HIGH COURT OF AUSTRALIA

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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' REPLY SUBMISSIONS

Filed on behalf of the plaintiffs by:
Jonathan Shaw, Solicitor
Level 17, 240 Queen Street
Brisbane Qld 4000

Date of this document: 4 June 2021
Ref: Jonathan Shaw
T: 07 3532 3849
E: jones@jcshaw.com.au

PART I PUBLICATION

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

PART II REPLY SUBMISSIONS

A. LIMITATIONS ON STATE LEGISLATIVE POWER

2. **Analytical technique**. Two errors, a failure to consider the 2020 Act, and the scheme it implements, as a whole, and the elevation of form over substance, pervade the defendant's and some interveners' Submissions. The former error divides the 2020 Act into independent segments, the constitutional validity of which the defendant then defends in isolation of one another. Hence, on the defendant's approach, a conclusion on the validity of the so-called "Declaratory Provisions" (ss. 8(2)-(3), 9, 10, 18(1)-(3) and 27) is reached by an analysis (D[76]-[80]) that does not mention the six other categories of impugned provisions.[1] The same piecemeal approach is then adopted one-by-one for each category of provisions (except when it comes to the provisions directed at courts, when the earlier provisions destroying the plaintiffs' rights are called in aid). At no point in these individual analyses is the conclusion previously reached about the "Declaratory Provisions" revisited; nor is there any attempt at an overarching analysis drawing together the individual analyses.

3. In this case the Act is impugned *in toto* and "[t]he question of validity requires attention to the features of the statutory scheme *taken as a whole*."[2] The correct approach (mandated by authority stretching back to at least *Kable* itself) is to consider "the whole of the Act in question and all of the features which it present[s]".[3]

4. This is so because the inquiry whether a law contravenes Ch. III, and particularly the principle derived from *Kable*, involves "an evaluative process which may require consideration of a number of factors".[4] The defendant's analysis, where the provisions of an intricately connected legislative scheme are shuttered off from one another, frustrates such a process. The "necessity for close analysis of complex and varied statutory schemes"[5] in this context should not be avoided by the defendant's technique.

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[1] The defendant goes as far as saying that "[t]he validity of the provisions concerning primary rights *in no way* depends upon the operation of the provisions concerning secondary enforcement rights": B52 D[130] (emphasis added). The same error is made by the Northern Territory, which by the first sentence of its *Kable* analysis says: "These submissions address only the declaratory provisions in the Amending Act": NT [47].

[2] *Assistant Commissioner Condon v. Pompano Pty Ltd* (2013) 252 CLR 38 at 78 [87] per French CJ (emphasis added).

[3] *Condon v. Pompano* at 91 [129] per Hayne, Crennan, Kiefel and Bell JJ.

[4] *K-Generation Pty Ltd v. Liquor Licensing Court* (2009) 237 CLR 501 at 530 [90] per French CJ.

[5] *Fardon v. Attorney-General* (Qld) (2004) 223 CLR 575 at 618 [104] per Gummow J.

5. A related error is the elevation of form over substance. For example, the defendant seeks to avoid the operation of the rule that Parliament cannot direct courts as to the manner or outcome of the exercise of their jurisdiction[6] by treating the regime as one where primary rights are obliterated, then the foregone conclusion of an application for judicial relief is pre-determined. States cannot avoid the constitutional limits on their ability to direct courts by such artificial means. As was said in *Ha v. New South Wales*:[7]

> "When a constitutional limitation or restriction on power is relied on to invalidate a law, the effect of the law in and upon the facts and circumstances to which it relates – its practical operation – must be examined as well as its terms in order to ensure that the limitation or restriction is not circumvented by mere drafting devices."

6. In this context, "it is the operation and effect of the law which defines its constitutional character, and the determination thereof requires identification of the nature of the rights, duties, powers and privileges which the statute changes, regulates or abolishes."[8]

7. The preoccupation with form is evident in the submission that the "drafting technique" of attaching "new legal consequences and a new legal status to things done" defeats the challenge to what the Commonwealth dubs "the determinative provisions".[9] Contrary to the Commonwealth's submission, *Duncan v. ICAC*, and the cases cited by it (addressed below), were decided on the basis of the constitutional character of the laws, determined by reference to their practical operation; they were not decided on the basis that the legislature had deployed an effective "drafting technique".

8. Similarly, Victoria seeks to distinguish the present case from *South Australia v. Totani* on the basis that there "the court was required to make its own order restricting liberty, but its order followed entirely from a determination by the executive", whereas the 2020 Act simply leads to courts "applying a legislative modification of rights and liabilities": Vic [22]. But there is no difference in substance in light of Victoria's recognition that "it is implicit" in the 2020 Act "that the court *must* make orders necessary to give effect to the statutory termination" of the proceedings that the legislature has chosen to terminate: Vic n. 25 (emphasis added). Such orders would likely take the form of orders for dismissal or a permanent stay: D[110(f)].

