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

PLAINTIFFS' SUBMISSIONS

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PART I PUBLICATION

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

PART II ISSUES

2. The central question in the Special Case is whether the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA) ("the 2020 Act") is, in whole or in part, a valid law of Western Australia. These submissions deal first with two bases on which the plaintiffs contend that the 2020 Act is invalid or of no force and effect *in toto*, namely:

   (a) absence of State legislative power (pars 50 to 86); and

   (b) failure to comply with s. 6 of the *Australia Act 1986* (Cth) (pars 87 to 109).

3. They then deal, in the following order, with further bases of challenge:

   (a) whether ss. 29-31 of the 2020 Act are an impermissible abdication of legislative power (pars 110 to 116);

   (b) whether the 2020 Act can validly be applied by courts exercising federal jurisdiction (pars 117 to 125);

   (c) whether the 2020 Act contravenes s. 118 of the Constitution (pars 126 to 132);

   (d) whether the indemnities in the 2020 Act are invalid (pars 133 to 140); and

   (e) whether the invalid provisions of the 2020 Act can be severed to preserve any otherwise valid provisions (pars 141 to 144).

PART III SECTION 78B

4. The plaintiffs have issued notices under s. 78B of the *Judiciary Act 1903* (Cth).

PART IV DECISIONS BELOW

5. This proceeding is brought in the Court's original jurisdiction.

PART V FACTS

6. The starting point is the Agreement referred to in paragraph 12 of the Special Case which is in Schedule 1 to the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA) ("the 2002 Act").[1]

7. By s. 4(1) of the 2002 Act the Agreement[2] was ratified. By s. 4(2) its implementation was authorised, and by s. 4(3) the Agreement was to operate and take effect despite any other Act or law. Similar provisions are in s. 6. Both ss. 2 and 6 refer to the *Government Agreements Act 1979* (WA), s. 3 of which is to rather similar effect.

8. Pursuant to cl. 6(1) of the Agreement Mineralogy (or Mineralogy with a Co-Proponent) was entitled to make "Project proposals". The matters to be dealt with by such Project proposals were set out in cl. 6(2). There were other requirements too: see, eg, cl. 6(6).

9. Two proposals, described in paragraphs 22 and 23 of the Special Case, have provided the occasion for the legislation presently in issue.

10. As the Special Case says at paragraphs 25 to 36, differences of view arose between Mineralogy and International Minerals on the one hand, and the State on the other, on whether the first Balmoral South proposal was a valid proposal with which the Minister was required to deal under cl. 7 of the Agreement. Clause 42 of the Agreement contemplated such disputes being referred to or settled by arbitration.

11. The dispute was resolved by the First Arbitration, with the arbitrator's award ("the First Award") made on 20 May 2014. The plaintiffs' contention was held to be correct.[3]

12. The arbitrator, at paragraph 70, also noted that the plaintiffs had foreshadowed a claim for damages for the State's breach of contract but had yet to make it. The orders made by the arbitrator in the First Award are set out in paragraph 31 of the Special Case.[4]

13. As will appear below, the 2020 Act seeks to give statutory effect to a concept that, notwithstanding the findings and terms of the First Award, the plaintiffs had no

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1 The term "the 2002 Act", except where otherwise indicated, is used to describe the Act as enacted in 2002 and as varied in 2008. The Agreement is also at Special Case Book ("SCB") 134.

2 Defined by s. 3 to include "the agreement as varied from time to time in accordance with its provisions". The variation provisions of the Agreement are in its cl. 32.

3 See First Award at [66]-[69] (SCB 305-306).

4 The State paid the costs provided for by the Arbitrator's Order 2: Special Case at [33].

contractual rights of the nature found by the arbitrator. That notion is a fiction or pretence. There is no basis on which the findings in the First Arbitration are not binding on the State. As will also appear below, the 2020 Act provides that the plaintiffs (and Mr Palmer, not a party to the Agreement or the arbitration) are liable for the State's costs of the arbitration.[5] There is no basis, let alone any principled basis, on which the plaintiffs, or Mr Palmer, should be liable to pay the State's costs in relation to the First Arbitration. The 2020 Act in so doing is an attempted confiscation of property of persons in consequence of success in demonstrating breach of contract by the State.

14. The Minister then sought to deal with the arbitrator's Order 1 by imposing conditions precedent to granting approval to the first Balmoral South proposal. Again, however, there was a difference of view on whether the Minister was entitled to act in that way under the Agreement.

15. That difference in view resulted in the Second Arbitration, this time on the issues referred to in the Special Case at paragraph 35 (they can be seen more fully in the Second Award at paragraphs 2 to 8: SCB 256-259). Again, those remaining live[6] were decided in the plaintiffs' favour, as is apparent from the Award.

16. Again the 2020 Act, as will appear, seeks to give statutory effect to a concept that the plaintiffs had no contractual rights of the nature found by the arbitrator. That notion is again a fiction or pretence. No basis, principled or otherwise, exists to support the view that the findings in the Second Arbitration are not binding on the State.

17. Once again, the 2020 Act provides that the plaintiffs, and Mr Palmer, should be liable for the losing party's costs of the Second Arbitration. Again no basis on which the plaintiffs, or Mr Palmer, should be liable to pay such costs appears. It is again a purported confiscation similar to that referred to above.

18. The plaintiffs then sought to proceed with their claim for damages, and the Third Arbitration was set in motion. It was to decide the matters at Special Case, paragraph 39. They include damages for breach of contract in relation to the first proposal and damages for the Minister's later attempts to impose conditions. That

[5] Except for the arbitrator's fees: see s. 26(3) of the 2020 Act.
[6] Note that "the Section 46 Issue" was resolved by agreement: Second Award paragraph 7 (SCB 385).

arbitration was to commence its substantive hearings on 30 November 2020. But no such hearing took place, due to the enactment of the 2020 Act on 13 August 2020.

PART VI ARGUMENT

A. THE 2020 ACT

19. It may be noted first that the 2020 Act does not itself provide any reason for its enactment. It contains no "objects" provision, nor do its provisions provide any assistance in that regard. All that appears from its provisions is that the State, having been found to be in breach of its Agreement with the plaintiffs, does not wish to have determined whether the Minister acted in accordance with the Agreement, does not wish to have the damages caused by its breaches assessed and also wants the plaintiffs (and Mr Palmer) to pay all the costs incurred in connection with its past conduct. And more.[7]

20. The 2020 Act has three Parts, the most immediately important provisions being in Subdivisions 1 and 2 of Division 2 of Part 3. They are concerned respectively with "disputed matters" and "protected matters" and are rather similar structurally. The following summary is directed to the provisions of most relevance.

21. Section 9, in Subdivision 1, is the starting point, providing in s. 9(1) that neither Balmoral South proposal has, or can have, any contractual, or other legal, effect whether under the Agreement or otherwise. Section 9(2) provides that only documents submitted after commencement can be "proposals" for the purposes of the Agreement.

22. Sections 9(1) and 9(2) are both completely contrary to the Agreement and the results of the First and Second Arbitrations. Those arbitrations and awards, however, remain extant. They took place and s. 10 seeks to deal with them. By s. 10(4) the First Award is said to be "of no effect" and never to have had any effect. By s. 10(5) the arbitration agreement pursuant to which the First Award was made is "not valid", and "is taken never to have been valid" to the extent that it would underpin, confer jurisdiction to make, authorise or otherwise allow the making of that Award. A similar course is adopted in relation to the Second Award and the arbitration agreement underlying it:

[7] The absence of an identifiable reason for the legislation creates particular conceptual difficulties in answering Special Case Question 3, bearing in mind the direction sought to be given by s. 8(5). It also creates particular difficulties in relation to the orders contemplated by s. 30.

ss. 10(6) and 10(7). The Third Arbitration, to have commenced on 30 November 2020, is "terminated" (s. 10(1)), as is the arbitration agreement underlying it (s. 10(2)).

23. Section 11(1) provides that the State has, and can have, no liability in respect of each of the First, Second and Third Arbitrations, if it was a "relevant arbitration" as defined in s. 7(1). Paragraphs (a) and (c) of that definition were satisfied. Paragraph (b) requires a "relevant arbitration" to concern a "disputed matter".[8] "Disputed matter" as defined by s. 7(1) has four categories:

(a) Paragraphs (a) to (e) are in effect the subject matters of the Arbitrations.

(b) Paragraph (f) refers to any conduct of the "State" or of a "State agent"[9], which is "connected with" the Balmoral South Iron Ore Project and which occurred or arose before "commencement".[10]

(c) Paragraph (g) refers to "any other conduct" of the State or a State agent. That conduct may have occurred or arisen *at any time* (i.e. before, or after "commencement"). The only further requirement is that the conduct be "connected with" a matter defined as a "disputed matter" in one of the earlier paragraphs.

(d) Paragraph (h) refers to "pre-agreement State conduct"[11], i.e. any conduct of the State or of a State agent occurring or arising before the making of the 2002 Agreement, and connected with its making or occurring or arising before the making of the 2008 Agreement and connected with its making.

24. It will be obvious that the title "disputed matters" is not an accurate depiction of matters currently in dispute. It cannot be an accurate description of them because some of the disputes about them have already been decided finally and adversely to the State by an agreed method, namely the First and Second Arbitrations. The description of such

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8 Sections 11(1)(b) and 11(1)(c) also require a connection to a "disputed matter". "Connected with" has the extensive meaning given in s. 7(1).

9 "State" and "State agent" are defined in s. 7(1).

10 "Commencement" is defined by s. 7(1) as meaning "the coming into operation of s. 7 of the amending Act".

11 As defined in s. 7(1).

matters is a reflection of a style of legal drafting[12] which adopts untrue or bland terms to make the subject matter appear more reasonable or palatable.

25. Section 11(3)(a) goes on to prohibit the bringing of proceedings against the State in respect of a liability referred to in s. 11(1). ("Proceedings" is very widely defined in s. 7(1). It includes – see paragraph (a)(i) – proceedings in a court, tribunal or arbitration: see the definitions of "adjudicator".) No such proceedings can be brought, made or began against after commencement. Section 11(3)(b) provides that no "proceedings" instituted on and after commencement can be brought, made or begun against the State to the extent that the proceedings are or would be "otherwise", *inter alia*, "in any other way connected with a disputed matter".

26. Section 11(4) applies to proceedings having the characteristics referred to in s. 11(3), but identified by different temporal characteristics. One such category referred to in s. 11(4)(a) is where the proceedings are brought before, but are not completed by, "commencement".[13] The other category is where the proceedings are brought before but not completed by the end of the day on which the 2020 Act received the Royal Assent. If proceedings fall within s. 11(4), they are "terminated".[14]

27. The term "proceedings" includes (paragraph (c)) "non-WA proceedings", defined in s. 7(1) to mean anything that corresponds to, or is substantially the same as, or is similar to, any "proceedings" as defined, and that takes place or occurs in one of the circumstances referred to in paragraphs (a) to (d) of the definition. Those circumstances include proceedings taking place under the law of the Commonwealth or under the law of another State, or under the law of a Territory. The view that a law of a State (at least without Commonwealth legislation authorising or permitting it to do so) may prohibit the taking of proceedings under a law of the Commonwealth, or terminate such proceedings when in being, should not be accepted. Nor should the view that a State may prohibit the taking of, or terminate, proceedings under the law of another State. These aspects are dealt with below.

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12 Described by Professor F. Reed Dickerson in "Definitions in Legal Instruments" (1966) 12 *Practical Lawyer* 45 at 48 as "Humpty Dumptyism". It derives from Humpty Dumpty's assertion in Lewis Carroll's *Through the Looking Glass* that "When *I* use a word, it means just what I choose it to mean – neither more nor less".

