found that the Minister's failure to give a decision on the proposal within two months of its receipt meant that the Minister was in breach of the Agreement, and liable in damages for any damage suffered by the Plaintiffs. The arbitrator (1) declared that the August 2012 submission was a proposal submitted pursuant to cl 6, with which the Minister was required to deal under cl 7; and (2) ordered the State pay the arbitrator's costs.[10]

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8 Special Case [12], [18], [20] **SCB 124-126**; see Annexure A **SCB 134**ff.

9 Special Case [23]-[27] **SCB 126-127**.

10 Special Case [28]-[31], Annexure B **SCB 127-128**, **255** ff. The costs have been paid: Special Case [33] **SCB 128**.

12. *State imposes conditions precedent (July 2014):* In July 2014, the State Minister stated that he was imposing 46 conditions precedent to giving approval to the first Balmoral South proposal. The Plaintiffs contend that this was a further breach of the Agreement.[11]

13. *Second award (Oct 2019):* The parties then referred three preliminary issues to arbitration. On 11 October 2019, the arbitrator made an award (**Second award**), which declared: (1) the Plaintiffs' right to recover damages was not determined by the First award; (2) the Plaintiffs were not foreclosed from pursuing further claims for damages arising from any breach(es) of the Agreement; (3) the First award was final, so the Arbitrator had no jurisdiction to adjourn those proceedings; and (4) there had not been inordinate or inexcusable delay on the part of the Plaintiffs in progressing their damages claims.[12]

14. *2020 Act:* On 11 August 2020, a Bill was introduced into the State Parliament for amending the Agreement Act. The 2020 Act was assented to on 13 August 2020.[13]

15. *Pending proceedings:* On 12 August 2020, the Plaintiffs commenced proceedings in the Federal Court, seeking (among other things): injunctions requiring the State to withdraw the Bill for the Amendment Act from Parliament; and damages for breach of contract and damages under the Australian Consumer Law relating to the introduction of the Bill for the 2020 Act. Those proceedings are adjourned.[14] And by letter dated 9 December 2020, the State has put the Plaintiffs on notice that it intends to rely on the indemnity in s 14(4) in connection with its legal costs in a Queensland Supreme Court proceeding.[15]

A. A State may validly enact laws altering substantive rights and liabilities

16. First, a State law may validly alter substantive rights and liabilities upon which courts adjudicate, including by overriding rights accrued under a contract or an arbitral award or preventing new rights and liabilities from accruing under the contract or award. That is the legal operation of new ss 9-12, 18(1)-(4), 19 and 20. Accordingly, for the reasons explained below, those provisions are valid.

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11 Special Case [32], Annexure C **SCB 128, 307**ff.

12 Special Case [34]-[36], Annexure D **SCB 129-130, 382**ff.

13 Special Case [43]-[44] **SCB 130-131**.

14 Special Case [45]-[46] **SCB 131**.

15 Special Case [47] **SCB 131**. The Special Case does not provide any information on the subject-matter of this proceeding.

A.1 No undermining impartiality of courts, or interference with judicial power

17. It may be accepted that the provisions of the 2020 Act listed in [16] above are inconsistent with the Agreement and the First and Second awards. Indeed, that is the point. But that does not mean that those provisions undermine the institutional integrity of the courts, or interfere with the exercise of judicial power.

Analysis of provisions:

18. The first step is to analyse the legal effect of the provisions. As explained below, the provisions listed in [16] above are properly analysed as provisions which alter the substantive rights and liabilities of the parties, rather than directing courts.

19. The alteration of rights and liabilities effected by the following provisions is clear: new s 9(1)-(2) (previous proposals for Balmoral South Ore Iron Project of no legal effect); new s 10(1)-(2) (terminating certain arbitrations and any relevant arbitration arrangements and mediation arrangements connected to them); new s 10(4)-(7) (First and Second awards of no legal effect, and Agreement invalid to extent it authorises the making of those arbitral awards); new s 11(1)-(2) (extinguishing any liability of the State in respect of a disputed matter[16] or relevant arbitration); new s 18(1)-(4) (setting out the legal effect of protected matters[17]); new s 19(1)-(2) (extinguishing any liability of the State in respect of a protected matter); and new s 20(8) (conduct connected with a protected matter not an offence). Each of these provisions plainly overrides existing substantive rights and liabilities or prevents new substantive rights and liabilities from arising in law.

20. The remaining provisions in new ss 11 and 19, as well as the provisions in new ss 12 and 20 that refer to "proceedings", are also properly analysed as altering the substantive rights and liabilities of parties, rather than directing courts. A valid interpretation of these provisions should be preferred when that valid interpretation is reasonably open.[18]

(1) *"No proceedings can be brought"; conduct "cannot be appealed"*: New ss 11(3) and 19(3) state that "no proceedings can be brought" for certain purposes or in

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16 "Disputed matter" is defined in new s 7(1), and broadly relates to the Minister's refusal to consider the Balmoral South proposals.

17 "Protected matter" is defined in new s 7(1), and broadly relates to the State's consideration of dealing with a disputed matter, preparing and enacting the 2020 Act, and any consideration of Pt 3 subsidiary legislation.

18 *Residual Assco Group v Spalvins* (2000) 202 CLR 629 at 644 [28] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Gypsy Jokers Inc v Commissioner of Police (WA)* (2008) 234 CLR 532 at 553 [11] (Gummow, Hayne, Heydon and Kiefel JJ).

respect of certain subject matter. They operate to bar any remedy,[19] correlative to the extinguishing of the State's substantive liabilities.[20] Similarly, the statements in new ss 12(1) and 20(1) that certain conduct of the State cannot in any proceeding be appealed against or otherwise called into question, or "be the subject of" a remedy, merely bar the legal remedy otherwise available to a party,[21] correlative to the legislative extinguishment of the State's substantive liabilities (see also new ss 11(7)-(8), 12(7), 19(7), 20(7)). These provisions limit remedies; they do not direct courts.