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[6] See *South Australia v. Totani* (2010) 242 CLR 1 at 52 [82] per French CJ, 92-93 [236] per Hayne J, 157 [428], 160 [436] per Crennan and Bell JJ.

[7] (1997) 189 CLR 465 at 498 per Brennan CJ, McHugh, Gummow and Kirby JJ. "

[8] *HA Bachrach Pty Ltd v. Queensland* (1998) 195 CLR 547 at 561 per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ.

[9] Cth [16]. See too the Northern Territory's submission defending the "drafting device" in s. 8(3) declaring that the Agreement is "taken not to have been, and never to have been" repudiated by the State: NT [54].

9. **Defendant's analogies**. The cases collected at D[76][10] and much relied upon by the defendant do not govern the outcome here. The validity of the 2020 Act

> "cannot be decided simply by taking what has been said in earlier decisions of the Court about the validity of other laws and assuming, without examination, that what is said in the earlier decisions can be applied to the legislation now under consideration".[11]

Similarly, it is necessary "to be wary of what might be called the 'domino' effect of cases that have distinguished *Kable*. It is a mistake to take what was said in other cases about other legislation and apply those statements without close attention to the principle at stake."[12] These warnings are especially apt here, as the 2020 Act contains several extraordinary features absent from the cases relied upon by the defendant.[13]

10. The legislation in *Humby* sought to address the invalidity of decrees issued by the Master of the Supreme Court of South Australia by declaring the rights, liabilities, obligations and status of all persons "to be, and always to have been, the same as if … the purported decree had been made by the Supreme Court … constituted by a single Judge". In holding the Act valid, the Court characterised it as declaring the "the rights, liabilities, obligations and status of individuals to be and always to have been the same as if purported decrees had in fact been made by a single judge of a Supreme Court".[14] The provisions did not "[purport] to effect a 'validation' of purported decrees".[15]

11. For essentially the same reason, in *Nelungaloo*, the validity of Commonwealth legislation was upheld, notwithstanding that the Act validated an executive order, the validity of which was in issue in proceedings pending when the Act was passed.[16] The limited holdings in these cases – concerning statutes conferring validity on certain acts that otherwise would have been invalid under the previous law – is hardly a solid foundation for the suite of extraordinary provisions in the 2020 Act.

12. In the *BLF Case (Cth)*, it was critical to the Court's reasoning that the legislation "does not deal with any aspect of the judicial process. It simply deregisters the Federation,

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[10] *Nelungaloo Pty Ltd v. The Commonwealth* (1948) 75 CLR 495; *R v. Humby; Ex parte Rooney* (1973) 129 CLR 231 ('*Humby*'); *Australian Building Construction Employees' and Builders Labourers' Federation v. The Commonwealth* (1986) 161 CLR 88 ('*BLF Case (Cth)*'); *HA Bachrach Pty Ltd v. Queensland* (1998) 195 CLR 547 ('*Bachrach*'); *Australian Education Union v. General Manager, Fair Work Australia* (2012) 246 CLR 117 ('*AEU*'); *Duncan v. Independent Commission Against Corruption* (2015) 256 CLR 83 ('*Duncan v. ICAC*').
[11] *Condon v. Pompano* at 94 [137] per Hayne, Crennan, Kiefel and Bell JJ.
[12] *Vella v. Commissioner of Police (NSW)* [2019] HCA 38; 93 ALJR 1236 at 1278 [188] per Gordon J.
[13] See P[75] for example.
[14] *Humby* at 243 per Stephen J (Menzies and Gibbs JJ agreeing).
[15] *Humby* at 242 per Stephen J (Menzies and Gibbs JJ agreeing); see too Gibbs J at 243-244.
[16] See *Nelungaloo* at 503-504 per Williams J, 579-580 per Dixon J.

thereby making redundant the legal proceedings which it commenced in this Court."[17] The Court stressed that it would be quite different if the legislation was such that it "interfer[ed] with the judicial process itself".[18]

13. Further (and relatedly), whereas the Commonwealth provision simply cancelled the registration "by force of this section", the corresponding New South Wales law said that the registration "shall, for all purposes, be taken to have been cancelled" on that day. Street CJ said that the New South Wales law was:[19]

> "cast in terms that amount to commands to this Court as to the conclusion that it is to reach in the issues about to be argued before it. Rather than substantively validating the cancellation of the registration …, Parliament chose to achieve its purpose in terms that can be characterised more accurately as directive rather than substantive."

Hence, the Act would have been invalid under the test applied to the Commonwealth Act.[20] His Honour reached the same conclusion in respect of a provision (s. 3(4)) that directed the court as to costs orders.[21] The 2020 Act is directive for similar reasons. To take but one stark example, s. 8(3)'s statement that the Agreement "is taken not to have been … repudiated by any conduct of the State" is direction to the courts.

14. In *Bachrach*, while an appeal challenging a zoning decision permitting the development of a shopping centre was pending, the Queensland Parliament passed the *Local Government (Morayfield Shopping Centre Zoning) Act 1996* (Qld) ("*Zoning Act*"). The plaintiff challenged the validity of the *Zoning Act*, which provided that the purposes for which the land could be used without the consent of the local council were "taken to include" the proposed shopping centre development.