13 This would include, for example, the Third Arbitration.

14 Sections 11(5) and 11(6) apply another temporal test, applying to proceedings commenced on or after 11 August and completed by the end of 13 August 2020. They are not dealt with further in these Submissions.

28. Two other provisions of s. 11 may be mentioned. First, s. 11(8) has the effect that no costs are recoverable *from the State* for those thrown away in the Third Arbitration. Indeed, as will appear, the plaintiffs are made liable to pay them. The second such provision is s. 11(7). If the proceedings fell within s. 11(4) or 11(6), no costs can be obtained against the State. Indeed we are liable for the State's costs.

29. As s. 12(3) makes clear, ss. 12(1) and 12(2) apply to conduct of a State whether it occurs before or after "commencement". Section 12(1) provides that:

> "(1) Any conduct of the State that is, or is connected with, a disputed matter cannot in any proceedings:
>
> (a) be appealed against, reviewed, challenged, quashed or called into question on any basis; or
>
> (b) be the subject of, on any basis –
>
> (i) a remedy by way of injunction, declaration, prohibition, mandamus or certiorari; or
>
> (ii) a remedy having the same effect as a remedy referred to in subparagraph (i)"

and s. 12(2) says that:

> "(2) The rules known as the rules of natural justice (including any duty of procedural fairness not apply to, or in relation to, any conduct of the State that is, or is connected with, a disputed matter".

30. Section 12(4) "terminates" any proceedings of the nature referred to in s.12(1) if they were instituted but not completed before commencement, or instituted the day when the 2020 Act received the Royal Assent but not completed that day.

31. Subdivision 1 also contains the provisions of s. 13 denying access to documents. By s. 13(1) the potentially relevant parts of the *Freedom of Information Act 1992* (WA) are disapplied. Section 13(4) provides that no proceedings can be brought for discovery, provision, production, inspection or disclosure by or from the State of any document or thing connected with a disputed matter. Any proceeding of the type referred to in s. 13(4) is terminated: s. 13(5).[15]

[15] Any outcome of proceedings of the type referred to in s.13(4) and made at or after "introduction time" and completed before the 2020 Act received the Royal Assent is extinguished "to the extent that it is against or

32. The provisions already referred to seek to take away the plaintiff's rights under the Agreement and the Awards. The 2020 Act goes far further, however. It requires the plaintiffs – the successful parties in the First and Second Arbitrations (and also Mr Palmer) – to indemnify the State against its expenditures. These are extraordinary provisions and once again the 2020 Act stands mute, providing no reasoning or intelligible basis for the enactment of such legislation.

33. The commencing indemnity provisions are ss. 14 and 15. Sections 14(1), 14(2) and 14(3) are definitional. Section 14(4) imposes an obligation on every "relevant person" to indemnify and keep indemnified the State against a number of contingencies. The "relevant persons" (defined by s. 14(2)) are the plaintiffs, Mr Palmer and every "relevant transferee" (or former relevant transferee[16]).

34. Section 14(4) then deals with the ambit of a relevant person's liability to indemnify. There is first an indemnity against any "protected proceedings" (s. 14(4)(a)): a term defined by s. 14(1) to mean proceedings "brought, made or begun, and connected with a disputed matter". Secondly there is an indemnity against any loss, or liability to any person, connected with a disputed matter: s. 14(4)(b). "Loss" is further defined by s. 14(1) to include a loss of, or reduction in, revenue or funding that would otherwise have been received by the State from the Commonwealth. It is bizarre that persons in the position of the plaintiffs, so far entirely successful in showing that the State has breached its contract with them, should have to compensate the State for a loss of revenue or funding from other sources presumably because of the State's conduct.

35. Section 14(4)(b) also requires an indemnity against a "liability"[17] to any person, connected with a "disputed matter". The indemnity then extends – see s. 14(4)(c) – to: (a) any legal costs of the State "connected with … any protected proceedings";[18] (b) any liability of the State to pay the legal costs of any person "connected with" any protected proceedings; and (c) any loss connected with a stated intention of, or a threat by, any person, to bring, make or begin protected proceedings.

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unfavourable to, the State or otherwise requires the State to do, or not to do, anything": s. 13(7). Again, no costs can be recovered against the State: s. 13(8).

16 "Relevant transferee" is defined by s. 14(3).

17 As noted earlier, widely defined in s. 7.

18 The term "connected with" is very broadly defined by ss. 7(1) and (3).

36. By s. 14(7) the State may enforce the indemnity provided by s. 14(4) even if the State has not made any payment, or done anything else, to meet, perform or address the proceedings, liability or loss in question, and by setting off the liability of the relevant persons against any liability that the State has to one or more of them.

37. Section 14(8) then goes on to provide that the matters or things covered by the indemnity include protected proceedings began before commencement (s. 14(8)(a)), liabilities or losses that arise or occur before commencement (s. 14(8)(b)), proceedings brought by relevant persons themselves (s. 14(8)(c)), or liabilities to one or more relevant persons (s. 14(8)(d)). Where the liability would fall within s. 14(8)(d), s. 14(9) provides that the State may enforce the indemnity by not paying, or otherwise meeting or performing, the liability.[19]

38. The further indemnity provided by s. 15 operates by reference to a broader definition of "relevant person" than s. 14, extending to "any person who has, or has had, a right in, or in respect of" the subject matter of protected proceedings or liability of the State connected with a disputed matter.

39. Section 16 then contains a kind of indemnity for "the Commonwealth". The provisions are outlined here. Their validity is discussed below. The principal operative provision is s. 16(3). It commences with the words "Without limiting the scope of any indemnity" and the indemnities to which it is referring are the indemnities under ss. 14(4), 15(2) and 15(3).[20] As s. 16(2) makes apparent, s. 16(3) is to apply if proceedings are brought, made or begun against the Commonwealth, or if the Commonwealth incurs a liability to any person, or a loss, and in either such case the proceedings, or liability or loss is "connected with" a disputed matter. Section 16(3) then says:

(a) in s. 16(3)(a), that each statutory indemnity applies as if the proceedings had been brought against the State, rather than the Commonwealth;

(b) again in s. 16(3)(a), that each statutory indemnity applies as if the liability or loss were incurred by the State, rather than the Commonwealth; and

[19] The provisions of ss. 14(7)(b) and 14(9), as submitted below, contravene s. 115 of the Constitution.
[20] See the definition of "indemnity" in s. 16(1).

(c) by s. 16(3)(b), that in each such case, the State may enforce the indemnity so created.

40. Sections 16(4)(a) and 16(4)(b) make it apparent that the liability created by s. 16(3) is an additional liability. And s.16(5) allows the State to assign to the Commonwealth, to put it shortly, its rights under the indemnity it has created in s. 16(3).

41. The final provision of Subdivision 1 of Division 2 is s. 17. By s. 17(1) the succeeding provisions apply to a liability of the State[21] *whenever arising*, connected with a "disputed matter".

42. Section 17(2) provides that no amount can be charged to, or paid out of the Consolidated Account to meet the liability. Nor, as s. 17(3) makes apparent, can any amount be borrowed by or on behalf of the State to meet the liability. Nor, as s. 17(4) states, may any asset, right or entitlement of the State be taken or used to enforce the liability. And s. 17(5) provides that no execution, or other process in the nature of execution, can be issued out of any court against the State in relation to the liability.

43. Subdivision 2 of Division 2 is concerned with "protected matters". That term, defined by s. 7(1), deals with a number of categories whether, as the opening words of the definition indicate, they occur or arise before, on or after commencement. They are:

(a) The consideration of courses for, to put it shortly, dealing with a disputed matter or liabilities, potential liabilities or proceedings connected with a disputed matter: para (a).

(b) The stages from the preparation of the Bill for the 2020 Act to the enactment or coming into operation of the 2020 Act: paras (b) to (e).

(c) The steps leading to, the making of, or the operation of "Part 3 subsidiary legislation", a topic dealt with further below: paras (f) to (j).

(d) Any of the following matters connected with a protected matter referred to in paragraphs (a) to (j), namely:

[21] "State" in s. 17(1) is given a broad operation by s. 17(6).

(i) any explanation, advice, consultation, discussion, communication, announcement, disclosure or statement;

(ii) the reverse of (i), i.e. any omission to explain etc.; and

(iii) any other conduct: paragraph (k).

(e) Any matter or thing connected with a protected matter referred to in any of paragraphs (a) to (k): paragraph (l).

44. By s. 18(1)(a) no such "protected matter" is to have the effect of causing or giving rise to the commission of a "civil wrong" by the State. Sections 18(1)(b) to (h) deal with "arrangements", a term defined by s. 7(1) to include the Agreement, any relevant arbitration or mediation agreement, or any contract, deed, agreement or other instrument or an understanding. These paragraphs say that no protected matter has any of the effects to which they refer. Those effects are principally of a contractual nature.

45. Section 18(5) then provides that no document or other thing, or oral testimony connected with a protected matter is admissible in evidence, or can otherwise be relied on or used, in any proceedings in a way that is against or against the interests of, any of the State, or a former State authority, a State agent or a former State agent.

46. By s. 18(6) no document or other thing connected with a protected matter can be required to be discovered, provided, produced, made available for inspection, or disclosed in any proceedings or otherwise under a written law. By s. 18(7) no person is compellable to discover, provide, produce, make available for inspection or disclose a document or thing connected with a protected matter, or to answer a question connected with a protected matter, to provide information connected with a protected matter or to give any other types of testimony or evidence connected with a protected matter.

47. Sections 19 to 25 then essentially mirror ss. 11 to 17, save that these provisions operate by reference to the concept of a "protected matter" rather than a "disputed matter".

48. Division 3 of Part 3 has two Subdivisions. Subdivision 1 deals first with events occurring at or arising at or after "introduction time". It provides in s. 27 that:

> "The State has, and can have, no liability, and is taken never to have had any liability, to any person to pay damages, compensation or any other type of amount connected with any of the following occurring or arising at or after introduction time —
>
> (a) the Minister's consideration of any proposals, or purported proposals, under clause 7 or 8 of the Agreement;
>
> (b) an omission of the Minister to consider any proposals, or purported proposals, under clause 7 or 8 of the Agreement;
>
> (c) any other conduct of the State, or of a State agent, under, or in relation to, clause 7 or 8 of the Agreement."

10 49. Subdivision 2 of Division 3 is concerned with "Subsidiary legislation". Paragraphs (f) to (j) of the definition of "protected matters" relate to what is described as "Part 3 subsidiary legislation". That term is itself defined by s. 7. It means regulations made pursuant to s. 29, or orders under s. 30. The regulation-making power under s. 29 is in a familiar enough form. Section 30, however, contains what is sometimes described as a "Henry VIII clause". The validity of s. 30 is dealt with below.

B. STATE LEGISLATIVE POWER

Incompatibility with the institutional integrity of State courts[22]

50. *The Kable principle*. As appears from *Kable v. DPP (NSW)*[23] and its progeny, a State law that would substantially impair or be repugnant to the institutional integrity of a
20 State court so as to be incompatible with its role as a potential repository of federal jurisdiction under Ch. III of the Constitution is invalid.[24] It is impossible to distil exhaustively what is meant by the critical notions of "repugnancy", "incompatibility" or "institutional integrity" in terms that will necessarily dictate future outcomes.[25] Ultimately the inquiry is an evaluative one.[26] The unusual character of the 2020 Act underscores the wisdom of observations that have been made as to the virtue of the *Kable* doctrine's flexibility.[27]

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22 SOC at [67]-[77], [91]; Def at [28]-[34], [37].
23 (1996) 189 CLR 51.
24 *Knight v. Victoria* (2017) 261 CLR 306 at 317 [5] per *curiam*, and the cases there cited.
25 *Assistant Commissioner Condon v. Pompano Pty Ltd* (2013) 252 CLR 38 at 89 [124] per Hayne, Crennan, Kiefel and Bell JJ, quoting *Fardon v. Attorney-General (Qld)* (2004) 223 CLR 575 at 618 [104] per Gummow J.
26 See *K-Generation Pty Ltd v. Liquor Licensing Court* (2009) 237 CLR 501 at 530 [90] per French CJ.
27 See, eg, *Fardon* at 618 [104] per Gummow J; *Condon v. Pompano* at 94 [137] per Hayne, Crennan, Kiefel and Bell JJ (quoting Judge Henry Friendly).