(2) *Proceedings "terminated"*: Other sections provide that proceedings (which include judicial proceedings[22]) are "terminated" in certain circumstances: new ss 11(4), 12(4), 19(4) and 20(4). These sections are an adjunct to other provisions that have extinguished the rights and remedies that would otherwise be in issue in the proceedings.[23] In that situation, it is necessary to have some mechanism to end the proceeding – notably, the Act provides that a proceeding is "terminated" (a neutral word), and not "dismissed".[24] In no sense is the Parliament making a legislative ruling on the merits of judicial proceedings.[25]

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19 See *Brisbane City Council v Amos* (2019) 266 CLR 593 at 599 [7] (Kiefel CJ and Edelman J), 615-616 [49] (Keane J).

20 New ss 11(3) and 19(3) apply (1) in relation to the liabilities extinguished by ss 11(1) and 19(1): see new ss 11(3)(a) and 19(3)(a); and (2) otherwise, broadly in relation to liabilities connected with relevant arbitrations, disputed matters and protected matters: see new ss 11(3)(b) and 19(3)(b).

21 These provisions do not affect the jurisdiction of a court to grant relief for jurisdictional error: see s 26(6).

22 See definition of "proceedings" in new s 7(1), especially para (b)(i)-(ii) of that definition.

23 The same analysis applies to new ss 13(4) and 21(4), which are adjuncts to restrictions on obtaining information. See [46]-[475] below.

24 Proceedings, once started, need to be terminated by one means or another: *Xenophon v Lucas* [2001] SASC 160 at [63] (Perry J). A statutory power to "terminate" a prosecution may be exercised for reasons unconnected with the merits of the prosecution case: *Beckett v New South Wales* (2013) 248 CLR 432 at 453 [50] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

25 These provisions are similar in this respect to long-standing provisions protecting persons against proceedings commenced in respect of the publication of reports and proceedings of Parliament. See *Constitution Act 1975* (Vic), s 73(2): "The court shall thereupon immediately stay such proceeding; and the same and every writ or process issued therein shall be determined and superseded by virtue of this Act." (emphasis added) See also *Parliamentary Papers Act 1891* (WA), s 1. These provisions are derived from s 1 of the *Parliamentary Papers Act 1840* (UK) (3 & 4 Vict c 9). Although new ss 11(4), 12(4), 19(4) and 20(4) do not expressly require or permit a court do anything consequential upon termination, it is implicit that the court must make orders necessary to give effect to the statutory termination in those provisions.

Institutional integrity

21. Starting with institutional integrity, it is well settled that a State Parliament may validly alter substantive rights and liabilities that are in issue in pending judicial proceedings.[26] The impartiality of the courts is not undermined by the courts applying a law which alters existing substantive rights and liabilities, even when that has been done with retrospective effect.[27] At most, that is all that new ss 9-12 and 18 do.[28] And new ss 19-20 modify substantive rights prospectively, which is plainly valid.

22. This case is different from *South Australia v Totani*:[29] contra PS [53]. In *Totani*, the court was required to make its own order restricting liberty, but its order followed entirely from a determination by the executive that an organisation was a "declared organisation".[30] That is different from a court applying a legislative modification of rights and liabilities; it cannot be said that these provisions seek to enlist the court to implement the policy of the executive and legislature under guise of judicial determination.

No interference with judicial power

23. Similarly, there is no interference with the exercise of judicial power. The provisions listed in [16] above merely alter the substantive rights and liabilities of the parties to the Agreement. The analysis in *Duncan v New South Wales*[31] applies equally here — the provisions do not quell any controversy between parties, preclude any future determination of past criminal or civil liability or determine the existence of any right that has accrued or any liability that has been incurred: contra PS [66]-[68]. The fact that the alteration of

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26 *HA Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 at 563 [19] (the Court) (referring to *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth* (1986) 161 CLR 88 at 96-97 (the Court)); *Duncan v Independent Commission Against Corruption* (2015) 256 CLR 83 at 98 [26] (French CJ, Kiefel, Bell and Keane JJ), [42] (Gageler J).

27 *Lay v Employers Mutual Ltd* (2005) 66 NSWLR 270 at 287 [50], 290 [60] (Bryson JA, with Santow and McColl JJA agreeing); *Pallace Gallery v Liquor and Gambling Commissioner* (2014) 118 SASR 567 at 578 [34], 580 [45].

28 Some of these provisions – ss 10(4)-(7), 11(7)-(8), 12(7) and 18(2) – are expressed in terms that are apt to alter the pre-commencement legal status and consequences of past matters or acts: see *Commonwealth v SCI Operations* (1998) 192 CLR 285 at 309 [57] (McHugh and Gummow JJ). Other provisions are not expressed as having any pre-commencement operation, and could only be described as retrospective in the "extended" (and unremarkable) sense that they address past matters or acts: *ADCO Constructions Pty Ltd v Goudappel* (2014) 254 CLR 1 at 15 [26] (French CJ, Crennan, Kiefel and Keane JJ).

29 (2010) 242 CLR 1.

30 See *Kuczborski v Queensland* (2014) 254 CLR 51 at 117-118 [223]-[224] (Crennan, Kiefel, Gageler and Keane JJ).

31 (2015) 255 CLR 388 at 408 [42] (the Court).

substantive rights and liabilities may affect the result of judicial proceedings does not mean that the Parliament is exercising judicial power: contra PS [60].[32]

24. In any event, there is no constitutional separation of power at the State level.[33] Nothing in the integrated national judicial system would prevent a State Parliament from exercising judicial power: contra PS [61]-[63]. Section 73 guarantees this Court appellate jurisdiction from judgment, decrees, orders and sentences of courts. If a State Parliament exercised judicial power, the courts could review that legislation for constitutional validity. And the 2020 Act does not create "islands of power" immune from restraint (contra PS [64]) — new s 26(6) expressly preserves the courts' jurisdiction to grant relief for jurisdictional error.