15. That the *Zoning Act* affected "rights in issue in pending litigation" did not "necessarily involve an invasion of judicial power".[22] That proposition, of course, is not doubted by the plaintiffs here. The Court said that the *Zoning Act* was "quite different" from the Act in the *BLF Case (NSW)*, which "specifically addressed current litigation, prescribed that for the purposes of determining the issues in that litigation certain facts were to be taken as established, and dealt with the costs of the litigation."[23] In upholding the validity of the *Zoning Act*, the Court noted that the "plaintiff's legal proceedings are not

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[17] *BLF Case (Cth)* at 96 per Gibbs CJ, Mason, Brennan, Deane and Dawson JJ.
[18] *BLF Case (Cth)* at 96 per Gibbs CJ, Mason, Brennan, Deane and Dawson JJ.
[19] *Building Construction Employees & Builders' Labourers Federation (NSW) v. Minister for Industrial Relations* (1986) 7 NSWLR 372 at 378A-C; see also at 394A per Kirby P.
[20] *BLF Case (NSW)* at 378C.
[21] *BLF Case (NSW)* at 378D-E.
[22] *Bachrach* at 563 [17] per *Curiam*, citing *Humby* and *Nelungaloo*.
[23] *Bachrach* at 564 [21] per *Curiam*.

mentioned in the Act", and that the Act's "manifest purpose" was to establish a "legal regime affecting the Morayfield shopping centre land, binding the developer, the Council, and all other persons including the plaintiff."[24] This generalised object and effect is quite different from the 2020 Act.

16. In *AEU*, a dispute about the respondent's registration as an employee organisation led to a judicial decision finding the registration invalid.[25] The Commonwealth then enacted legislation providing (s. 26A) that if an association was purportedly registered as an employee organisation, and the purported registration was invalid only because of the characteristic that led to invalidity in *Lawler*, that registration would be taken to be valid and to have always been valid. The plaintiff argued that Act was an interference with judicial power, in that it "dissolved or reversed" the Court's orders.

17. A majority considered that the operation of s. 26A was simply to attach to the "purported registration" – which existed as an historical fact, albeit without legal effect – the legal consequences of a valid registration,[26] an orthodox application of *Humby*. Similarly, Gummow, Hayne and Bell JJ held that s. 26A "altered the law by providing, in effect, that the organisations with which it dealt were to be treated as having had the status of registered organisation" from the time of the purported registration.[27] *AEU* holds that a legislature may, conformably with Ch. III, state a rule of law which alters the legal status and consequences of a past act "generally and for the particular case".[28] But that is not an available characterisation of the operation and effect of the 2020 Act.

18. *Duncan v. ICAC* concerned legislation retrospectively validating acts and investigations conducted under the interpretation of "corrupt conduct" in the *Independent Commission Against Corruption Act 1988* (NSW) prior to *Cunneen*.[29] The new law provided that anything done or purporting to have been done by the Commission before the High Court's decision that would have been validly done if corrupt conduct for the purposes of the Act included "relevant conduct" (defined to reflect ICAC's interpretation before *Cunneen*) was taken to have been, and always to have been, validly done.

19. The Court held that the case was governed by *AEU*: like s. 26A in that case, the provisions attached new legal consequences and legal status to what otherwise would

[24] *Bachrach* at 564 [22] per *Curiam*.
[25] *Australian Education Union v. Lawler* (2008) 169 FCR 327.
[26] *AEU* at 137 [36], 140-141 [48], 143 [53] per French CJ, Crennan and Kiefel JJ, 161 [117] per Heydon J.
[27] *AEU* at 154 [90].
[28] See *AEU* at 143 [53] per French CJ, Crennan and Kiefel JJ.
[29] *Independent Commission Against Corruption v. Cunneen* (2015) 256 CLR 1.

not have had such consequences or status.[30] It is distinguishable from the present case because there the Act did not confer any power or function on a court, did not deprive the court of a function or affect its processes, and did not give a direction to a court "to treat as valid that which the legislature has left invalid".[31] In short, the law was no more than "a retrospective alteration of the substantive law which is to be applied by courts in accordance with their ordinary processes."[32] The 2020 Act goes much further than a simple change in the substantive law, and it distorts the ordinary processes of courts.

20. Ultimately, this aspect of the case concerns the intersection of two well-established propositions, the correctness of which both parties and the interveners appear to accept: on the one hand, legislatures may pass laws that affect rights in issue in pending proceedings, and which validate conduct or acts that were invalid under the previous law; on the other hand, the legislature cannot direct courts as to the manner or outcome of the exercise of their jurisdiction. The plaintiffs submit that the 2020 Act, when read as a whole and focussing on its practical operation and effect, falls into the latter category and is invalid in its entirety for that reason.