51. These observations do not detract, however, from the fact that certain themes and high-level principles clearly emerge from the decided cases. One such principle is that "independence and impartiality are defining characteristics of all of the courts of the Australian judicial system."[28] While such institutional independence may not be entirely coextensive with the separation of judicial power effected by Ch. III in its application to federal courts, there are yet "clear parallels".[29] The need for an independent judiciary is one such parallel. Any unqualified proposition that there is *no* constitutionally mandated separation of powers at State level (sometimes said to follow from *BLF v. Minister for Industrial Relations*[30]), and consequently no requirement for an independent judiciary at State level, cannot stand in a post-*Kable* world.[31]

52. The constitutional requirement for an independent judiciary at State level was explained in *Kuczborski v. Queensland*:[32]

> "the institutional integrity of a court is taken to be impaired by legislation which enlists the court in the implementation of the legislative or executive policies of the relevant State or Territory, or which requires the court to depart, to a significant degree, from the processes which characterise the exercise of judicial power."

53. *South Australia v. Totani*[33] involved a challenge to legislation directed to the making of "control orders". The impugned provision provided that, on application by a member of the Executive, the court was required to make a control order if satisfied that the defendant was a member of a "declared organisation". No scope was left for the determination, by ordinary judicial processes, of whether the defendant had engaged in serious criminal activity. A majority held that this provision was invalid, essentially because it enlisted the court in the implementation of government policy by a process in which the court's adjudicative function was so confined that it was required to act at the government's behest.[34]

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28 *Condon v. Pompano* at 89 [125] per Hayne, Crennan, Kiefel and Bell JJ (citations omitted).
29 *Condon v. Pompano* at 89-90 [124]-[125] per Hayne, Crennan, Kiefel and Bell JJ. Cf the scepticism expressed by the Hon Robert French AC as to the "additional stringency" thought to apply at the federal level: "The *Kable* Legacy: Its Impact on the Australian Judicial System" in Griffiths and Stellios (eds), *Current Issues in Australian Constitutional Law* (The Federation Press, 2020) at 235.
30 (1986) 7 NSWLR 372.
31 Professor Wheeler has said that "the legislation in *BLF* would almost certainly fail on *Kable* grounds": "Due Process" in Saunders and Stone (eds), *The Oxford Handbook of the Australian Constitution* (OUP, 2018) at 948 (citations omitted).
32 (2014) 254 CLR 51 at 98 [140] per Crennan, Kiefel, Gageler and Keane JJ (citations omitted).
33 (2010) 242 CLR 1.
34 *Totani* at 52 [82] per French CJ, 92-93 [236] per Hayne J, 157 [428], 160 [436] per Crennan and Bell JJ.

54. *International Finance Trust Co Ltd v. NSW Crime Commission*[35] is an application of the proposition that laws requiring a marked departure from traditional judicial functions, methods or procedures may infringe the *Kable* principle. In that case laws providing for the mandatory *ex parte* sequestration of property, with no ability to dissolve the order, were held to be invalid.

55. *Application to the 2020 Act*. The 2020 Act targets a single party (Mr Palmer, directly and through the companies he controls) for adverse treatment and directs the precise disposition of pending and potential civil claims. The enlistment of the courts, and dictation to them, is at the heart of the legislation. In multiple respects, the 2020 Act requires the judicial power to be exercised at the behest of the legislature but without the judicial process. The court is given no power independently to adjudicate the matter, and yet it is required to give its judicial imprimatur to the outcome of the dispute.

56. This may be seen in a number of provisions of the 2020 Act. For example, there are the provisions purporting to eliminate the ability of courts independently or impartially to adjudicate the dispute. In this category are ss. 8-11 (described above), which dictate the answers to quintessentially judicial questions. By way of example, s. 8(3) would require a court to find that the State has never repudiated the Agreement, merely because that is the outcome that the legislature has chosen. These provisions direct courts to reach findings that are plainly contrary to the true position; they could not sensibly be characterised as "a retrospective alteration of the substantive law which is to be applied by courts in accordance with their ordinary processes".[36]

57. The 2020 Act does not preserve the courts' "ordinary processes". Sections 13 and 21 exclude the ordinary pre-trial processes for access to relevant documents. Section 18(5) renders evidence that is "against the interests of" the State inadmissible. Such provisions seriously distort ordinary judicial processes. There is "no novelty in the proposition" that a defining characteristic of a court is that "the court not be required to adopt a procedure that is unfair".[37] That basic safeguard "requires, at the very least, the

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35 (2009) 240 CLR 319.

36 Cf *Duncan v. Independent Commission Against Corruption* (2015) 256 CLR 83 at 98 [27]-[28] per French CJ, Kiefel, Bell and Keane JJ; *Lazarus v. Independent Commission Against Corruption* (2017) 94 NSWLR 36 at 64 [126]-[127] per Leeming JA (McColl and Simpson JJA agreeing).

37 *Condon v. Pompano* at 108 [188] per Gageler J, citing *Nicholas v. The Queen* (1998) 193 CLR 173 at 208-209 [74] per Gaudron J.

adoption of procedures that ensure to a person whose right or legally protected interest may finally be altered or determined by a court order a fair opportunity to respond to evidence on which that order might be based."[38] In rendering inadmissible whatever evidence is "against the interests of" the State, the 2020 Act guarantees that any party challenging the State will not have a fair opportunity to present evidence in its case.[39]

58. Section 12(1)(a) provides that "no conduct of the State" connected with a "disputed matter" can "in any proceedings … be … called into question on any basis".[40] Nor can it be the subject of judicial remedy (s. 12(1)(b)). This position is bolstered by s. 17(5), which is directed in terms to courts and provides that no execution "can be issued out of any court *against the State*" (emphasis added). Section 12(4) provides that, to the extent that anything described in sub-s. 12(1) is sought in proceedings, those proceedings are "terminated". By these provisions, State courts hearing matters to which the 2020 Act applies are required to adopt an adjudicative process "to implement a political decision or a government policy without following ordinary judicial processes"; the 2020 Act thereby "deprives that court of its defining independence and institutional impartiality".[41]

Usurpation of judicial power[42]

59. The submissions above fix on the way in which the 2020 Act affects the exercise by State courts of their judicial power. There is a separate but related strand, developed in this section, fixing upon the judicial character of the exercise of ostensibly legislative power that is the 2020 Act. This argument involves the minor premise that the 2020 Act is properly characterised as an exercise of judicial power, and the major premise that the Parliament of Western Australia is precluded from exercising such power.

60. *State Parliaments are precluded from exercising judicial power*. Starting with the major premise, the plaintiffs submit that the exercise of judicial power by Australian

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38 *Condon v. Pompano* at 108 [188] per Gageler J.

39 Cf the impugned provisions in *Lawrence v. State of New South Wales* [2020] NSWCA 248, which required certain evidence favourable to the State to be admitted, but were held not to create sufficient unfairness to infringe the *Kable* principle, because the court retained the power to decide the weight to give the evidence and to make orders limiting its use: at [76]-[79] per Bathurst CJ (Bell P and Leeming JA agreeing).

40 Section 12 is mirrored by s. 20, applying to "protected matters".

41 *A-G (NT) v. Emmerson* (2014) 253 CLR 393 at 426 [44] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ.

42 SOC at [85], [88]; Def at [37].

State legislatures is precluded by the prescription in Ch. III of the Constitution of an "integrated national judicial system" under the "final superintendence" of this Court.[43] A necessary aspect of this system is that an exercise of judicial power in a State must be amenable to the supervision of the Supreme Court of the State, and (since the passage of the *Australia Acts 1986*) ultimately this Court's final superintendence.

61. The most distinctive aspect of the structure erected by Ch. III – integral to the reasoning in *Kable* – is the "autochthonous expedient"[44] in s. 77(iii) empowering the Commonwealth to invest State courts with federal jurisdiction. A second critical aspect of the integrated judicial system, expressly relied upon by McHugh and Gummow JJ in *Kable*,[45] is the Court's appellate jurisdiction from State Supreme Courts in s. 73(ii). This provision ensures that this Court's position as "a general court of appeal for Australia" is "constitutionally secured".[46] A third critical aspect of Ch. III is the entrenched supervisory jurisdiction of State Supreme Courts to enforce the jurisdictional limits of inferior State courts and administrative tribunals.[47]

62. This third aspect, authoritatively recognised in *Kirk*, is an important landmark in the realisation of the consequences of the integrated judicial system. The constitutionally guaranteed place of State Supreme Courts, as "the mechanism for the determination and the enforcement of the limits on the exercise of State executive and judicial power",[48] is the foundation for the entrenchment of that jurisdiction. It hardly needs stating that the Supreme Court of Western Australia is powerless to enforce the limits on exercises of judicial power by the Parliament of Western Australia. An exercise of judicial power beyond the supervision of the Supreme Court frustrates the constitutionally mandated supervisory jurisdiction, and thereby frustrates the integrated national judicial system with this Court at its apex.

63. This Court's superintendent function entrenched by s. 73 was referred to as a relevant contextual matter in the key passages of *Kirk*.[49] So too was the now well-established

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43 See *Kable* at 138 per Gummow J; *K-Generation* at 529 [87] per French CJ; *Rizeq v. Western Australia* (2017) 262 CLR 1 at 5 [12] per Kiefel CJ, 22 [49] per Bell, Gageler, Keane, Nettle and Gordon JJ.
44 *R v. Kirby; Ex parte Boilermakers Society of Australia* (1956) 94 CLR 254 at 268 per Dixon CJ, McTiernan, Fullagar and Kitto JJ.
45 At 109-111 and 137-139.
46 J Quick and RR Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 742.
47 *Kirk v. Industrial Court (NSW)* (2010) 239 CLR 531 at 580-581 [98].
48 *Kirk* at 580-581 [98].
49 *Kirk* at 581 [98].

proposition that there is "but one common law of Australia", made up of principles that "in the end are set by this Court".[50] This reasoning has since been further advanced by the confirmation that "a single though composite body of law", including federal, State and Territory laws, applies in federal as in State jurisdiction.[51]

64. The present submission is consistent with the central holding in *Kirk*. A critical aspect of the reasoning in *Kirk* was that the Constitution does not countenance "islands of power immune from supervision and restraint".[52] Yet that is precisely what occurs when a State Parliament exercises judicial power. Were such exercises of power permissible, there could be no truly integrated national judicial system, with this Court at its apex as the "Federal Supreme Court".[53]

65. The purpose of s. 73(ii) is to realise the framers' "instinctive faith in the unity of the system and in the consequent need of uniform interpretation".[54] It is a natural implication from that purpose that a State cannot diminish this Court's role by exercising judicial power outside the nationally integrated judicial system. "In so far as the supervisory and appellate jurisdiction of State Supreme Courts can be reduced, the position of the High Court at the apex of the State's judicial system is also reduced."[55] Once the significance of s. 73 is recognised, it is a short, logical step to the proposition that a State Parliament cannot exercise judicial power.