25. Equally, the fact that the 2020 Act could affect the result in judicial proceedings does not mean that it directs the courts in the exercise of their jurisdiction. The courts will apply this modification of the substantive law in accordance with their usual processes.[34]

No interference with other State/Territory courts

26. For the reasons set out above, the 2020 Act does not interfere with the exercise of jurisdiction by the courts of another State or Territory: contra PS [78]-[86]. The provisions listed in [16] above alter the substantive rights and liabilities of the parties, and are not commands directed at courts. (The effect of the 2020 Act on arbitral awards is addressed in section A.2 below.)

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32 *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 at 141-142 [50], 143 [53] (French CJ, Crennan and Kiefel JJ), 150-151 [78]-[79], 154 [90] (Gummow, Hayne and Bell JJ). For example, Parliament can legislate to deal with the dissolution of particular marriages or the winding up of particular companies: see eg *Re Macks; Ex parte Saint* (2000) 204 CLR 1 at 175-176 [15] (Gleeson CJ); *PGA v The Queen* (2012) 245 CLR 355 at 378-379 [47] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

33 See eg *Pollentine v Bleijie* (2014) 253 CLR 629 at 648-649 [42] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ). Note that both Commonwealth and State Parliaments have some powers that are judicial in nature, such as the power to punish for contempt: *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 167 (the Court). The principle which protects the institutional integrity of State Supreme Courts as a suitable repository of federal jurisdiction, as applied in *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, does not imply into the Constitutions of the States the separation of judicial power mandated by Ch III of the Constitution: *Condon v Pompano* (2013) 252 CLR 38 at 53 [22] (French CJ), 89-90 [124]-[125] (Hayne, Crennan, Kiefel and Bell JJ); *Pollentine v Bleijie* (2014) 253 CLR 629 at 649 [42].

34 *Duncan v ICAC* (2015) 256 CLR 83 at 98 [28] (French CJ, Kiefel, Bell and Keane JJ).

Excluding procedural fairness

27. A State law may validly exclude procedural fairness in the making of an administrative decision (see new s 12(2); s 20(2)):[35] cf Third Further Amended Statement of Claim [73].

A.2 2020 Act is not contrary to "full faith and credit" required by s 118 of the Constitution

28. The Plaintiffs also contend that the 2020 Act is contrary to the full faith and credit requirement in s 118 of the Constitution, on the basis that the 2020 Act is said to interfere with the enforcement of an arbitral award under s 35 of the *Commercial Arbitration Act 2013* (Qld) (**Arbitration Act**): PS [126], [129]. There are two points in response.

29. **"Full faith and credit" does not resolve any inconsistency between State laws:** First, s 118 of the Constitution operates on State laws that are otherwise applicable, and therefore does not provide a mechanism for resolving any conflict between the laws of different States. The position was explained as follows in *McKain v RW Miller & Co (SA) Pty Ltd*:[36]

> [T]he requirement that full faith and credit be given to the laws of a State, statutory or otherwise, throughout the Commonwealth, affords no assistance where there is a choice to be made between conflicting laws. Once the choice is made, then full faith and credit must be given to the law chosen but the requirement of full faith and credit does nothing to effect a choice.

30. It may be accepted that s 118 would invalidate a State law that refused to give effect to the law of another State on public policy grounds.[37] But that is not what the 2020 Act does. Accordingly, even if there were an inconsistency between the 2020 Act and the Arbitration Act, that inconsistency would not be resolved by s 118.

31. **No inconsistency between 2020 Act and Arbitration Act:** The second point in response is that there is no inconsistency between the 2020 Act and the Arbitration Act. Rather, the 2020 Act alters the predicate on which the Arbitration Act operates, namely, the validity of the relevant arbitration agreement under WA law.

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35 *Condon* (2013) 252 CLR 38 at 98 [152] (Hayne, Crennan, Kiefel and Bell JJ); *Gypsy Jokers* (2008) 234 CLR 532 at 595-596 [182] (Crennan J, with Gleeson CJ agreeing).

36 (1991) 174 CLR 1 at 37 (Brennan, Dawson, Toohey and McHugh JJ), quoting *Breavington v Godleman* (1988) 169 CLR 41 at 150 (Dawson J). See also *Sweedman v Transport Accident Commission* (2006) 226 CLR 362 at 398-399 [19] (Gleeson CJ, Gummow, Kirby and Hayne JJ).

37 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 533-534 [63]-[64], 535 [70] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). That is, s 118 may limit the range of permissible choice of law rules, but it does not prescribe any particular rule, nor does it resolve an inconsistency between State laws.

32. Section 35 of the Arbitration Act provides that an arbitral award is to be recognised in this State as binding and, on application in writing to the Court, is to be enforced subject to the provisions in s 35 and s 36. Thus, enforcement requires an application to the court, and recognition and enforcement are subject to the exceptions in s 36. One of the exceptions is that recognition and enforcement of an arbitral award may be refused at the request of the party against whom it is invoked, if that party furnishes proof that the arbitration agreement "is not valid under the law to which the parties have subjected it" (s 36(1)(a)(i)).

33. In this case, the 2020 Act removes the validity of the relevant arbitration agreement for the purposes of s 36 of the Arbitration Act, by providing that the arbitration agreement "is not valid, and is taken never to have been valid" to the extent that it would allow the making of the First or Second award (new s 10(5) and (7)). That is effective, because the Agreement (and thus the associated arbitration agreement) are governed by the law of WA (cl 46). The invalidity of the arbitration agreement under the law of WA, in turn, furnishes a ground for the Court to refuse to recognise or enforce the arbitral awards under the Arbitration Act. No inconsistency arises.