21. **Further Chapter III aspects**. *A change in the substantive law?* The Commonwealth submits that the provisions it says are determinative[33] "simply alter the applicable law" to be applied by courts (Cth [18]).[34] This characterisation is flawed. The 2020 Act does, in a sense, change the law. All statutes do. But caution must be exercised in asserting that an Act is unobjectionable because it does so. When considering the difference between legislative and judicial power, "[t]he concept of 'changing the law' must imply some measure of generality or preservation of an adjudicative role for the courts."[35] A provision such as s. 9(1), declaring that specified proposals made under the Agreement do not have "any contractual or other legal effect", is not in this sense a change in the substantive law. Nor is a provision like s. 11(1), declaring that in respect of a specific contractual dispute, the State has no liability. Contrary to the defendant's submission (D[77]), such provisions do not create "new norms of conduct"; they are statements of outcomes required to be reached by courts.

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[30] *Duncan v. ICAC* at 98 [25] per French CJ, Kiefel, Bell and Keane JJ.
[31] *Duncan v. ICAC* at 98 [26]-[28] per French CJ, Kiefel, Bell and Keane JJ.
[32] *Duncan v. ICAC* at 98 [28] per French CJ, Kiefel, Bell and Keane JJ.
[33] Sections 9, 10(1)-(2), (4)-(7), 11(1)-(2) and 19(1)-(2).
[34] The defendant makes a similar submission (albeit apparently applying to a wider suite of provisions) at D[162], and Victoria also characterises the 2020 Act as a "modification of the substantive law" (Vic [25]).
[35] *Patchak v. Zinke*, 138 S.Ct. 897 (2018) at 920 per Roberts CJ (dissenting as to the result).

22. *Exclusive and inalienable judicial functions*. The fact that actions for breach of contract and similar civil wrongs are routinely determined by arbitral tribunals does not deny that such determinations are the province of the judicial branch of government (*contra* D[67], NSW [13]). Arbitral tribunals do not ordinarily exercise sovereign power; their power is sourced in the voluntary act of the parties conferring power on them. They do not exercise judicial power, which is fundamentally different because it is "an assertion of the sovereign, public authority of a polity".[36] But when a *Parliament* quells a contractual dispute, it does exercise that sovereign authority. When such power is engaged to determine an action in contract, there are "basic rights and interests necessarily protected and enforced by the *judicial branch* of government."[37]

23. *The ad hominem nature of the law*. The defendant submits that that the "ad hominem nature of the provisions is irrelevant in the context of this particular legislation": D[64]. That submission should be rejected for at least two reasons. First, it is based on the premise that this legal regime was always inherently *ad hominem*: D[16]. That premise is wrong: see for example the sections of the Agreement which operate beyond the parties to it: cll. 5A(4); 5A(9); 6(4); 10(5); 12(1); 18(3); 21(3); 22(4)-(5); 38 and 40.

24. Secondly, regardless of the nature of the 2002 Act, and accepting that it is not determinative,[38] on no view is the *ad hominem* nature of legislation "irrelevant" to a *Kable* analysis. To disregard that feature would be contrary to the evaluative inquiry, having regard to the totality of the legislative scheme, required by the authorities. Further, the submission in the final sentence of D[64] that *Bachrach* upheld "party-specific" legislation is not correct. The Court in *Bachrach* explicitly rejected a submission that the *Zoning Act* was *ad hominem*, observing that that "[l]egislation *ad hominem* would not have achieved" the *Zoning Act*'s objective of a generalised rezoning providing for the legality of the development for all purposes.[39]

25. *Abuse of process and vexatious litigants*. In defending the "No Proceeding Provisions",[40] the defendant likens the parties barred from bringing proceedings by the 2020 Act to vexatious litigants and parties pursuing documents for no proper forensic

[36] *TCL Air Conditioner (Zhongshan) Co Ltd v. Judges of Federal Court of Australia* (2013) 251 CLR 533 at 566 [75] per Hayne, Crennan, Kiefel and Bell JJ (citations omitted); see also at 553 [28] per French CJ and Gageler J.
[37] *Attorney-General v. Breckler* (1999) 197 CLR 83 at 109 [40] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ (emphasis added).
[38] See *Knight v. Victoria* (2017) 261 CLR 306 at 323 [26] per *Curiam*.
[39] *Bachrach* at 564 [23] per *Curiam*.
[40] Elaborately defined at D[38] to comprise ss. 11(3)-(7), 12(4)-(7), 13(4)-8), 19(3)-(7), 20(4)-(7), 21(4)-(8).

purpose: D[110(b)].[41] Whether a party is a vexatious litigant, is engaging in an abuse of process, or has a proper forensic purpose for engaging the court's processes are typically questions reserved for judicial determination, not legislative fiat. There is no analogy between the two, especially in circumstances where the fact giving rise to the prohibition is simply that the plaintiffs succeeded in an arbitration against the State.

26. *Evidentiary provisions*. In defending the validity of the provisions expressly governing the judicial process and the evidence available in such proceedings, the defendant says that "it is not an impermissible interference with judicial power to prescribe rules of evidence": D[120].[42] That is trite. But the effect and practical operation of the provisions, and in particular their effect upon the judicial process, must be considered.