66. *The 2020 Act is an exercise and usurpation of judicial power*. Turning then to the minor premise, the typical features of judicial power were adverted to in *Duncan v. New South Wales*,[56] where it was said that the legislation there impugned exhibited none of the typical features of an exercise of judicial power, in that it: (a) "quells no controversy between parties"; (b) "precludes no future determination by a court of past criminal or

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50 *Kirk* at 581 [99].
51 *Rizeq* at 12 [7] per Kiefel CJ, 21 [48] per Bell, Gageler, Keane, Nettle and Gordon JJ, quoting *Felton v. Mulligan* (1971) 124 CLR 367 at 392 per Windeyer J.
52 *Kirk* at 581 [99].
53 See Constitution (Cth), s. 71.
54 Sir Owen Dixon, "Sources of Legal Authority" in S Crennan and W Gummow (eds), *Jesting Pilate and Other Papers and Addresses* (The Federation Press, 3rd ed, 2019) at 249.
55 J Stellios, *Zines's the High Court and the Constitution* (The Federation Press, 6th ed, 2015) at 298. Professor Zines expressed the same view in an unpublished address: L Zines, "Recent Developments in Chapter III: *Kirk v. Industrial Relations Commission of NSW* and *SA v. Totani*" (Seminar Paper, CCCS/AACL Seminar, 26 November 2010) at 10-13. See too J Goldsworthy, "*Kable*, *Kirk* and Judicial Statesmanship" (2015) 40(1) *Monash University Law Review* 75 at 103-104; O I Roos, "The *Kirk* Structural Constitutional Implication" (2020) 44(1) *Melbourne University Law Review* 345
56 (2015) 255 CLR 388 at 408 [42] per *curiam*.

civil liability"; (c) "does not determine the existence of any right that has accrued or any liability that has been incurred"; and (d) (with one qualification), "does not otherwise affect any accrued right or existing liability".

67. Here the 2020 Act does all those things. Its apparent *raison d'être* is to quell a contractual dispute. It is directed in terms to precluding the future determination by a court of past civil liability.[57] It is also directed in terms to determining the existence of rights that have accrued and liability that has been incurred.[58]

68. A unanimous Court has referred to the "exclusive" and "inalienable" judicial function that is the determination of "actions for breach of contract and for civil wrongs".[59] The exercise of power at the heart of the 2020 Act is the determination of a contractual dispute. That is quintessentially an exercise of judicial power. Whilst there may be cases at the margins calling for an elaborate analysis as to whether an exercise of power is properly to be characterised as judicial, this is not such a case.

Contravention of the rule of law[60]

69. In the *Communist Party* case, Dixon J said that "the rule of law forms an assumption" of the Commonwealth Constitution.[61] The language of "assumption" ought not to be understood to mean that the rule of law in Australia is without normative force.[62] The Constitution gives effect to the rule of law in more than one respect. The central holding of the *Communist Party* case – that the Federal Parliament cannot enact any law it thinks fit and must, rather, demonstrate the connection of its laws to a constitutional head of power – is itself an affirmation of the rule of law. Similarly, s. 75 of the Constitution protects one aspect of the rule of law by guaranteeing this Court's jurisdiction to review the legality of executive action.[63]

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57 See especially ss. 8(3), 9(1), 10(4)-(7), 11, 12.
58 See especially ss. 11(1)-(2) and 19(1)-(2), providing that the State has, and can have, no liability in respect of certain matters, and that any such liability that previously existed is extinguished.
59 *H A Bachrach Pty Ltd v. Queensland* (1998) 195 CLR 547 at 562 [15] per *curiam*; see also *Federal Commissioner of Taxation v. Munro* (1926) 38 CLR 153 at 175 per Isaacs J.
60 SOC at [66B]-[66C] (read with [5(a)] of Particulars) and [85]-[87]; Def at [27B] and [37].
61 *Australian Communist Party v. Commonwealth* (1951) 83 CLR 1 at 193.
62 Cf Mason CJ's conception of "unexpressed assumptions" in *Australian Capital Television v. Commonwealth* (1992) 177 CLR 106 at 135.
63 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 415 [64] per Gaudron J.

70. That the rule of law is an assumption without normative force is also refuted by more recent treatments of it. In the 21st century it has been stated and restated that the rule of law is "an assumption upon which the Constitution depends for its efficacy".[64] It is still true, as Gummow and Hayne JJ observed in *Kartinyeri v. Commonwealth*,[65] that "the occasion has yet to arise for consideration of all that may follow" from Dixon J's dictum. There thus remains "a large question concerning the limits, if any, which [the rule of law] may effect upon the grant of legislative power to State parliaments."[66]

71. Once it is recognised that the rule of law is an assumption upon which the Constitution *depends for its efficacy*, it is axiomatic that States – who "owe their existence to" that Constitution[67] – cannot pass laws that flout that assumption. It is not necessary for present purposes to decide the outer limit of what the rule of law requires,[68] nor to decide in what cases it may legitimately be infringed. It is sufficient that at the very least it requires that citizens have access to impartial courts in which to vindicate their legal entitlements. None of the circumstances of this case would justify infringement of that core requirement.

72. Sir Victor Windeyer identified as one of three core aspects of the rule of law that "all should be able freely to assert, and by the processes of the law to vindicate, rights under the law."[69] The 2020 Act sets out to destroy the plaintiffs' right to do so. This core aspect of the rule of law was also acknowledged (extrajudicially) by Gordon J:[70]

> "access to the courts is a defining feature of the rule of law and an effective judicial system. Without an accessible judicial system for the identification, application and enforcement of previously ascertainable norms of conduct, there will not be that

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64 *APLA v. Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 351 [30] per Gleeson CJ and Heydon J, quoted in *Thomas v. Mowbray* (2007) 233 CLR 307 at 342 [61] per Gummow and Crennan JJ and *Totani* at 42 [61] per French CJ, 63 [131] per Gummow J, 91 [233] per Hayne J, 156 [423] per Crennan and Bell JJ.

65 (1998) 195 CLR 337 at 381 [89].

66 *Momcilovic v. The Queen* (2011) 245 CLR 1 at 216 [563] per Crennan and Kiefel JJ. In the United Kingdom, it was recently said to be "a matter for debate" whether a law can be struck down due to contravention of the rule of law, "at least in the context of the doctrine of the sovereignty of the United Kingdom Parliament": *Moohan v. Lord Advocate* [2015] AC 901 at 925E [35] per Lord Hodge (Lady Hale, Lords Neuberger, Clarke and Reed agreeing). Parliamentary sovereignty is quite different in Australia.

67 *Durham Holdings Pty Ltd v. New South Wales* (2001) 205 CLR 399 at 409 [10] per Gaudron, McHugh, Gummow and Hayne JJ (and the cases there cited).

68 See *Graham v. Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 38 [82] per Edelman J, observing that the "precise content" of the rule of law is "hotly disputed".

69 V Windeyer, "'A birthright and inheritance': The Establishment of the Rule of Law in Australia" in B Debelle (ed), *Victor Windeyer's Legacy: Legal and Military Papers* (The Federation Press, 2019) at 99.

70 "The Rule of Law – What We Share and Must Defend" (Australian High Commission, Malaysia, 8 March 2018) at 3.

> absence of arbitrary power or universal subjection to the law, which are central attributes of the rule of law."

73. The Hon Kenneth Hayne AC recently set out a tripartite formulation of the rule of law in the Australian constitutional tradition:[71]

> "first, that there is a system of general rules from which there can be identified the rights, duties, powers, and immunities of those entities that the legal system recognizes as right- and duty-bearing entities; second, that those general rules, and only those rules, must be applied and enforced; and third, that disputes about the content or the application of the rules must be determined fairly."

10 74. The 2020 Act simultaneously strikes at the heart of each of those three conceptions of the rule of law. Access to independent courts in which parties have a right to be heard was also stressed by French CJ to "operate within the framework of the rule of law".[72]

75. The 2020 Act contains several provisions that are abhorrent to the rule of law. Sections 8-10, by erecting fictions denying the reality of past events under previously ascertainable norms of conduct, are arbitrary exercises of power applying to specific, as opposed to general, entities and events. Sections 11(3)-(4) and 19(3)-(4), which proscribe the bringing or continuation of proceedings against the State, are direct attacks on the plaintiffs' rights to challenge the legality of government action. Sections 11(7)-(8) and 19(7)-(8), which exclude any liability for legal costs on the
20 State's part, is a wholly arbitrary exercise of power without any stated or defensible rationale. Section 12(1), which provides that no conduct of the State connected with a "disputed matter" can in any proceedings be "challenged … or called into question on any basis", or be the subject of judicial remedy, is a breathtaking denial of the government's subjection to law.[73] The indemnity provisions (ss. 14-16, 22-24) are calculated to punish the plaintiffs for seeking to vindicate their legal rights against the State, without any regard to the merits of their claims. The same is true of s. 17, which frustrates the ability of the courts to issue or enforce any remedy against the State.

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71 "Rule of Law" in Saunders and Stone (eds), *The Oxford Handbook of the Australian Constitution* (OUP, 2018) at 169.

72 *Condon v. Pompano* at 72 [68].

73 Section 20(1) mirrors s. 12(1), save that it applies to "protected matters".

Violation of unwritten principles deeply rooted in the common law[74]

76. In *Union Steamship Co of Australia v. King*, the Court recognised that State legislative power may be "subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law".[75] It was not necessary there to explore the outer limits of that observation.[76] This potential limitation on State legislative power was again adverted to in *Durham Holdings Pty Ltd v. New South Wales*, where four Justices said that "whatever may be the scope of the inhibitions on legislative power involved in the question identified but not explored in *Union Steamship*, the requirement of compensation which answers the description 'just' or 'properly adequate' falls outside that field of discourse."[77] There is overlap between this potential limitation on State legislative power and that discussed above concerning the rule of law.[78] Sir Victor Windeyer considered this category of rights to be an aspect of the overarching rule of law, describing them as a series of principles "that we owe more to history than to logic" and which "lie in the bosom of the common law".[79]

77. The potential restraints on State legislative power referred to in *Union Steamship* should not be regarded as applicable only to things like imposition of capital or other punishment without trial, or authorisation of torture in aid of police investigation. Rather such restraints should be recognised as applicable where there have been gross contraventions of the norms of a civilised, modern society. There have been such contraventions here – arbitrary variations of a contract with government, removal of rights to sue in respect of breaches of such contract, removal of jurisdiction of courts to enforce such contracts, concealment of access to information, the use of misleading statutory language, the imposition by the indemnities of liability upon those having the temerity to disagree with the State, the abolition of criminal responsibility (ss. 20(6) to (8)), and other matters. It is a case where the State has gone beyond the powers to legislate accorded to it by the Constitution and the *Australia Act.* Such cases, hopefully,

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74 SOC at [66B]-[66C] (read with [5(c)] of Particulars); Def at [27B].

75 (1988) 166 CLR 1 at 10 per *curiam*. This passage was referred to without disapproval by Toohey J in *Kable* at 91, noting that the appellant did not seek "to bring his case directly within this category".

76 Their Honours acknowledged that the existence of such constraints had been "firmly rejected" in *Pickin v. British Railways Board* [1974] AC 765 at 782 per Lord Reid. But that rejection was rightly not considered to answer the question under the Australian Constitution.

77 (2001) 205 CLR 399 at 410 [14] per Gaudron, McHugh, Gummow and Hayne JJ.

78 See, eg, *Momcilovic v. The Queen* (2011) 245 CLR 1 at 215-216 [562]-[563] per Crennan and Kiefel JJ.

79 Windeyer, "'A birthright and inheritance': The Establishment of the Rule of Law in Australia" at 99 (quoting J Story, *Commentaries on the Constitution* (abridged ed. 1833) at 65).

will arise only rarely but this is one of them. The Court should treat the 2020 Act as outside the legislative power of Western Australia, and invalid.