34. Accordingly, it is not necessary to determine what would be the proper test of inconsistency between the laws of different States. However, it would be appropriate to adopt a narrow test of inconsistency, to preserve as far as possible the concurrent power of equal State polities to legislate. It would not be appropriate to apply any test of inconsistency that applies when there is clear hierarchy of legislative competence (such as "cover the field").[38]

A.3 Rule of law and unwritten principles do not take position any further

35. **Rule of law:** To say that the rule of law is an assumption on which the Constitution is based does not mean that the rule of law is a constitutional implication which limits legislative power.[39] Rather, the Constitution gives practical effect to the rule of law by ensuring that the courts can review the legality of legislative and executive action.[40] But it would be going much further to give the values underpinning the rule of law any immediate

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38 *Sweedman* (2006) 226 CLR 362 at 406 [48] (Gleeson CJ, Gummow, Kirby and Hayne JJ).

39 On the difference between an "assumption" and an "implication", see *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 135 (Mason CJ); cf PS [69].

40 *Thomas v Mowbray* (2007) 233 CLR 307 at 342 [61] (Gummow and Crennan JJ); *Totani* (2010) 242 CLR 1 at 62-63 [131] (Gummow J), 91 [233] (Hayne J), 155 [423] (Crennan and Bell JJ); *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 512-513 [102]-[103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *Graham v Minister for Immigration* (2017) 263 CLR 1 at 24-25 [40]-[44] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

normative basis, absent any textual or structural basis.[41] The rule of law is much too contested a concept to form the direct basis of an implied limitation on legislative power.[42] And such a limitation would be contrary to existing doctrine, such as the undoubted power of the States to legislate with retrospective effect.

36. Further, the 2020 Act does not deprive the Plaintiffs of access to the courts, for the reasons set out above: cf PS [72]. Rather, that Act alters the substantive rights and liabilities to be applied. There is no contravention of the rule of law.

37. In any event, the Plaintiffs' submissions would also risk diminishing a different, and fundamental, aspect of the rule of law in Australia: that is, the adherence by the courts to their duty to apply the law as enacted by Parliament within its legislative competence.[43] As Brennan CJ said in *Nicholas v The Queen*:[44]

> It is the faithful adherence of the courts to the laws enacted by the Parliament, however undesirable the courts may think them to be, which is the guarantee of public confidence in the integrity of the judicial process and the protection of the courts' repute as the administrator of criminal justice.

38. **Unwritten principles:** Equally, deeply rooted unwritten principles might inform the interpretation of the express provisions of the Constitution, but they could not constitute a free-standing limit on legislative power: contra PS [76]. And, even if there were such a limit, the legislation upheld in cases such as *Duncan v New South Wales*, *Bachrach*, and *Durham Holdings Pty Ltd v New South Wales*[45] indicates that the 2020 Act would not contravene any such limit. There is no reason to disturb those cases, which are plainly correct.

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41 *Re Minister for Immigration; Ex parte Lam* (2003) 214 CLR 1 at 23 [72] (McHugh and Gummow JJ).

42 See eg Kenneth Hayne AC QC, "The Rule of Law" in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (OUP, 2018), 167-168: "No single definition or description of the notion of 'the rule of law' is now seen as commanding general acceptance". Cf PS [73].

43 *Nicholas v The Queen* (1998) 193 CLR 173 at 197 [38].

44 (1998) 193 CLR 173 at 197 [37]; see also *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 262 (Fullagar J); *British Columbia v Imperial Tobacco Canada Ltd* [2005] 2 SCR 473 at 500-501 [66] (Major J, delivering the judgment of the Court).

45 (2001) 205 CLR 399 at 409-410 [10]-[14] (Gaudron, McHugh, Gummow and Hayne JJ).

A.4 Indemnity provisions

39. The indemnity provisions are contained in new ss 14-16 and 22-24 of the Agreement Act. The State does not propose to discuss these provisions in any detail, other than making three short points.

40. First, the extent to which these provisions are currently engaged is unclear on the Special Case.

(1) The indemnities provided for in new ss 14-16 are only engaged once protected proceedings connected with a disputed matter are brought, or a loss or liability connected with a disputed matter is incurred: see ss 14(4), 15(2)-(3), 16(2).[46] The State has notified an intention to rely on s 14(4) in relation to its legal costs in a Queensland Supreme Court proceeding between the parties; however, there is no other information about that proceeding: see [15] above.

(2) Similarly, the indemnities in new ss 22-24 are only engaged once protected proceedings connected with a protected matter are brought, or a loss or liability connected with a protected matter is incurred: see ss 22(4), 23(2)-(3), 24(2). The Plaintiffs' Federal Court proceedings seek relief in relation to the enactment of the 2020 Act, and therefore may be connected with a "protected matter" (cf definition of "protected proceedings" in new s 22(1)). Those Federal Court proceedings have been adjourned pending the result in this proceeding: see [1515] above.

41. Second and in any event, the provisions would be valid for the reasons already set out. A State may validly alter substantive rights and liabilities, even if that has the effect of negating the rights and liabilities declared in previous court proceedings.[47] The courts would determine the application of these indemnity provisions according to the courts' usual processes. The indemnities could be said to favour the State, or even be "harsh", but that does not mean that the courts would be acting at the behest of the State in applying those laws.[48]

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46 The 2020 Act does not disturb the liability to pay costs for awards that accrued before the commencement of the 2020 Act: see s 26(3).

47 See *AEU* (2012) 246 CLR 117 at 142 [50], 143 [53] (French CJ, Crennan and Kiefel JJ), 150-151 [78]-[79], 154 [90] (Gummow, Hayne and Bell JJ).