27. Contrary to Vic [53], s. 18(5) is quite different from the legislation in *Nicholas v. The Queen*,[43] which upheld a law providing that in determining whether evidence that narcotics were imported into Australia was admissible, "the fact that a law enforcement officer committed an offence in importing the narcotic goods … is to be disregarded" if certain conditions were met. It is not the plaintiffs' case that the impugned provisions of the 2020 Act are invalid simply because they favour the State or may work a hardship on the plaintiffs. The problem is their effect on the judicial process. See too the powerful statement of Gaudron J in *Nicholas*.[44] Considerations of the kind adverted to by Gaudron J limit the propositions relied upon by the defendant.[45] Section 18(5) is in the category of laws described by Gaudron J. It requires the court to apply, as a criterion of admissibility, whether the evidence is (*inter alia*) "against the interests of" the State. To apply this rule, the court is required to evaluate the respective "interests" of the parties, and then refuse to admit evidence on the basis that it may be contrary to one party's interests. That is a signally unjudicial function.

28. **Further aspects of State legislative power**. The defendant's submissions on the rule of law and *Union Steamship* (D[176]-[180]) do not account for the 2020 Act as a whole. The 2020 Act, on any view, does far more than "declaring the rights and liabilities of parties in pending litigation" (D[180]); those further relevant attributes (P[75]) must be

[41] See also Vic [4] and [45].
[42] See also Vic [53].
[43] (1998) 193 CLR 173.
[44] *Nicholas* at 208-209 [74] (see also Brennan CJ at 188 [20]). This passage has been cited with approval on many occasions: see, eg, *Bass v. Permanent Trustee Group* (1999) 198 CLR 334 at 359 [56] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.
[45] *Lawrence v. State of New South Wales* (2020) 103 NSWLR 401 at 425 [76] per Bathurst CJ (Bell P and Leeming JA agreeing).

part of any analysis addressing the rule of law. The correct approach, it is submitted, is to consider the Act as a whole, accounting for the cumulative effect of the constellation of attributes relevant to the particular exercise of legislative power.

29. In adopting such an approach, it is inevitable that the content of these limitations on legislative power can only be worked out on a case-by-case basis (cf Qld [39]). It would be inappropriate in any one case to attempt to define the precise parameters of these limitations. It is sufficient to find that they exist and may be enlivened in rare, extreme cases, of which this is one.

30. The somewhat dated and, with respect, somewhat ritualistic invocation of "Diceyan"-type notions of parliamentary supremacy to characterise the 2020 Act as exemplifying the rule of law (NT [19]) should be regarded as no longer appropriate in the Australian context.[46] Such a characterisation is in any event somewhat undermined by the abdication of power in this case in ss. 30-31.

B. MANNER AND FORM[47]

31. First, the arguments in D[94] should not be accepted. They do not give effect to the actual wording of ss. 4(3) and 6(3). Nor do they give effect to s. 3(b) of the *Government Agreements Act*[48] which in clear terms provides that a modification of another Act or law provided for by a Government agreement is to "operate and take effect so as to modify that other Act or law". Such modification is to so operate "for the purposes of the Government agreement", but it does operate as a modification of an existing law.[49]

32. Secondly, it is immaterial that the Agreement was "evidently a contract executed prior to the Act itself". Once the Act came into force the provisions of the Agreement became law, and modified other laws. The modifications to other laws do not occur only in cl. 27. See too cll. 9(2)(b)(i), 9(2)(c)(ii), 10(3), 10(8), 20(6), 20(7), 23, 31(3) and 42(1).

33. Thirdly, the decisions referred to at D[94(c)] are erroneous and should not be followed. *Re Michael; Ex parte WMC Resources Ltd*[50] is bereft of reasoning leading to the

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[46] *Attorney-General (WA) v. Marquet* (2003) 217 CLR 545 at 570 [66] per Gleeson CJ, Gummow, Hayne and Heydon JJ. Victoria makes a similar submission to the Northern Territory's at Vic [37].

[47] This is dealt with in the defendant's Submissions in B52, [92]-[100]. References in this Part to paragraph numbers in the defendant's Submissions are to those paras in B52.

[48] The only references to s. 3 of the *Government Agreements Act* in the defendant's Submissions are in para 19 in B54 and para 94(a) in B52. No reasoning is provided. The interveners do not deal with the issue.

[49] As was said by French CJ, Kiefel, Bell and Keane JJ in *Duncan v. ICAC* at 94 [12]: "It is not to the point that cl 35 does not expressly purport to 'amend' s 8(2): it is well settled that a statute which effects an alteration of the provisions of an earlier statute amends that earlier statute even though it may not expressly describe itself as 'an amending statute'."

[50] [2003] WASCA 288.

conclusions: see P[103]-[107]. Nor does *Commissioner of State Revenue v. OZ Minerals Ltd* provide it.[51] Indeed the passage at [179], if regarded as supporting the view in *Re Michael*, was in the course of an *obiter* discussion of the general nature of State agreements. No issue under the *Australia Act* was involved. Again, *Western Australia v. Graham*[52] involved no issue arising under the *Australia Act.* The reasons of Jagot J at 239 [38] and 240 [40]-[41] add no reasoning in support of the conclusions.