Interference with the functions of other States and Territories[80]

78. The plaintiffs submit that the 2020 Act contravenes three limitations on State power concerning interference with the governmental functions of other polities. The first limitation, arising from s. 106 of the Constitution, is the absence of power to make laws impairing the exercise of judicial power by the government of another State.[81] The second limitation is the doctrine associated with *Melbourne Corporation*.[82] The third is an analogous limitation precluding laws impairing the functions of Territory courts. It is convenient to address each of these three limitations in turn.

79. *The Section 106 limitation*. The Parliament of Western Australia has no power to make laws directed to prohibiting the exercise of jurisdiction by the courts of other States. Such courts form part of the Constitution of each State and their continued existence as such is guaranteed by s. 106 of the Commonwealth Constitution.

80. *Re Tracey* concerned Commonwealth provisions enacted to avoid the double jeopardy of prosecution before a service tribunal and a civil court. To that end, the law deprived State and federal courts of jurisdiction to try cases where an individual had been tried by a service tribunal for substantially the same offence. The Court held that that law was beyond the defence power (s. 51(vi)). Mason CJ, Wilson and Dawson JJ went on to doubt "whether provisions of that kind, which strike at the judicial power of the States, could ever be regarded as within the legislative capacity of the Commonwealth having regard to s. 106 of the Constitution."[83] Brennan and Toohey JJ expressly relied on s. 106 in concluding that the Commonwealth could not prohibit the exercise by State courts of the ordinary criminal jurisdiction vested in them by State law:[84]

> "State courts are an essential branch of a government of a State and the continuance of State Constitutions by s. 106 of the Constitution precludes a law of the Commonwealth

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80 SOC at [90]; Def at [37]. Further particulars of this allegation are at SCB 460-462.
81 Acknowledged in *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 547; *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188 at 229.
82 *Melbourne Corporation v. The Commonwealth* (1947) 74 CLR 31.
83 *Re Tracey* at 547.
84 *Re Tracey* at 574-575.

> from prohibiting State courts from exercising their functions. It is a function of State courts to exercise jurisdiction in matters arising under State law."

81. These observations were affirmed by six Justices in *Re Australian Education Union*.[85] Whilst both of these cases were concerned with exercises of Commonwealth power, by parity of reasoning the same limitation should apply as between the States.[86]

82. The 2020 Act infringes this limitation on State legislative power. It prevents the courts of each State from entertaining certain categories of proceedings (ss. 11(3)-(4), 12(1), (4), 19(3)-(4), 20(1), (4)), from calling Western Australia's conduct into question "on any basis" in such proceedings (ss. 12(1), 20(1)), from awarding remedies in such proceedings (ss. 12(1)(b), 17(5), 20(1)(b), and from exercising their ordinary pre-trial disclosure procedures (ss. 13, 21). These are functions going to the heart of these courts' constitutionally protected jurisdictions. The Parliament of Western Australia has no power to eliminate them.

83. *The Melbourne Corporation limitation*. The doctrine associated with *Melbourne Corporation* is a separate limitation, though it overlaps with that recognised in *Re Tracey*.[87] A key difference is that the former is not founded on s 106, but arises rather as "a structural implication built on" the continued independent existence of a central government and a number of State government prescribed by the Constitution.[88]

84. The modern understanding of the practical operation of the *Melbourne Corporation* doctrine is that one polity cannot significantly impair, curtail or weaken the capacity of other polities to exercise their constitutional powers and functions or significantly impair, curtail or weaken the actual exercise of those powers or functions.[89] This is a reciprocal limitation existing throughout the federation, including as between the

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85 *Re Australian Education Union* at 229 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

86 As much is assumed in S Gageler SC, "Private intra-national law: Choice or conflict, common law or constitution?" (2003) 23 *Australian Bar Review* 184 at 188 and J Kirk, "Conflicts and Choice of Law within the Australian Constitutional Context" (2003) 31(2) *Federal Law Review* 247 at 290.

87 See generally A Sharpe, "State Immunity from Commonwealth Legislation: Assessing its Development and the Roles of Sections 106 and 107 of the *Commonwealth Constitution*" (2012) 36(2) *UWA Law Rev* 252 at 256-258, 261-262.

88 *Spence v. Queensland* [2019] HCA 15; 93 ALJR 643 at 671 [99]-[100] per Kiefel CJ, Bell, Gageler and Keane JJ.

89 *Clarke v. Federal Commissioner of Taxation* (2009) 240 CLR 272 at 298 [32] per French CJ.

States.[90] The reference to the "constitutional powers and functions" of the States encompasses "the working of the judicial branch of the state government".[91]

85. By enacting a law prohibiting the courts of each State within the federation from exercising their lawfully acquired jurisdictions under State law, Western Australia infringes this limitation on its legislative power.

86. *The Territories*. The Commonwealth has exercised its power under s. 122 to enact self-government legislation for the more populous Territories.[92] The Supreme Courts of these Territories were in turn created by Territory law.[93] Hence, Commonwealth law is the ultimate foundation for these courts; a State law that prohibits courts so created from exercising their core judicial functions is inconsistent with Commonwealth law and is therefore by force of s. 109 invalid to the extent of the inconsistency.

C. THE 2020 ACT DOES NOT COMPLY WITH MANNER AND FORM REQUIREMENTS[94]

87. Section 6 of the *Australia Act 1986* provides that:

> "Notwithstanding 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."

88. Section 6 is *not* in the same terms as its predecessor s. 5 of the *Colonial Laws Validity Act 1865*.[95] In particular, s. 6 uses the expression "constitution, powers *or* procedure", "or" replacing "and" used in the former Act. By s. 6 State laws to which it applies will be "of no force or effect" unless made in a manner and form required by a law made by the Parliament. Section 6 thus looks to two provisions, one earlier in time, one later.

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90 See *Spence v. Queensland* at [107] per Kiefel CJ, Bell, Gageler and Keane JJ and [309] per Edelman J (confirming that the same limitation applies to exercises of State legislative power affecting the Commonwealth) and *Mobil Oil Australia Pty Ltd v. Victoria* (2002) 211 CLR 1 at [15] per Gleeson CJ.

91 *Austin v. Commonwealth* (2003) 215 CLR 185 at 259-260 [147]-[148] per Gaudron, Gummow and Hayne JJ, citing *Melbourne Corporation* at 80 per Dixon J and 99-100 per Williams J and *Re Australian Education Union* at 229.

92 *Northern Territory (Self Government) Act 1978* (Cth); *Australian Capital Territory (Self-Government) Act 1988* (Cth).

93 *Supreme Court Act 1979* (NT); *Supreme Court Act 1933* (ACT). (These courts previously existed directly under Commonwealth law.)

94 SOC at [49]-[58]; Def at [14]-[17].

95 The differences are summarised conveniently in A Twomey, *The Australia Acts 1986* (The Federation Press, 2010) at 242-243.

89. The later provision here is the 2020 Act. It purports to be a "law made by the Parliament of a State". Its passage through the Parliament was as a statute, as was obtaining the Governor's approval. Its form is that of a law made by the Parliament, and in operation it purports to amend existing laws made by that Parliament.

90. Is the 2020 Act a law "respecting" the constitution, powers or procedure of the Parliament of Western Australia? In *Attorney-General v. Marquet*,[96] four Justices left open the ambit of "constitution, powers or procedures" as now used in s. 6. It is submitted that the 2020 Act *is* such a law in that:

(a) It provides the protections contained in ss. 18 and 19 (and elsewhere) to "protected matters", a term which by s. 7(1) includes the preparation of the Bill for the 2020 Act, any decision or recommendation to introduce the Bill into Parliament, and the Bill's passage through Parliament.

(b) By s. 30(2) it allows a body other than Parliament to make laws of the nature referred to in ss. 30(1)-30(3). In relation to such matters the powers of the Parliament are only those under s. 42 of the *Interpretation Act 1984* (WA).

(c) It is a law respecting the powers of the Parliament of Western Australia in enacting in terms of ss. 10(4)-10(7), 11(1)-11(6), and in terms of ss. 17(1) to (5) and ss. 25(1) to 25(5).

91. The earlier provision providing for a manner and form is found in the 2002 Act and in particular in cl. 32 of the Agreement in the form which it took at the time of the enactment of the 2020 Act.

92. Clause 32 (SCB 197-198) should be regarded as a law made by the Parliament of Western Australia (in terms of s. 6 of the *Australia Act*). Sections 4(3) and 6(3) of the 2002 Act provide that the Agreement is to operate and take effect despite any other Act or law. See too cl. 4(3) of the Agreement. These provisions must have the effect of amending *pro tanto* the laws of the State to the extent that they would operate inconsistently with the Agreement. That is their purpose. Very express amendments can be seen in, for example cl. 10(3) (Mineralogy not required to comply with expenditure conditions imposed by or under the *Mining Act 1978),* cl. 20(5)

[96] (2003) 217 CLR 545 at 572 [74].

(modification of *Land Administration Act 1997*), cl. 20(7) (modification of *Aboriginal Heritage Act 1972*) and cl. 41(1) (exemptions from stamp duty).

93. Further, the one piece of legislation excepted from the operation of ss. 4(3) and 6(3) is the *Government Agreements Act 1979*. The Agreement is clearly a "Government agreement" as defined in s. 2 of that Act. See the definition of "Minister" in cl. 1. There are also so many references to "the Minister" in the Agreement that it could not operate unless there was someone answering that description throughout its duration.

94. The important provision of the *Government Agreements Act* is s. 3. It is expressed to be for the removal of doubt, and states that it declares two matters. One is in s. 3(a). It declares that each provision of a Government agreement:

> "shall operate and take effect, and shall be deemed to have operated and taken effect from its inception, according to its terms notwithstanding any other Act or law."

The other is in s. 3(b). It declares that any purported modification of any other Act or law contained or provided for in a provision of a Government agreement:

> "shall operate and take effect so as to modify that other Act or law for the purposes of the Government agreement, and shall be deemed to have so operated and taken effect from its inception, according to its terms notwithstanding any other Act or law."

95. In addition, ss. 4(3) and 6(3) also bring into play what was described by Aickin J in *Sankey v. Whitlam* (1978) 142 CLR 1 at 105-106:

> "There is, however, a long established distinction between, on the one hand, legislation which merely gives validity to a contract and makes its provisions binding on the parties, notwithstanding that their agreement cannot alone produce that result because of some lack of power or some other source of invalidity, and on the other hand, legislation which imposes a statutory obligation on the parties to carry out the terms of the contract, a provision which gives to those terms themselves the force of law."

See too Gibbs ACJ at 30-31, Stephen J at 77, and Mason J at 89-91, especially at 89.

96. The terms of the 2002 Act do provide for observance by the parties, as may be seen in cll. 3(b), 5(1), 5(3), 5A, 6(1), 6(2), 7(6), 8, 21(1), 22(2), 22(3), 31(2), 33.

97. It is submitted that it is clear that the terms of the 2020 Act effect variations to the provisions of the Agreement. There are numerous provisions of the 2020 Act directly inconsistent with it. For example, the Agreement has a dispute resolution provision in

cl. 42. The provisions of the 2020 Act containing prohibitions on bringing proceedings are directly contrary to it. Directly contrary to the Agreement also are provisions such as ss. 9 and 27.

98. The next issue is whether cl. 32 is mandatory, in the sense that its procedure is the *only* way in which the Agreement may be varied. The resolution of this issue is determined "by reference to the nature of the power conferred, the consequences which flow from its exercise, the character and purpose of the procedure prescribed".[97] The relevant provisions should be read as a whole.[98]

99. In the first place it may be noted that when the Agreement may be affected by statutory change, that possibility is referred to specifically: cll. 2(f), 21(2), 21(4), 22(6)(c) are examples. Relevant also is the breadth of the force majeure clause (cl. 33(2)). The specific provisions for when a party may be discharged from its obligations tend to suggest that there was no contemplation that power to amend the Agreement other than in conformity with cl. 32 could be exercised and especially to discharge the obligations of the State. Further, a failure to agree under cl. 32 is capable of resolution under cl. 42.