48 *Kuczborski* (2014) 254 CLR 51 at 116 [217], 117 [220] (Crennan, Kiefel, Gageler and Keane JJ); see *Magaming v The Queen* (2013) 252 CLR 381 at 397-398 [52] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), 414 [108] (Keane J).

42. Third, and alternatively to the second point made above, the indemnity provisions would plainly be severable from the remainder of the Agreement Act.

B. The provisions preventing the disclosure of certain information are valid

43. Second, the provisions added by the 2020 Act which prevent the disclosure of certain information (and limit the giving of evidence on certain topics) do not interfere with the exercise of judicial power or undermine the independence or impartiality of the courts. To the extent that they are engaged on the facts of this case,[49] new ss 13(4)-(8), 18(5)-(7) and 21(4)-(8) are valid. Further, if (contrary to this analysis) they are invalid, they would also be severable from the remainder of the Agreement Act.

10 ***B.1 Restrictions on production and discovery (ss 13 and 21)***

44. New s 13(4) provides that, on and after commencement, no proceedings can be brought seeking from the State discovery, provision, production, inspection or disclosure of any document or other thing connected with a "disputed matter". New s 21(4) makes corresponding provision in relation to documents or things connected with a "protected matter".

45. These restrictions on obtaining documents or things are an adjunct to the modification of the parties' substantive rights and liabilities (in new ss 9-12 in respect of disputed matters, and in new ss 18-20 in respect of protected matters). Discovery and other compulsory court processes for production are limited to obtaining documents or things that are relevant to
20 a proceeding or potential proceeding.[50] But once the parties' substantive rights in relation to disputed matters or protected matters are modified by those provisions, there can be no legitimate forensic purpose for invoking compulsory court process in order to obtain documents or things connected with disputed matters or protected matters. These provisions therefore do not stultify the ability of courts to make orders to vindicate any legal rights.

46. New ss 13(5)-(8) and 21(5)-(8) are not engaged on the facts of this case. There is no evidence that the Plaintiffs or anyone else has brought proceedings that would come within

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49 New ss 13(5)-(8) and 21(5)-(8) are not engaged on the facts of this case: see [46] below.

50 In relation to discovery, see eg *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303 at 319 [44] (the Court); *Hooper v Kirella Pty Ltd* (1999) 96 FCR 1 at 9 [25] (Wilcox, Sackville and Katz JJ). See also *Palmer v Ayres* (2017) 259 CLR 478 at 494 [38] (Kiefel, Keane, Nettle and Gordon JJ). The limited purpose of such procedures is reinforced by the obligation not to use compulsorily disclosed documents for any purpose other than that for which the disclosure was made: *Hearne v Street* (2008) 235 CLR 125 at 154-155 [96] (Hayne, Heydon and Crennan JJ).

any of new ss 13(5) or 21(5) (proceedings for discovery or access to documents brought before 13 August 2020 and not completed by that date, or brought before the end of 13 August 2020 but not completed by the end of that date), or new ss 13(6)-(7) or 21(6)-(7) (proceedings for discovery or access to documents brought at or after 11 August 2020 and completed by the end of 13 August 2020). It is therefore unnecessary to rule on the validity of these provisions (or new ss 13(8) or 21(8), which relate to the payment of costs in such proceedings): see section C below.

B.2 Restriction on giving evidence (s 18(5)-(7))

47. Broadly, the effect of new ss 18(5)-(7) is as follows: no document or oral testimony connected with a protected matter is admissible in evidence, or otherwise capable of being relied on or used, in any proceedings against a State or State body in a way that is against the interests of the State or various emanations of the State (new s 18(5)); no document connected with a protected matter can be required to be discovered, provided, produced, made available for inspection or disclosed (new s 18(6)); and no person is compellable or can be required to discover, provide, produce, make available for inspection or disclose a document connected with a protected matter, or answer a question connected with a protected matter (new s 18(7)).[51]

48. A State can modify the laws of evidence without interfering with the exercise of judicial power.[52] Here, the modifications to the rules of evidence, and to any rights to require disclosure of documents, do not undermine the decisional independence of the courts.

49. Broadly, the definition of "protected matter" in new s 7(1) covers the following:

(1) the consideration of courses of action to resolve or deal with a disputed matter, or proceedings or liabilities connected with a disputed matter (definition, para (a));

(2) the process from preparation of the amending Bill, introduction into Parliament and enactment of the Bill and coming into operation (definition, paras (b)-(e));

(3) considering, preparing and making, and the operation of, Pt 3 subsidiary legislation (definition, paras (f)-(j));

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[51] For completeness, new s 18(8) provides that s 18(5)-(7) do not limit any other basis on which a person is not compellable, or can refuse, to do anything referred to in those sections.

[52] See, in relation to Commonwealth laws, *Nicholas v The Queen* (1998) 193 CLR 173 at 188-190 [23]-[24] (Brennan CJ), 203 [55] (Toohey J), 235-236 [152]-[156] (Gummow J), 272-273 [234]-[238] (Hayne J); *Thomas v Mowbray* (2007) 233 CLR 307 at 356 [113] (Gummow and Crennan JJ). The same point applies with respect to State laws.

(4) associated matters, such as advice and consultation (definition, paras (k)-(l)).

50. It can be seen that many of these matters concern the preparation and making of the 2020 Act. For that reason, there is a significant overlap between new s 18(6)-(7) in their application to these matters and the immunity from disclosure that would follow in any event from parliamentary privilege,[53] and the common law protection of Cabinet confidentiality.[54] Equally, new s 18(5) overlaps with the limitations that parliamentary privilege places on the admissibility or use of evidence as to proceedings in Parliament.[55] Further, any activities being carried on in connection with the preparation and making of the 2020 Act would be in the performance of functions peculiar to government for the purposes of s 64 of the Judiciary Act, namely, the development of legislation.[56]

51. Other matters covered by "protected matters" also involve the framing of government policy at the highest levels of government. Again, there is a significant overlap between the existing immunities protecting Cabinet confidentiality and the restrictions on disclosure provided in new s 18(6)-(7).