34. Fourthly, as to the contention at D[95] that if the Agreement has effect as a law made by Parliament it is "difficult to see how the plaintiffs could ever say that they had a claim for contractual damages arising from breach of contract" – there is no reason why breach of contractual provisions which are given statutory effect as well may not be sued for as such.

35. Fifthly, the contentions at D[96] should be rejected. It may be accepted that the Agreements themselves were not initially made by Parliament, but they achieve statutory effect because of laws made by Parliament. To regard, as does D[96], ss. 4(3) and 6(3) as the relevant law "made by the Parliament" unnaturally separates ss. 4(3) and 6(3) from their subject matter and does not give effect to their wording.

36. Sixthly, D[97] involves reading into s. 6 requirements which are not there. Section 6 does not require that every aspect of the manner and form provided for by the earlier legislation be carried out by Parliament itself.[53] Here cl. 32(1), to put it shortly, provides for amendments to be made by agreement. The proposed amendment must be provided to each House of Parliament within 12 sitting days: cl. 32(2). Either House may disallow the amendment: cl. 32(3). If neither House has done so in 12 sitting days after the amendment has been laid before it, the amendment takes effect: cl. 32(3). By the operation of s. 3, "the Agreement" then means the Agreement as so varied, "in accordance with its provisions". Parliament *is* involved in the procedure.

37. Seventhly, D[97] and [98] are also erroneous in saying that, at most, cl. 32 prescribes "a manner and form for *the parties*" to follow if they wish to amend the Agreement, and in suggesting that the need for agreement is so outside the concept of "manner and form" that it is not caught by s. 6. But in the first place absence of agreement by a party to an amendment is not the end of the matter. It may be the subject of arbitration under

[51] (2013) 46 WAR 156 at 189-190 [179]-[183].
[52] (2016) 242 FCR 231.
[53] That would exclude referendum provisions: cf *Attorney-General (NSW) v. Trethowan* (1931) 44 CLR 394.

cl. 42, with the result going to the Houses of Parliament under cl. 32. Again, each of the two Houses of Parliament *is* involved.

38. Finally, D[100] places (unpleaded) reliance on s. 73 of the *Constitution Act 1889* (WA). That provision, however, applies relevantly only to changes in the "Constitution" of either House. Clause 32 says nothing about the "Constitution" of a House. It takes the Houses as it finds them.

C. APPLICATION IN FEDERAL JURISDICTION

39. Section 79(1) of the *Judiciary Act 1903* (Cth) "is not directed to, and it does not add to or subtract from, laws which are determinative of the rights and duties of persons as opposed to the manner of exercise of jurisdiction."[54] Applying this distinction, the defendant submits that the "No Proceeding Provisions"[55] apply of their own force in federal jurisdiction because, "as a matter of substantive law", they are "declarations of rights and liabilities": D[111]-[113]. That characterisation should be rejected. These provisions are explicitly directed at "proceedings", and are designed to impair or detract from the scope of the exercise of the court's jurisdiction in such cases. The only "rights and liabilities" engaged are those directly concerned with the proceedings. For example, the declaration that the State "has no liability … for any of a person's legal costs connected with the proceedings" (ss. 11(7), 12(7) 19(7), 20(7)) detracts from the court's jurisdiction to award costs. The prohibitions on bringing proceedings, and provisions terminating extant proceedings (e.g. ss. 11(3)-(4), 12(4), 13(4)) are in substance commands as to the manner of exercise of the court's jurisdiction, and they detract from that jurisdiction.

40. The defendant submits that s. 64 of the *Judiciary Act* does not apply for essentially two reasons. First, it is said that "the nature of the suit" between the parties "is not of a type which could exist between a subject and subject": D[59(d)(i)].[56] Any limitation to s. 64's operation of this kind can only arise from the proviso "as nearly as possible". The effect of those words – which are synonymous with "as completely as possible"[57] – is that a State will acquire no special privilege "except where it is *not possible* to give

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[54] *Masson v. Parsons* (2019) 266 CLR 554 at 575 [30] per Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ.
[55] Sections 11(3)-(7), 12(4)-(7), 13(4)-8), 19(3)-(7), 20(4)-(7), 21(4)-(8).
[56] New South Wales appears to go further in its proposed test, submitting that s. 64 will not operate where the suit "is not of a kind which ordinarily exists between a subject and subject": NSW [42]. Victoria says that it will not operate where a State's liabilities "relate to the exercise of its governmental functions": Vic [56(2)]. A suit involving a government party that would not at least "relate to" its governmental functions would be rare indeed.
[57] *The Commonwealth v. Evans Deakin Industries Ltd* (1986) 161 CLR 254 at 264 per Gibbs CJ, Mason, Wilson, Deane and Dawson JJ, citing *Asiatic Steam Navigation Co Ltd v. The Commonwealth* (1956) 96 CLR 397 at 427 per Kitto J.

it the same rights and subject it to the same liabilities as an ordinary subject."[58] The defendant has not identified (nor has any intervener) any reason in practice or principle why it would not be possible for the parties' rights to be the same in proceedings concerning the subject matter of the 2020 Act. It is not sufficient that the underlying agreement giving rise to the dispute concerns matters of governmental importance. There is nothing about the suit against the State that entrenches upon some essential or peculiar government function; it is a claim under commercial arbitration legislation.