100. The specific power conferred upon the Minister by cl. 34 to vary dates referred to in the Agreement, which is expressly conferred "[n]otwithstanding any provision of this Agreement", also supports the view that the power to vary in cl. 32 was otherwise intended to be exclusive. It too supports the interpretation that where a power to amend, vary or repeal the Agreement was to exist, it was to be found in the Agreement itself.

101. The factors referred to in *Clayton v. Heffron* (quoted above) favour treating cl. 32 as a mandatory requirement. At the broadest level, it is unlikely that the parties to the Agreement contemplated that the precise and important rights and obligations provided for by it could be taken away or added to by the legislature in circumstances not provided for by the Agreement, and entirely arbitrarily.

102. The better interpretation, it is submitted, is that the presence of cl. 32 is to avoid circumstances such as the present, where a government has decided that it no longer wants to be bound by the Agreement enacted into law by its predecessors.

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97 *Clayton v. Heffron* (1961) 105 CLR 214 at 246 per Dixon CJ, McTiernan, Taylor and Windeyer JJ.
98 *Project Blue Sky Inc* v. *Australian Broadcasting Authority* (1998) 194 CLR 355.

103. Some reliance has been placed on a view that provisions such as those of s. 4(3) do not give the terms of the Agreement the force of law. *Re Michael*,[99] a decision of the Full Court (per Parker J), is such a case. The provisions there under consideration appear at 251 [20]. Parker J was of the view that the expression "despite any other Act or law" did not give the Agreement there in question the force of law but rather was to show that "the general body of law in the State was not to stand in the way of the implementation of the agreement" (at [21]).

104. His Honour held (at [26]) that s. 4(3) of the *Agreement Act* there in question had the effect that the provisions of the State Agreement "have the force of law" or "create statutory duties and obligations", but that the terms of the agreement "remain contractual terms with force and effect as a contract" and, as such, it "is binding on the parties to the contract and not on others". At [28]-[30] Parker J held that s. 3 of the *Government Agreements Act* "does not purport to give to the provisions of the State Agreement the force of law", and concluded at [30] that the effect of the provisions "are contractual provisions, binding, insofar as their terms create binding legal obligations, as such on the parties to the State Agreement by the force of the common law, and having no binding legal force on those who are not parties."

105. There are difficulties in adopting Parker J's construction. If the provisions of an Agreement are to take effect "despite any other Act or law", it must have effect in changing – amending – the other Act or law. That is so because the assumption underlying the phrase is that the other Act or law would operate were it not for the words in question.[100] In the simplest example the ambit of operation of the other Act or law is reduced.

106. Again, the notion that the terms of the Agreement would have "no binding legal force" on those who are not parties is not correct. For example, would not a third party who with the consent of the State wished to have access over Area 4, Area B1 or Area B2 be entitled to rely on cl. 10(5)? If a contractor to a Project Proponent sought to charge members of the workforce for Mining Lease Accommodation, would not the members be entitled to rely on cl. 18(3)?

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[99] *Re Michael; Ex parte WMC Resources Ltd* (2003) 134 LGERA 246; [2003] WASCA 288.

[100] See *Kartinyeri v. Commonwealth* (1998) 195 CLR 337 at 353-354 [9]-[10] per Brennan CJ and McHugh J, 375-376 [66]-[68] per Gummow and Hayne JJ.

107. Further, the reasoning does not give effect to s. 3(b) of the *Government Agreements Act*. It provides specifically that a purported modification of an Act or law which is provided for in a provision of a Government agreement takes effect to modify that Act or law. True it is that s. 3(b) speaks of modification "for the purposes of the Government agreement", but that expression is used to describe the ambit of the modification.[101]

108. In *Commonwealth Aluminium Corporation Ltd v. Attorney-General*,[102] the enabling Act said that the provisions of the agreement "shall have the force of law as though the Agreement were an enactment of this Act". Wanstall SPJ (at 236-239) appears to have decided the matter on the basis that Parliament could not bind itself not to legislate in a particular way. Hoare J (at 247-248) held that the plain meaning of the provisions quoted above was to confer on the agreement the status of an Act of Parliament. Dunn J (at 259-260) held that the agreement remained something separate from the Act.

109. In *Commonwealth Aluminium Corporation* and in *Re Michael* at [45]-[46] reliance was placed on the notion that Parliament cannot bind itself not to legislate in particular ways in the future. But that notion is itself subject to s. 6 of the *Australia Act*.[103] It is submitted that the provisions of s. 6 of the *Australia Act* have not been complied with, and that the 2020 Act is of no force or effect.

D. THE 2020 ACT IMPERMISSIBLY DELEGATES LEGISLATIVE POWER[104]

110. Section 30 of the 2020 Act contains what the Attorney General for Western Australia described, with uncurbed enthusiasm, as "the Henry VIII clause of all Henry VIIIs!"[105] That label, which has been described as a "disrespectful commemoration of that monarch's tendency to absolution",[106] is commonly applied to delegations of legislative power permitting the executive to make laws that amend the principal Act, or (less commonly) other Acts of the same parliament. Such clauses are to be distinguished from commonplace and unobjectionable regulation-making powers that permit, for example, regulations "not inconsistent with this Act", and also broader regulation-

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101 In *Hancock Prospecting Pty Ltd v. BHP Minerals Pty Ltd* [2003] WASCA 259, Hasluck J at [66]-[67] (Murray J agreeing) treated provisions of the Act there in question and similar to s. 4(3) of the 2020 Act as going "no further than to displace the effect of statutory provisions such as planning controls or otherwise".
102 [1976] Qd R 231.
103 *Kartinyeri* at 369 [47] per Gaudron J.
104 SOC at [99]-[106]; Def at [41]-[47].
105 Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 12 August 2020 at 4834.
106 Lord Rippon, "Henry VIII Clauses" (1989) 10 *Statute Law Review* 205 at 205.

making powers directed towards the practical challenges of "replacing one modern complex statutory scheme with another".[107]

111. Whilst it may be accepted that Australian legislatures have a power to authorise "in wide and general terms"[108] subordinate legislation by the executive, that power is not unlimited. The limitations relevant to the present case are ultimately sourced in the separation of powers, and the conferral of legislative power on "the Parliament of the State" in ss. 107 and 108 of the Commonwealth Constitution. The Commonwealth Constitution confers upon the Parliament of Western Australia, and reserves to it, the power to make legislation; it cannot, conformably with the Constitution, abdicate that legislative power to the executive government.

112. The existence of such a limitation has been identified. Dixon J said that the distribution of powers under the Constitution may supply "considerations of weight" affecting the validity of delegations of legislative authority.[109] In *Giris Pty Ltd v. Federal Commissioner of Taxation*,[110] the Court considered the validity of provisions of the *Income Tax Assessment Act 1936* (Cth), which by s. 99A prescribed a manner by which a trustee was to be assessed, subject to the proviso that s. 99A did not apply where the Commissioner "is of the opinion that it would be unreasonable that this section should apply". Having found that this was a law with respect to taxation (s. 51(ii)), the Court considered other potential grounds of invalidity. Barwick CJ observed that "[n]o doubt whilst the Parliament may delegate legislative power it may not abdicate it" (at 373). Windeyer J agreed with Barwick CJ, and remarked that s. 99A was "very close to the boundary of constitutional validity" (at 385). Kitto J posited that "an attempt to invest an officer of the executive government with part of the legislative power of the Commonwealth" could be invalid (at 379). Menzies J said "at some point in a process of parliamentary abnegation … the shifting of responsibility from Parliament to the Commissioner would require consideration of [its] constitutionality" (at 381).

113. The plaintiffs submit that ss. 29-31 of the 2020 Act infringe this limitation. The provisions of s. 30(1) indicating when the power to make orders will be enlivened is far

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[107] *ADCO Constructions Pty Ltd v. Goudappel* (2014) 254 CLR 1 at 25 [61] per Gageler J.
[108] *Plaintiff S157/2002 v. Commonwealth* (2003) 211 CLR 476 at 512 [102] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.
[109] *The Victorian Stevedoring and General Contracting Company Pty Ltd v. Dignan* (1931) 46 CLR 73 at 101.
[110] (1969) 119 CLR 365.

too broad. The Minister may recommend orders if the Minister is of the opinion that "this Part does not deal adequately or appropriately with a matter or thing" (s. 30(a)) or "it is appropriate for this Part to be improved … in any other way" (s. 30(e)(ii)). The opinion must be formed "having regard to the purposes and subject matter of this Part" (s. 30(1)); but that is no practical limitation at all, especially given that the 2020 Act has no objects provision. How could the Minister, in these circumstances, decide the issue of "appropriateness", as required by s. 30(1)(a)-(e)?

114. There is also no limit to the laws permitted to be amended. Section 30(2), read with s. 31, confers a power on the Minister to amend not only the Agreement and Part 3, but also any other "written law". Having regard to s. 8 of the *Interpretation Act 1984* (WA), that includes a power to amend *future* laws.[111] "Amendment is a legislative act. It is an exercise which must be reserved to Parliament."[112] The basic purpose of these provisions was explained by the Attorney General: "if Mr Palmer or his lawyers come up with something that we have not thought of, we will bring in a regulation or an order."[113] Concerns as to defective legislation are to be addressed by the taking of care in the legislative process,[114] and, if necessary, amendment by the Parliament. They should not be addressed by Parliament abdicating power to the executive. In sum, the 2020 Act grants the executive an unconstrained power to make and change the law to deal with the State's liability under the Agreement and anything related thereto. In our system of government, such powers are the exclusive province of the legislature.

115. The defendant contends that this devolution of power is valid because Parliament retains the power to legislate inconsistently with ss. 30 and 31.[115] But that quality inheres in *all* legislative power. The question is not revocability. As Evatt J explained in *Dignan*, "The fact that Parliament can repeal or amend legislation conferring legislative power will not be a relevant matter because parliamentary power of repeal or amendment applies equally to all enactments."[116]

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111 As to which see generally NW Barber and AL Young, "The Rise of Prospective Henry VIII Clauses and Their Implications for Sovereignty" [2003] *Public Law* 112.

112 *Momcilovic v. The Queen* (2011) 245 CLR 1 at 158 [398] per Heydon J, quoting *R v. Lambert* [2002] 2 AC 545 at 586 [81] per Lord Hope of Craighead.

113 Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 12 August 2020 at 4834.

114 See G Bowman, "Why is there a Parliamentary Counsel Office?" (2005) 26 *Statute Law Review* 69 at 70.

115 Def at [47], presumably calling in aid the dictum in *Capital Duplicators Pty Ltd v. Australian Capital Territory* (1992) 177 CLR 248 at 265.

116 *The Victorian Stevedoring and General Contracting Company Pty Ltd v. Dignan* (1931) 46 CLR 73 at 120.