52. More generally, there is in any event no interference with or usurpation of judicial power or undermining of the court's decisional independence.[57] New s 18(5)-(7) do not usurp or impair any fact-finding function of a court: they change the ambit of the material available to be used by the parties, and consequently the material available to be used by a tribunal of fact in carrying out its fact-finding function.[58]

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53 See *Parliamentary Privileges Act 1891* (WA), s 1. Parliamentary privilege operates, in part, to protect against production under compulsory court process: see eg *Rowley v O'Chee* [2000] 1 Qd R 207 at 222-225 (McPherson JA, with Fitzgerald P agreeing), adopted in *Sportsbet Pty Ltd v New South Wales (No 3)* (2009) 262 ALR 27 at 33-34 [21] (Jagot J) and *Re OPEL Networks Pty Ltd (In liq)* (2010) 77 NSWLR 128 at 134-135 [118]-[119] (Austin J).

54 Documents that may be protected from disclosure at common law include, inter alia, documents recording Cabinet deliberations, documents brought into existence for the purposes of preparing submissions to Cabinet and documents relating to the framing of government policy at a high level: *Sankey v Whitlam* (1978) 142 CLR 1 at 39 (Gibbs ACJ); *HT v The Queen* (2019) 93 ALJR 1307 at 1315 [28] (Kiefel CJ, Bell and Keane JJ); *Spencer v The Commonwealth* (2012) 206 FCR 309 at 323 [42]-[43] (Keane CJ, Dowsett and Jagot JJ). A provision that corresponds to existing common law restrictions on disclosure is unlikely to impede the institutional integrity or impartiality of courts: *Gypsy Jokers* (2008) 234 CLR 532 at 550-551 [5] (Gleeson CJ), 559 [36] (Gummow, Hayne, Heydon and Kiefel JJ), 595 [181] (Crennan J).

55 See eg *Amann Aviation Pty Ltd v The Commonwealth* (1988) 19 FCR 223 at 230-231 (Beaumont J); *Mees v Roads Corporation* (2003) 128 FCR 418 at 443 [80], 445 [85] (Gray J).

56 *Evans Deakin* (1986) 161 CLR 254 at 265; see [56(2)] below.

57 A Parliament may validly modify or abrogate common law principles relating to the method or burden of proving facts: *Graham* (2017) 263 CLR 1 at 22 [32] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

58 See *Nicholas* (1998) 193 CLR 173 at 188-189 [23], 191 [26] (Brennan CJ), 202 [53] (Toohey J).

53. To the extent that the Plaintiffs rely on the "unfairness" of denying the admissibility or use of evidence only in a way that is "against" or "against the interests of" the State (new s 18(5)), the proposition that the procedure of a court must be fair as between the parties does not support the quite different proposition that the Parliament may not prescribe rules of evidence that make it more difficult for one or the other party in a proceeding to establish its case: cf PS [57].[59] The latter proposition is contrary to the result in *Nicholas*, which upheld the validity of laws which enabled (but did not compel) evidence that could only aid the prosecution in proving an offence to be adduced.[60] New s 18(5) "postulates a particular evidentiary footing";[61] it does not prescribe or alter the procedure that is then to be adopted by a court.

C. The 2020 Act can apply in federal jurisdiction

54. Third, the 2020 Act can apply in federal jurisdiction. A matter in federal jurisdiction is determined in accordance with the "independently existing substantive law".[62] Therefore, the key provisions added by the 2020 Act (set out in [16] above) operate of their own force, even in federal matters.

55. The particular provisions identified by the Plaintiffs (new ss 11(3)-(4), (7), 12(1), (4), (7), 19(3)-(4), (7), 20(1), (4), (7))[63] as provisions that cannot validly be applied in federal jurisdiction fall into four categories, namely provisions that: (1) prevent proceedings being brought, (2) terminate proceedings, (3) relate to legal costs, and (4) prevent appeal or review of State conduct.

56. If and to the extent that provisions in any of these categories are regarded as laws governing the exercise of jurisdiction[64] (as opposed to laws that are determinative of the rights and

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59 For example, exclusionary rules based on public interest immunity or "matters of state" (see eg s 130 of the *Evidence Act 2008* (Vic)) of their nature operate in a way that favour the interests of the State.

60 See s 15X of the *Crimes Act 1914* (Cth) (as in force at the time of that decision), permitting evidence to be adduced of a "controlled operation", even though that type of evidence would previously have been excluded under the discretion in *Ridgeway v The Queen* (1995) 184 CLR 19.

61 *Nicholas* (1998) 193 CLR 173 at 202 [53] (Toohey J).

62 See *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2000) 204 CLR 559 at 586 [55], 587 [57] (Gleeson CJ, Gaudron and Gummow JJ, with Hayne and Callinan JJ agreeing).

63 The plaintiffs also identify new ss 11(5)-(6), 12(5)-(6), 13(6)-(8), 17(4)-(5), 19(5)-(6), 20(5)-(6) and 21(6)-(8): PS [118]; Third Further Amended Statement of Claim [59]-[61], [63]-[65]. However, for the reasons set out at [62] below, none of these provisions is engaged and it is therefore unnecessary for the Court to determine the extent to which they operate in federal jurisdiction.

64 *Rizeq v Western Australia* (2017) 262 CLR 1 at 26 [63], 36 [90] (Bell, Gageler, Keane, Nettle and Gordon JJ); see also 14 [16]: "laws which provide a court with powers necessary for the hearing and determination of a matter … in federal jurisdiction" (Kiefel CJ).

duties of persons)[65] they could be picked up by s 79 of the Judiciary Act. Contrary to the Plaintiffs' submissions, the Commonwealth has not "otherwise provided", and neither has the Constitution.