41. Secondly, the defendant relies upon *Auckland Harbour Board v. The King*:[59] D[59(d)(ii)], [127]-[129]. The aspect of *Auckland Harbour* that has been applied as a limitation to s. 64 is that a payment out of the consolidated fund without Parliament's authority is ultra vires and may be recovered by the Government, regardless of rules of estoppel.[60] The defendant's submission is to the effect that it is able to avoid any liability by the expedient of removing the legislative authority for a payment to meet it: D[127]-[129]. This is an overly broad interpretation of the role of the *Auckland Harbour* principle as a limitation to s. 64. It would have the potential to frustrate the purpose of s. 64 entirely. Such an expansive exception finds no support in the *Melbourne Corporation* doctrine by enabling the defendant to avoid a substantial claim for damages: *contra* D[129]. That a claim against the State is substantial, as they often will be, does not alter the command under Commonwealth law that in federal jurisdiction, the parties' rights are to be the same.

D. ABDICATION OF LEGISLATIVE POWER[61]

42. The defendant's attempts to identify limits in the delegation of power should not be accepted. The first (D[115]), that "the Governor's power to make orders under s 30(2) is exercisable 'on the Minister's recommendation'", is simply not a relevant limitation.

43. By the second limitation (D[116]), the defendant seeks to read in a limitation not found in the text, and obscure in meaning, namely that s. 30(1) "should be regarded as only permitting orders to perfect the intention of the Amending Act", as opposed to orders "made to supplement that intention". Such a limitation would be contrary to the text of s. 30(1), which simply requires the Minister to "[have] regard to the purposes and subject matter of this Part".

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[58] *The Commonwealth v. Evans Deakin Industries Ltd* (1986) 161 CLR 254 at 263 per Gibbs CJ, Mason, Wilson, Deane and Dawson JJ (emphasis added).
[59] [1924] AC 318.
[60] *Commonwealth v. Burns* [1971] VR 825 at 830 per Newton J.
[61] A "procedural-type ground", according to the defendant (D[5]), and therefore addressed in its B52 Submissions.

44. The third limitation, being the right to seek judicial review (D[118]), is practically no limitation at all. The power is enlivened by the formation of the Minister's opinion. Accepting that the formation of such an opinion may be reviewed as a jurisdictional fact,[62] given the nature of the matters in s. 30(1) of which it is sufficient for the Minister to be satisfied, it is difficult to see how a court could ever conclude that this opinion was not formed. As was recently said in the Supreme Court of Canada, one of the vices of Henry VIII clauses is that they "limit the availability of judicial review by providing no meaningful limits against which a court could review."[63] That is the case here.

45. The defendant contends that the fact that Parliament may later repeal or amend a Henry VIII clause is sufficient to ensure its constitutional validity: D[110]-[113]. As submitted in-chief, however, that an abdication of power may later be reversed does not deprive it of its character of an abdication: P[115].

46. Reliance on *Re Gray*[64] (D[110], [112]) is misplaced. In upholding the validity of a Henry VIII clause containing "unlimited powers",[65] the Court was moved by the urgency of war, when "the safety of the country is the supreme law against which no other law can prevail".[66] Obviously no such considerations are relevant in this case.

47. That the regulation-making power is yet to be exercised does not make its validity hypothetical (D[106]-[107]). First, as is clear from the Hansard quoted at P[116], part of the reason for the power's existence is that it can be exercised speedily when the legislative process is too cumbersome for the government's aims. Secondly, given that this is what the defendant calls "necessarily 'ad hominem' legislation" (B54 D[23]), there is no realistic possibility (cf D[107]) that an exercise of the power may not sufficiently affect the plaintiffs to ground standing. Thirdly, in circumstances where it is the delegation that the plaintiffs submit is unconstitutional – regardless of how the power is exercised – there are no further facts that would affect its constitutionality.

E. FULL FAITH AND CREDIT

48. The plaintiffs recognise that the actual operation of s. 118 may require further examination, as cases arise. It must be borne in mind, however, that s. 118 is a provision of Ch. V, to which effect *must* be given.

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[62] *Harbour Radio Pty Ltd v. ACMA* (2012) 202 FCR 525 at 547 [83] per Griffiths J.
[63] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at [269] per Côté J (concluding, in a rich dissenting judgment on the point, that Henry VIII clauses are unconstitutional).
[64] (1919) 57 SCR 150.
[65] That was the meaning of the clause, "taken literally", and Parliament "must be understood to have employed words in their natural sense, and to have intended what they have said": at 158-159 per Fitzpatrick CJ.
[66] *Re Gray* at 158-160 per Fitzpatrick CJ.