116. The defendant also contends that this aspect of the challenge is hypothetical because no order under s. 30 has yet been made.[117] As the Hansard quoted above (at [114]) shows, this provision is targeted directly at the plaintiffs. The Attorney General elaborated by saying that "Mr Palmer and his lawyers … can swiftly be put to the sword by the Minister making an order".[118] The spectre of that exercise of executive power presently exists, it uniquely affects the plaintiffs, and it cannot be said that the challenge to these provisions is hypothetical.[119]

E. THE 2020 ACT CANNOT VALIDLY BE APPLIED IN FEDERAL JURISDICTION[120]

117. The authority to decide matters in federal jurisdiction derives from Ch. III of the Constitution. No legislature other than the Parliament of the Commonwealth has the capacity to affect the exercise of federal jurisdiction conferred by or invested in a federal or State court under Ch. III.[121] This limitation precludes State Parliaments from adding to or detracting from federal jurisdiction, and also from commanding a court as to the manner of exercise of federal jurisdiction conferred on or invested in it.[122]

118. The 2020 Act exceeds both aspects of this limitation on State legislative power. It does so, first, by purporting to direct federal courts and courts exercising federal jurisdiction as to the manner of exercise of such jurisdiction.[123] Secondly, it detracts from federal jurisdiction by purporting to limit or impair its exercise.[124]

119. The defendant admits that the 2020 Act may be applicable to proceedings in a federal court or a court exercising federal jurisdiction.[125] Indeed, it is admitted that the 2020 Act applies to specific proceedings in the Federal Court of Australia which the plaintiffs commenced against the State on 12 August 2020.[126]

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117 Def at [41].
118 Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 12 August 2020 at 4834.
119 See *Croome v. Tasmania* (1997) 191 CLR 119 at 136 per Gaudron, McHugh and Gummow JJ.
120 SOC at [59]-[66], [92]-[95]; Def at [18]-[27], [38]; Reply at [9]-[17]; Rejoinder at [2]-[4].
121 *Rizeq v. Western Australia* (2017) 262 CLR 1 at 24 [58] per Bell, Gageler, Keane, Nettle and Gordon JJ.
122 *Rizeq* at 25-26 [60]-[61] per Bell, Gageler, Keane, Nettle and Gordon JJ.
123 See especially the provisions referred to at SOC [61], [63]-[65].
124 See especially the provisions referred to at SOC [59]-[61], [64].
125 Def at [18(a)].
126 Rejoinder at [2]-[4]. The nature of those proceedings is described at [45]-[46] of the Special Case.

120. Given these limitations on State legislative power,[127] the provisions referred to in paragraph 118 above can only apply in federal jurisdiction to the extent that they are picked up by s. 79 of the *Judiciary Act 1903* (Cth) and applied as Commonwealth laws. It is submitted that these provisions cannot be so picked up for two reasons.

121. The *first* reason is that the Commonwealth Parliament has "otherwise provided". Where a plaintiff brings a suit against a State in federal jurisdiction, the right to proceed against the State derives from the conferral of federal jurisdiction by Commonwealth laws, and therefore cannot be abrogated by State law.[128] Hence, for instance, a plaintiff's non-compliance with a State law requiring the giving of timeous notice before proceeding against the State cannot bar a plaintiff's claim in federal jurisdiction.[129] On that basis, the provisions of the 2020 Act prohibiting the invocation and exercise of jurisdiction cannot be picked up and applied in federal jurisdiction.

122. Further, s. 64 of the *Judiciary Act*, which provides that "[i]n 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, and judgment may be given and costs awarded on either side, as in a suit between subject and subject", has otherwise provided. Section 79 cannot pick up a State law that "would deny the requirement by s 64 that the rights of [the plaintiff] and the State … be as nearly as possible the same as those in a suit between subject and subject".[130] Section 64 prevents the numerous provisions of the 2020 Act that favour the State in their application from being picked up by s. 79, including the provisions: (a) precluding proceedings and execution of process "against the State" (ss. 11(3), 17(5), 19(3)); (b) precluding "conduct of the State" from being "called into question on any basis" in proceedings (ss. 12(1)-(4), 20(1)-(4)); (c) precluding the seeking of payment "from the State" of any legal costs connected with relevant proceedings (ss. 11(7), 12(7), 13(8), 19(7), 20(7), 21(8)); and (d) excluding evidence that is "against the interests of" the State (s. 18(5)).

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127 The issue is one of legislative competency, as opposed to s. 109 inconsistency: *Rizeq* at 25 [60] per Bell, Gageler, Keane, Nettle and Gordon JJ; *Masson v. Parsons* (2019) 266 CLR 554 at 574 [30] per Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ.

128 *British American Tobacco Australia Ltd v. Western Australia* (2003) 217 CLR 30 at 55 [50], 57-58 [59]-[60], 59 [63] per McHugh, Gummow and Hayne JJ, 90 [172] per Callinan J.

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

130 *British American Tobacco* at 60-61 [68]-[69] per McHugh, Gummow and Hayne JJ, 90 [172] per Callinan J.

123. The plaintiffs also refer to the Commonwealth provisions listed at paragraphs 92 to 95 of the Statement of Claim. In proceedings in federal jurisdiction to which those provisions apply, an inconsistency would arise between them and the provisions of the 2020 Act. Accordingly, Commonwealth law has "otherwise provided".[131]

124. The *second* reason is that the Constitution has "otherwise provided". Section 79 cannot pick up State laws that would be unconstitutional if enacted by the Commonwealth.[132] The separation of judicial power is entrenched at Commonwealth level by Ch. III.[133] The 2020 Act contravenes this separation because it is in substance a usurpation of judicial power by the legislative branch (pars 66 to 68 above). The Commonwealth Parliament could not enact a law which in substance directed the judicial branch to deal with a specific matter independently of all legal rule.[134]

125. Finally, it is submitted that s. 79 could not operate to pick up some but not all of the provisions of the 2020 Act, "for to do so would be to give an altered meaning to the State legislation."[135] For example, the provisions conferring special rights and immunities on the State, are "an integral part of the State legislative scheme",[136] and therefore s. 79 cannot pick up some but not all of the provisions.

F. THE 2020 ACT CONTRAVENES SECTION 118 OF THE CONSTITUTION[137]

126. The plaintiffs contend that the 2020 Act is invalid in whole or part because its provisions do not give full faith and credit to the laws of the other States, namely the uniform *Commercial Arbitration Acts* ("CAAs") which provide for recognition of domestic arbitral awards, wherever made, as binding.[138]

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131 *Masson v. Parsons* at 580 [43] per Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ.

132 *Solomons v. District Court (NSW)* (2002) 211 CLR 119 at 134-135 [23]-[24] per Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ.

133 *R v. Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; affirmed *sub nom Attorney-General for Australia v. The Queen* [1957] AC 288.

134 This has recently been affirmed by the Supreme Court of the United States, pithily encapsulated in the proposition that Congress cannot, conformably with the separation of powers effected by Article III, enact a law directing that in "Smith v. Jones, Jones wins": *Bank Markazi v. Peterson*, 136 S.Ct. 1310 at n 17 (2016).

135 *The Commonwealth v. Mewett* (1997) 191 CLR 471 at 556 per Gummow and Kirby JJ.

136 *Solomons v. District Court* at 135 [24] per Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ.

137 SOC at [25]-[46]; Def at [6]-[13].

138 *Commercial Arbitration Act 2010* (NSW), *2013* (Qld); *2011* (SA); *2011* (Tas); *2011* (Vic). See also *Commercial Arbitration Act 2012* (WA). The plaintiffs also contend that the 2020 Act does not give effect to, and is inconsistent with, ss. 5 and 143 of the *Evidence Act 1995* (Cth) concerning the Territory CAAs: *Commercial Arbitration Act 2017* (ACT); *Commercial Arbitration (National Uniform) Act 2011* (NT).

127. Section 35(1) of the CAAs provides that "an arbitral award, irrespective of the State or Territory in which it was made, is to be recognised in this State [or Territory] as binding and, on application in writing to the Court, is to be enforced subject to the provisions of this section and section 36. The CAAs were based on the provisions of the *UNCITRAL Model Law on International Commercial Arbitration* ("Model Law") and apply to domestic arbitrations. The *International Arbitration Act 1974* (Cth) ("IA Act") governs international commercial arbitrations and the enforcement of foreign awards. By s. 16 of the IA Act, the Model Law is given the force of law in Australia."[139]

128. The leading case on the interpretation of Art. 35 in Australia is *TCL Air Conditioner (Zhongshan) v. Judges of the Federal Court of Australia*.[140] Article 35 is in materially identical terms to s. 35.[141] French CJ and Gageler J concluded that an arbitral award:[142]

> "is binding by force of the Model Law on the parties to the arbitration agreement for all purposes, on and from the date the arbitral award is made. The purposes for which an arbitral award is recognised as binding include reliance on the award in legal proceedings in ways that do not involve enforcement, such as founding a plea of former recovery or as giving rise to a res judicata or issue estoppel."

129. These observations apply equally to s. 35 of the CAAs. The contention by the defendant in paragraph 6C(a)(i) of the defence that the effect of s. 35(1) is that an arbitral award will only be recognised as having legally binding effect by a court "if and when the award is invoked in proceedings before the court and the court is asked to recognise it as binding" does not sit well with these observations. Pursuant to s. 35, arbitral awards are to be recognised throughout Australia[143] as binding for all purposes from the date they are made. It is submitted that the provisions of the 2020 Act

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139 The CAAs also provide that they bind the State or Territory enacting them and, so "far as the legislative power of the [State or Territory] permits, the Crown in all its other capacities": see CAAs, NSW: s. 40; Qld: s. 1AD; SA: s. 40; Tas: s. 1D; Vic: s. 1AD; WA: s. 1E. See Also CAA in ACT, s. 1D. As to legislation in one jurisdiction binding the Crown in another jurisdiction, and the formula of binding the Crown "in each of its capacities": see *AGU v. Commonwealth (No 2)* (2013) 86 NSWLR 348 at [28]-[29].

140 (2013) 251 CLR 555.

141 *TCL* at [52]. See also s. 2A(1).

142 At [23]; see also [31]. The other members of the Court in *TCL* did not squarely address the issue of timing of the recognition of arbitral awards. However, their Honours' reasons at [78]-[80] are consistent with a construction that provides for recognition of an arbitral award once it is made. See also *Eiser Infrastructure v. Kingdom of Spain* (2020) 142 ACSR 616 where Stewart J observed at [90] that recognition may occur without court enforcement, including as a claim in an insolvent estate (decision overturned on appeal due to errors in the wording of the orders made: *Kingdom of Spain v. Infrastructure Services LS* [2021] FCAFC 3).

143 See CAAs, s. 1(2) as to application beyond the jurisdiction passing the legislation.

identified in paragraphs 42 to 46 of the SOC do not give full faith and credit in terms of s. 118 of the constitution to these laws and are invalid.[144]

130. Section 118 has engendered much academic discussion, but has not been considered in a large number of cases. Those that have considered it have largely done so in the context of interstate torts or personal injury cases where a court is required to choose between conflicting laws and have tended to the view that s. 118 has no part to play until a choice between two conflicting laws has been made in accordance with common law choice of law rules.[145] On this basis, s. 118 does not affect the choice of law or role to play in resolving inconsistencies between laws of different legislatures.[146] Where it is contended that two inconsistent State laws purport to apply to the same subject matter, the first step is to conduct a close analysis of the statutes to determine whether or not there is indeed a conflict.[147] However if, after conducting that analysis, true conflict subsists, the appropriate way in which to resolve such conflicts remains unclear.

131. A majority in *Sweedman* said that the criterion to resolve inconsistency between the laws of two or more States "awaits formulation on another occasion" when the propounded incompatibility of the State laws suggests "a criterion by which that incompatibility is to be recognised and resolved".[148] Whilst significant academic attention has been given to the question of the correct resolution to this problem and the role for s. 118 in that analysis,[149] the issue has not been revisited since *Sweedman*.[150]

132. An analysis of the 2020 Act against the CAAs shows a clear conflict in their operation. When enacting the 2020 Act, Western Australia was required to give full faith and credit

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144 SOC, paragraphs 25E to 25H.

145 See *Breavington v. Godleman* (1988) 169 CLR 41 at 150 per Dawson J; *McKain v. RW Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1 at 37 per Brennan, Dawson, Toohey and McHugh JJ; *John Pfeiffer Pty Ltd v. Rogerson* (2000) 203 CLR 503 at 533 [63]; *Sweedman v. TAC* (2006) 226 CLR 362 at 407 [49].