(1) The provisions do not interfere with the Plaintiffs' right to proceed. That is because the provisions do not place bars on litigants *bringing* proceedings against the State; rather, they bar remedies, correlative to the extinguishing of the State's substantive liabilities: contra PS [121].[66]

(2) The Plaintiffs also contend that certain provisions are inconsistent with s 64 of the Judiciary Act (albeit that s 64 is not mentioned in the pleadings[67]): PS [122]. However, the State's liabilities under the Agreement relate to the exercise of its governmental functions and therefore concern rights that can only arise between a State and a subject – there is no equivalent suit "between subject and subject" on which s 64 could operate.[68] (The restrictions on giving evidence in new s 18(5)-(7) apply to matters "peculiar to government":[69] see section B above.) In any event, the issue as to the effect of s 64 is hypothetical at this point, because although there is a suit in the Federal Court to which the State is a party, none of the provisions listed in [55] above appear to be engaged in that proceeding.

(3) The federal laws referred to in PS [123] confer and regulate the exercise of federal jurisdiction. These laws operate on substantive law created elsewhere; in this case, the substantive rights and liabilities as altered by the 2020 Act. There is no inconsistency with those Commonwealth provisions.

(4) The provisions do not interfere with the exercise of federal judicial power, for the reasons given in [23]-[25] above. That is, these provisions alter the substantive rights and liabilities of the parties, bar remedies or are adjuncts to other provisions

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65 *Masson v Parsons* (2019) 266 CLR 554 at 575 [30] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

66 Cf *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30.

67 Cf Third Further Amended Statement of Claim [92]. Section 64 is in Pt IX of the Judiciary Act.

68 See, on peculiar government functions, *Commonwealth v Lawrence* [1960] NSWR 312 at 315-316; *Victorian WorkCover Authority v The Commonwealth* (2004) 187 FLR 296 at 307-308 [32]-[33], 309 [40] (Kaye J). By contrast, the suit in *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30 was an action for moneys had and received, and the State would not be performing a peculiar government function by withholding the repayment of invalidly collected moneys: see 64-65 [81]-[83] (McHugh, Gummow and Hayne JJ, with Callinan J agreeing).

69 See *Asiatic Steam Navigation Co Ltd v The Commonwealth* (1956) 96 CLR 397 at 417 (Dixon CJ, McTiernan and Williams JJ); *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254 at 265 (Gibbs CJ, Mason, Wilson, Deane and Dawson JJ).

that have extinguished rights and remedies, and do not undermine the decisional independence of the courts: contra PS [118]. These provisions do not amount to an exercise of judicial power: contra PS [124].

D. The variation procedure in cl 32 is not a "manner and form" requirement

57. Fourth, the procedure for varying the Agreement in cl 32 is not a manner and form provision that would attract s 6 of the Australia Act.[70] Accordingly, the State can legislate to create rights and liabilities that are inconsistent with the Agreement without needing to comply with the procedure in cl 32 in enacting that law.

58. An essential first step in the Plaintiffs' argument is that the Agreement is given the status of a "law" by ss 4 and 6 of the Agreement Act: PS [92]. Therefore, it is said, the method for amending the Agreement in cl 32 is the only means of altering the rights and liabilities created by the Agreement: PS [97]-[101]. But that first step is incorrect, and the argument should be rejected – cl 32 merely sets out the process for amending the Agreement.

59. **The Agreement is not made a "law":** Nothing in ss 4 or 6 of the Agreement Act gives the Agreement the effect of a "law". The Plaintiffs concentrate particularly on the statements in s 4(3) and s 6(3) that each of the Original Agreement and the Variation Agreement "operates and takes effect despite any other Act or law": PS [92]. But these provisions simply ensure that the Agreement is effective, by displacing the operation of other State laws that would otherwise be inconsistent.[71] That does not make the Agreement itself a law – the modification of other WA Acts is done by the Agreement Act. Indeed, the WA Court of Appeal has held that the Agreement is to be interpreted as a contract, not as a statute.[72]

60. The Plaintiffs acknowledge that their argument is contrary to the reasoning in *Re Michael; Ex parte WMC Resources Ltd*:[73] PS [104]-[106]. But the argument is also contrary to other

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70 Section 6 of the Australia Act provides: "[n]otwithstanding sections 2 and 3(2) above, a law made after the commencement of this Act by the Parliament of a State respecting the constitution, powers or procedure of the Parliament of the State shall be of no force or effect unless it is made in such manner and form as may from time to time be required by a law made by that Parliament, whether made before or after the commencement of this Act." (emphasis added)

71 *Hancock Prospecting Pty Ltd v BHP Minerals Pty Ltd* [2003] WASCA 259 at [66] (Hasluck J, with Murray J agreeing); *Kidd v Western Australia* [2014] WASC 99 at [112]-[113] (Beech J). Consistently with that analysis, the Agreement (but not the Agreement Act) identifies State Acts that will be modified: cf PS [92].

72 *Mineralogy Pty Ltd v Western Australia* [2005] WASCA 69 at [13]-[14] (McClure JA, with Steytler P and Roberts-Smith JA agreeing).

73 (2003) 27 WAR 574 at 579 [21], 581 [26] (Parker J, with Templeman and Miller JJ agreeing).

intermediate appellate decisions adopting the reasoning in *Re Michael*,[74] and the cases in [59] above.

E. It is not necessary to rule on the remaining provisions added by the 2020 Act

61. Finally, the remaining provisions added by the 2020 Act that are challenged by the Plaintiffs — set out below — would be severable from other provisions if that were necessary, and are not engaged on the facts of this case. Accordingly, this Court should not rule on the validity of those provisions.