49. This does not mean s. 118 is concerned only with the *recognition* of the existence of other laws. It involves too that full faith is given throughout the Commonwealth to matters taking place pursuant to those laws. As a practical matter, that means that the awards in this case which were made pursuant to and in accordance with provisions of State laws, are to be given their effect throughout the Commonwealth from the time that they are made. The giving of such full faith and credit is required by s. 118. It cannot be taken away at the will of a State wishing to renege on arrangements it has made. Section 118 is one of the occasions where a State's legislative power is, in the language of s. 107, "withdrawn".

F. SECTION 115

50. The contentions at D[155]-[157] seize on the words "by setting off" in ss. 14(7)(b), 15(5)(b) and 22(7)(b) and then approach the matter by saying that that term conveys no more than the setting off of money cross-claims to provide a balance. But "setting off" is used in the three impugned provisions in a particular statutory context – a context where it is provided that the "State may … enforce the indemnity … by setting off the liability" etc. The intention of the provisions is clearly, it is submitted, that the effect of the set off will be to pay to satisfy the liability of a relevant person under the indemnity either in full or to the extent of the amount set off. There is, in terms of s. 115, a *payment* of the debt.

51. None of the decisions referred to at D[156]-[157] touches the matter presently in issue.

G. ISSUES OF VALIDITY SHOULD BE DECIDED

52. At D[104] and in various places in the B52 submissions, it is contended that some of the issues as to validity of the 2020 Act should not be resolved at this point.[67]

53. The approach taken by the Court to issues of this kind was dealt with in *Lambert v. Weichelt*.[68] Whilst differences of emphasis may be seen, the position remains, it is submitted, that the Court will decide a constitutional question if it is necessary to do so in order to do justice in the given case and to determine the rights of the parties.

54. This is a case where the Court does need to express a view on the validity of the whole of the enactment. For a start the operation of the Act turns on what it describes as "disputed matters" and "protected matters", features which recur throughout it. Further,

[67] Cth [51]-[63] raise similar points. See too Qld [9]-[14] and Vic [61]-[64].
[68] (1954) 28 ALJ 282 at 283, and more recently, of course, *Knight v. Victoria* (2017) 261 CLR 306 at 324 [32]; *Clubb v. Edwards* (2019) 267 CLR 171 at 192-193 [34]-[35], 216-217 [135]-[136]; *Private R v. Cowen* (2020) 94 ALJR 849 at [107], [158]-[159]; *Zhang v. Commissioner of Police* [2021] HCA 16 at [21]-[23].

the 2020 Act operates to immediately remove or alter the plaintiffs' existing rights. For example, it prevents the plaintiffs from seeking payment for any legal costs of, *inter alia*, any proceedings commenced prior to commencement or connected with any arbitration (ss. 11(7)-(8), 12(7)); it requires the plaintiffs to provide indemnities for an expansive range of conduct, including any loss "connected with" a disputed matter (ss. 14, 15, 22, 23); and it prevents the plaintiffs from continuing proceedings in respect of their rights that existed prior to commencement (ss. 11(4), 12(4)).

55. The provisions of the 2020 Act should be considered as a whole, not in isolation. The approach urged by the relevant interveners is inappropriate and should not be adopted.

H. SEVERANCE

56. Section 8(4)-(5) is given an overly expansive role by the defendant and some interveners. To take but one example, it is untenable to submit (Cth [52]), that due to s. 8(4)-(5) there is "no doubt" that *every* provision of the 2020 Act is severable from the others.[69] No severance clause can require this Court to depart from its judicial task and embark upon "the legislative task of making a new law from the constitutionally unobjectionable parts of the old".[70] Such clauses "cannot be more than a guide".[71]

57. Two examples illustrate the legislative task that the Court is being asked to undertake. First, the defendant invites the Court to read the defined term "proceedings" as not extending to judicial proceedings in federal jurisdiction or in other States: B52 D[125]. However, that is directly contrary to the definition of that term in s. 7, which includes the separately defined term "non-WA proceedings". Secondly, acceptance of the defendant's submission that the "provisions concerning secondary enforcement rights can be entirely severed" (B52 D[130]) would convert the 2020 Act into something entirely different from what Parliament enacted. "To attempt to convert a blunderbuss into a precision rifle is not a judicial task."[72]

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D.F. JACKSON Q.C.
(02) 9151 2009
jacksonqc@newchambers.com.au

M.A. KARAM
(02) 9151 2005
mkaram@newchambers.com.au

H.C. COOPER
(02) 9151 2012
cooper@newchambers.com.au

[69] Having regard to the defendant's elaborate submissions on severance at B52 D[119]-[133], Queensland's submission that due to s. 8(4)-(5), severance in this case is "not complex", appears quixotic.
[70] *Bank of New South Wales v. The Commonwealth* (1948) 76 CLR 1 at 372 per Dixon J.
[71] *Bank of New South Wales v. The Commonwealth* at 372 per Dixon J.
[72] *APLA Ltd v. Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 447 [370] per Kirby J.