146 M Davies et al, *Nygh's Conflict of Laws in Australia* (LexisNexis, 10th ed, 2020) at 18.

147 *Port MacDonnell Professional Fishermen's Association Inc v. South Australia* (1989) 168 CLR 340 at 374; *Mobil Oil Australia Pty Ltd v. Victoria* (2002) 211 CLR 1 at 61 [131] per Kirby J; *Sweedman* at 405 [44]-[45]. See also M Leeming, *Resolving Conflicts of Laws* (The Federation Press, 2011) at [1.4].

148 *Sweedman* at 407 [52] per Gleeson CJ, Gummow, Kirby and Hayne JJ.

149 See Leeming, *Resolving Conflicts of Laws* (supra), Ch 6; S Gageler SC, "Private intra-national Law: Choice or conflict, common law or constitution?" (2003) 23 *Aust Bar Rev* 184; J Kirk, "Conflicts and Choice of Law within the Australian Constitutional Context" (2003) 31 *Fed L Rev* 247; G Hill, "Resolving a True Conflict between State Laws: A Minimalist Approach" (2005) 29 *MULR* 39; G Lindell and A Mason, "The Resolution of Inconsistent State and Territory Legislation" (2010) 38 *Fed L Rev* 391.

150 Section 118 has no application to Territory legislation: see *Breavington* at 80, 93, 114, 149-50 and 163. Nevertheless, for the reasons identified by Leeming in *Resolving Conflicts of Laws* (supra) at 244-246, the plaintiffs submit that there is no practical difference in the resolution of a conflict between the laws of two States, and a conflict between a State law and a Territory law.

to s. 35 of the CAAs, which recognised as binding the First and Second Awards throughout Australia. Plainly, it did not do so in light of the provisions of ss. 10(1) and 10(4)-(7), which extinguish the Awards and the arbitration agreements that underpinned the making of them, and ss. 11(1)-(4), which purport to re-determine or ventilate matters that were the subject of the Awards and related to rights that had been extinguished on the making of the arbitral awards. The binding nature of the Awards, recognised throughout the other States and Territories, was disregarded.

G. PARTICULAR ASPECTS OF THE INDEMNITIES

133. The plaintiffs submit that the indemnities are in any event invalid in their application to the Commonwealth, and that they infringe s. 115 of the Constitution.

134. *Indemnities and the Commonwealth*. This part of the submissions is concerned with ss. 16 and 24 and the provisions giving effect to by them. The principal operative provision of s. 16 is s. 16(3), commencing with the words "Without limiting the scope of any indemnity". The indemnities to which it is there referring are the indemnities under ss. 14(4), 15(2) and 15(3).[151]

135. As s. 16(2) makes apparent, s. 16(3) is to apply if proceedings are brought, made or begun against the Commonwealth,[152] or if the Commonwealth incurs a liability to any person, or a loss, and in either such case the proceedings, or liability or loss is "connected with" a disputed matter. Section 16(3) then provides:

(a) in s. 16(3)(a), that each statutory indemnity applies as if the proceedings had been brought against the State, rather than the Commonwealth;

(b) again in s. 16(3)(a), that each statutory indemnity applies as if the liability or loss were incurred by the State, rather than the Commonwealth; and

(c) by s. 16(3)(b), that in each such case, the State may enforce the indemnity so created.

136. Sections 16(4)(a) and 16(4)(b) make it apparent that the liability created by s. 16(3) is an additional liability. And s. 16(5) allows the State to assign to the Commonwealth,

[151] See the definition of "indemnity" in s. 16(1).
[152] A term widely defined in s. 16(1).

to put it shortly, its rights under the indemnity it has created in s. 16(3). Section 24 adopts a similar approach, essentially mirroring the terms of s. 16 by bringing into play the indemnities in ss. 22(4), 23(2) and 23(3).[153]

137. Sections 16 and 20 refer to proceedings against the Commonwealth. Any such proceeding is *necessarily* in federal jurisdiction.[154] The provisions of ss. 16 and 20 State enactments, purport to add to those invoking such federal jurisdiction a liability to the State for so doing. There is no provision of the Constitution which allows a State to adopt such a course.[155]

138. Sections 16 and 24 also purport to apply in certain circumstances where the Commonwealth has incurred a liability or a loss. These provisions purport to attach to exercises of Commonwealth power conditions: (a) in favour of the State; (b) against the interests of those dealing with the Commonwealth; (c) potentially against the wishes of the Commonwealth; and (d) without the authority or support of Commonwealth legislation. The provisions of ss. 16 and 24 effect a direct, and obviously deliberate, interference with exercise of Commonwealth judicial (and executive) power. Further, ss. 16 and 24 infringe, it is submitted, the reciprocal structural implication[156] deriving from *Melbourne Corporation*. The remaining provisions of ss. 16 and 24 serve no purpose if ss. 16(3) and 24(3) do not operate.

139. *Section 115 of the Constitution*.[157] Section 115 says that a State "shall not coin money, nor make anything but gold and silver coin a legal tender in payment of debts."[158] The effect of s. 115 is that the Commonwealth's power in s. 51(xii) to make laws with respect to "currency, coinage, and legal tender" is for practical purposes exclusive. The concept of "legal tender" in s. 115 is the same as that in s. 51(xii), denoting "the prescription of that which is, at any particular time, to be a lawful mode of payment

153 See the definition of "indemnity" in s. 20(1).
154 Constitution, s. 75(iii); *Judiciary Act 1903*, s. 39(2).
155 And, needless to say, there is no Commonwealth legislation purporting to allow the State so to legislate.
156 See *Spence v. Queensland* [2019] HCA 15; 93 ALJR 643 at [107], [109], [309].
157 SOC at [84A]-[84BB]; Def at [36].
158 This wording is derived from Art. 1, s. 10, cl. 1 of the Constitution of the United States. See the remarks of Sir Edmund Barton at the Melbourne Convention: *Convention Debates* at 653.

within a polity."[159] The effect of s. 115 is that it is beyond State power to enact a law compelling a person to accept anything other than gold or silver as a legal tender.[160]

140. The impugned provisions[161] are contained within the indemnity regime. Their purported effect is to allow the defendant to set off, against debts due from it to a "relevant person",[162] the amount of that person's liability under the indemnity created by the 2020 Act. The plaintiffs submit that these provisions contravene s. 115 by purporting to create a new form of legal tender and compelling the plaintiffs to accept it in payment of a debt. It is true that this is an unusual form of "legal tender" (in essence, forbearance of a liability created by statutory fiction[163]), and likely remote from the core operation of s. 115 envisaged by the framers; but any such novelty is a product of the unusual choices of the Western Australian Parliament, and does not deny that the impugned provisions of the 2020 Act are within the prohibition in s. 115.

H. THE 2020 ACT CANNOT BE SAVED BY SEVERANCE

141. Whether provisions of an Act can continue to operate after invalid provisions have been separated depends upon whether such separation would result in remaining provisions that Parliament never intended to enact.[164] If the legislation in substance contains a "package of interrelated provisions which appears intended to operate fully and completely according to its terms", as opposed to a series of disparate provisions addressing different subjects, then severance cannot occur, as all that would be left standing is a residue of provisions which Parliament never intended to enact.[165]

142. As noted above, the 2020 Act does not contain any statement of its objects. Nevertheless, depending on which provisions are declared to be invalid, it is likely that the remaining provisions would not be consistent with the objects of the 2020 Act given that the 2020 Act is presented as a package of interrelated provisions. The 2020 Act

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159 *Watson v. Lee* (1979) 144 CLR 374 at 398 per Stephen J; see also Quick & Garran's discussion of "legal tender": *The Annotated Constitution of the Australian Commonwealth* (1901) at 575-576.

160 See Quick & Garran, *The Annotated Constitution* at 575-576. Such a power, of course, is squarely within Commonwealth legislative competency, and has been exercised.

161 The specific provisions are identified at SOC [84A]-[84BB].

162 Defined in s. 14(2) to include the plaintiffs and Mr Palmer.

163 Such an act of forbearance is capable of amounting to good consideration under the law of contract: *Crears v. Hunter* (1887) 19 QBD 341 at 344 per Lord Esher MR, 346 per Lindley LJ, 346 per Lopes LJ.

164 *Wenn v. A-G (Vic)* (1948) 77 CLR 84 at 122 per Dixon J; *Bell Group NV (in Liq) v. Western Australia* (2016) 260 CLR 500 at 522 [52].

165 See also the observations in *Bell Group* at 527 [70]-[72].

attempts to address this outcome in s. 8 by presenting the provisions as multiple packages with a view to achieving an outcome whereby valid provisions will continue to operate after invalidation of other provisions: see in particular ss. 8(4) and 8(5).

143. The difficulty with this is that the 2020 Act contains provisions which are so integral to and interwoven with the balance of the Act that they must remain operative for the remaining parts of the Act to have any freestanding operation. For example, if the Court determines that the provisions terminating the arbitrations and arbitration agreements are invalid, the balance of the Act could not stand because the provisions affecting the arbitrations and arbitral agreements are integral to the operation of its remaining parts.

10 144. To like effect, if the provisions purporting to extinguish the arbitral Awards are invalid, the numerous other provisions preventing different types of enforcement could not operate. Accordingly, if the plaintiffs succeed in establishing that the provisions terminating the Awards are of no effect, then this has significant consequences for the balance of the Act, which would amount to an unintended and ineffective residue. A similar conclusion is likely to follow from the invalidity of the other provisions.

PART VII ORDERS SOUGHT

145. Questions 1 to 3 at Part G of the Special Case should be answered: the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA) is invalid in its entirety. The defendant should pay the costs of the Special Case (question 4).

20 ## PART VIII ESTIMATE FOR PLAINTIFFS' ORAL SUBMISSIONS

146. The plaintiffs estimate that one to one and a half days will be required.

23 April 2021

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ANNEXURE

LIST OF CONSTITUTIONAL PROVISIONS, STATUTES AND STATUTORY INSTRUMENTS REFERRED TO IN SUBMISSIONS

CONSTITUTIONAL PROVISIONS

1. Constitution (Cth), current.

2. Constitution of the United States, Art. 1 s. 10 cl. 1, Art III, current.

STATUTES

3. *Australia Act 1986* (Cth), s. 6 current.

4. *Australian Capital Territory (Self-Government) Act 1988* (Cth), current.

5. *Evidence Act 1995* (Cth), ss. 5 and 143, current.

6. *International Arbitration Act 1974* (Cth), current.

7. *Judiciary Act 1903* (Cth), current.

8. *Northern Territory (Self Government) Act 1978* (Cth), current.

9. *Commercial Arbitration Act 2017* (ACT), current.

10. *Commercial Arbitration Act 2010* (NSW), current.

11. *Commercial Arbitration (National Uniform) Act 2011* (NT), current.

12. *Commercial Arbitration Act 2013* (Qld), current.

13. *Commercial Arbitration Act 2011* (SA), current.

14. *Commercial Arbitration Act 2011* (Tas), current.

15. *Commercial Arbitration Act 2011* (Vic), current.

16. *Commercial Arbitration Act 2012* (WA), current.

17. *Freedom of Information Act 1992* (WA), current.

18. *Government Agreements Act 1979* (WA), current.

19. *Interpretation Act 1984* (WA), ss. 8 and 42, current.

20. *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA), current.

21. *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA), current.

22. *Supreme Court Act 1933* (ACT), current.

23. *Supreme Court Act 1979* (NT), current.

24. *Colonial Laws Validity Act 1865* (Imp), s. 5, as at 1 January 1986.

STATUTORY INSTRUMENTS

10 25. Nil.