62. **Remaining provisions are not engaged:** The following provisions are not engaged on the facts of this case.

(1) New ss 13(5)-(8) and 21(5)-(8): see [46] above.

(2) New ss 11(5)-(6), 12(5)-(6), 19(5)-(6) and 20(5)-(6): there is no evidence of any proceedings commenced at or after 11 August 2020 and completed by the end of 13 August 2020.

(3) New ss 17 and 25: there is no evidence that anyone has taken any such step to attempt to enforce any liability of the State connected with a disputed or protected matter.

(4) New ss 30 and 31: no Pt 3 subsidiary legislation has been made under new s 30 of the Agreement Act, including of the kind contemplated in new s 31. These provisions have not been engaged, and may never be, so it is unnecessary to rule on whether they are an impermissible delegation of legislative power:[75] cf PS [110]-[116].

63. **Unnecessary to rule on validity:** This Court generally does not rule on the constitutional validity of laws unless it is necessary to resolve a proceeding.[76] If provisions of an Act are not engaged on the facts of a case, and would be severable if necessary, then it is not

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74 *Re Michael* was approved in *Commissioner of State Revenue v OZ Minerals Ltd* (2013) 46 WAR 156 at 189-190 [179] (Buss JA, with Newnes JA agreeing), 204 [275] (Murphy JA). Both *Re Michael* and *OZ Minerals* were adopted in *Western Australia v Graham* (2016) 242 FCR 231 at 238 [31]-[33] (Jagot J, with Mansfield and Dowsett JJ agreeing). There, that meant that an agreement operated only as a contract, and did not confer power to dispose of Crown lands: at 239 [38].

75 See *Williams v The Commonwealth [No 2]* (2014) 252 CLR 416 at 457 [36] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

76 See eg *Duncan v New South Wales* (2015) 255 CLR 388 at 410 [52] (the Court); *Clubb v Edwards* (2019) 267 CLR 171 at 216 [135] (Gageler J), 288 [334] (Gordon J); *Zhang v Commissioner of Police* (2021) 95 ALJR 432 at 437-438 [21]-[22] (the Court).

necessary to determine the validity of those provisions. That is so, even if the plaintiff had standing to seek relief.[77] In this case, severance of invalid provisions could occur under new s 8(4)-(5) of the Agreement Act and s 7 of the *Interpretation Act 1984* (WA).

64. It may be accepted that some of the new provisions are integral to the scheme, especially the provisions listed in [19] above which in terms alter substantive rights and liabilities (new ss 9(1)-(2), 10(4)-(7), 11(1)-(2), s 18(1)-(4) and s 19(1)-(2)). However, that does not mean that none of the provisions are severable from any other provisions: contra PS [143]-[144]. None of the other provisions (including those listed in [62] above) are integral to the scheme. Many of them merely reinforce the alteration of rights and liabilities. They therefore stand in contrast to those considered in *Bell Group NV (in liq) v Western Australia*, where the invalid provisions were so fundamental to the legislative scheme that their severance would leave "a radically different and essentially ineffective residue" that the Parliament never intended to enact.[78] Here, new ss 8(4) and (5) make clear that any of these additional provisions could be deleted without altering the essential features of the 2020 scheme.[79]

PART V: ESTIMATE OF TIME

65. The Attorney-General for Victoria estimates that she will require approximately 20 minutes for the presentation of her oral submissions.

Dated: 28 May 2021

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77 *Knight v Victoria* (2017) 261 CLR 306 at 324-325 [32]-[33] (the Court). However, this is not a rigid rule imposed by law: *Clubb* (2019) 267 CLR 171 at 193 [36] (Kiefel CJ, Bell and Keane JJ); *Zhang* (2021) 95 ALJR 432 at 438 [22] (the Court).

78 (2016) 260 CLR 500 at 527 [70] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ).

79 New ss 8(4)-(5) negate any suggestion that Parliament intended that the entire Act should have a full and complete operation or none at all: see *Clubb* (2019) 267 CLR 171 at 221-222 [148]-[149] (Gageler J), 290-291 [341]-[342] (Gordon J), 321 [431] (Edelman J). This would be an instance where "it is found that particular clauses, provisos or qualifications, which are the subject of distinct or separate expression, are beyond the power of the legislature": *Clubb* (2019) 267 CLR 171 at 218-219 [141] (Gageler J), see also 320-321 [429]-[430] (Edelman J); *R v Poole; Ex parte Henry [No 2]* (1939) 61 CLR 634 at 652 (Dixon J).

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY No 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 THE STATE OF VICTORIA (INTERVENING)

Pursuant to Practice Direction No. 1 of 2019, Victoria sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

No.	Description	Date in Force	Provisions
	Constitutional provisions		
1.	*Commonwealth Constitution*	Current	ss 73, 118, Ch III
	Statutes		
2.	*Australia Act 1986* (Cth)	Current	s 6
3.	*Commercial Arbitration Act 2013* (Qld)	Current	ss 35, 36
4.	*Constitution Act 1975* (Vic)	Current	s 73
5.	*Crimes Act 1914* (Cth)	1 January 1998 – 28 June 1998	s 15X
6.	*Evidence Act 2008* (Vic)	Current	s 130
7.	*Interpretation Act 1984* (WA)	Current	s 8
8.	*Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA)	11 December 2008 – 12 August 2020	ss 4, 6

9.	*Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA)	Current (from 13 August 2020)	ss 4, 6–26, 30, 31
10.	*Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA)	13 August 2020	s 7
11.	*Judiciary Act 1903* (Cth)	Current	ss 64, 79
12.	*Parliamentary Papers Act 1891* (WA)	Current	s 1
14.	*Parliamentary Privileges Act 1891* (WA)	Current	s 1
15.	*Parliamentary Papers Act 1840* (UK) (3 & 4 Vict c 9)	Current	s 1