HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. **B52 of 2020**

BETWEEN:

CLIVE FREDERICK PALMER
Plaintiff

and

STATE OF WESTERN AUSTRALIA
Defendant

SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

Filed on behalf of the Attorney-General for the State of Queensland (Intervening)

28 May 2021

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PART I: Internet publication

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

PART II: Basis of intervention

2. The Attorney-General for Queensland ('Queensland') intervenes in this proceeding pursuant to s 78A of the *Judiciary Act 1903* (Cth), not in support of any party.

PART III: Reasons why leave to intervene should be granted

3. Not applicable.

PART IV: Submissions

SUMMARY OF ARGUMENT

4. Queensland adopts and relies upon its submissions in the B54/2020 proceedings, to the extent that the issues in those proceedings overlap with the issues in these proceedings. Queensland makes the following additional submissions in these proceedings:

   (a) The *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA) ('the Amendment Act') does not discriminate against the plaintiff on the basis of his residency in Queensland. Section 117 of the *Constitution* does not render the plaintiff immune from the application of the Amendment Act.

   (b) The Amendment Act is not an exercise of judicial power in respect of a matter mentioned in s 75(iv) of the *Constitution*.

   (c) The Amendment Act is not a bill of pains and penalties as (1) it is not an exercise of judicial power; and (2) in any event it does not have the defining characteristics of a finding of guilt or an imposition of punishment.

   (d) The Amendment Act is not an 'extreme law' falling outside the meaning of a 'law' of a State.

Section 117

5. As this Court explained in *H A Bachrach Pty Ltd v Queensland*:[1]

> …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.

6. An appreciation of the operation of an Act may require consideration of the context in which it was enacted;[2] and s 19 of the *Interpretation Act 1984* (WA) permits the use of 'any official record of proceedings in either House of Parliament' where it is 'capable of assisting in the ascertainment of the meaning of a provision.' The plaintiff, however, relies on Hansard[3] not for that purpose, but to 'attribute malevolent designs to the Minister or to other persons who promoted or supported the legislation'.[4] That is a use of Hansard which infringes parliamentary privilege.[5] But even in the absence of such an obstacle, the argument would not assist the plaintiff, just as it did not assist the plaintiff in *Bachrach*. It sheds no light on the 'nature of the rights, duties, powers and privileges which the statute changes, regulates or abolishes'.

7. Section 117 provides that a 'subject of the Queen', resident in any State, shall not be subject to any 'disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.' Where s 117 applies, it does not render a statute invalid. Section 117 'does not restrict legislative or other power' but 'confers an immunity on individuals or … confers a constitutional right not to be subjected to a certain disability or discrimination'.[6] 'Its protection is limited to

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1 *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547, 561 [12] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ) ('*Bachrach*').
2 *Bachrach* (1998) 195 CLR 547, 561 [12] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).
3 Plaintiff's submissions ('PS') [22]-[24].
4 *Bachrach* (1998) 195 CLR 547, 561 [12] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).
5 'It is incontestable that the courts will not examine the motives which inspire members of Parliament to enact laws': *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170, 225 (Mason J); *Queensland Harness Racing Ltd v Racing Queensland Ltd* [2013] 2 Qd R 372, 378-379 [20]-[21] (Peter Lyons J in relation to ss 8 and 9 of the *Parliament of Queensland Act 2001* (Qld); cf s 1 of the *Parliamentary Privileges Act 1891 (WA)*. See also Defendant's submissions ('DS') [22].
6 *Street v Queensland Bar Association* (1989) 168 CLR 461, 502-3 (Brennan J). See also 486 (Mason CJ), 541 (Dawson J), 582 (McHugh J) ('*Street*').

natural persons'.[7] It follows that, even if the Amendment Act were contrary to s 117 (which it is not), it would not 'fail[] in its purpose and [be] invalid in its entirety'.[8]

8. The settled position is that the terms of s 117 require:[9]

> a comparison of the actual situation of the out-of-State resident with what it would be if he were a resident of the legislating State.

9. The Amendment Act applies specifically to the plaintiff, certain companies, and specific contractual arrangements and their consequences.[10] That observation alone is enough to demonstrate that the plaintiff would be subject to exactly the same provisions of the Amendment Act if he were a resident of Western Australia rather than of Queensland.

10. It follows that the plaintiff's claim that the Amendment Act discriminates against him on the basis of his residency in Queensland, such as to engage s 117, should be rejected.

The Amendment Act is not an exercise of judicial power in relation to s 75(iv)

11. The plaintiff submits that the Amendment Act 'purports to exercise jurisdiction and adjudicative authority over matters between the State of Western Australia and me, the Plaintiff, a resident of the State of Queensland…in direct contravention of section 75(iv) of the Constitution which reserves that jurisdiction and adjudicative authority to Chapter III courts'.[11]

12. That submission should not be accepted. First, the Amendment Act does not constitute an exercise of judicial power, for the reasons set out in paragraphs [15] to [26] of Queensland's submissions in the B54 proceedings.

13. Second, even if the Amendment Act did constitute an exercise of judicial power, it was not an exercise of judicial power in a 'matter…between a State and a resident of another State' within s 75(iv).

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7 *Street* (1989) 168 CLR 461, 504 (Brennan J).
8 PS [34].
9 *Street* (1989) 168 CLR 461, 486 (Mason CJ). See to similar effect 507 (Brennan J), 529 (Deane J), 545 (Dawson J); 555 (Toohey J); 566-7 (Gaudron J), 582 (McHugh J).
10 See, for example, s 10 and 14 of the Amendment Act.
11 PS [35].

14. If the Amendment Act were an exercise of judicial power, it would be necessary to identify the 'matter' or 'justiciable controversy',[12] which existed prior to the enactment of the Amendment Act, and which was said to be 'quelled' by the enactment of the Act.

15. It has been said that the concept of a 'matter' is 'identifiable independently of the proceedings which are brought for its determination'.[13] However, in many cases, identifying whether the 'subject matter' for 'determination in a legal proceeding'[14] is within ss 75 or 76 of the *Constitution*, in the absence of any legal proceedings, would be conceptually difficult, if not impossible.[15]

16. In this case, however, no such difficulty arises. The controversy supposedly 'quelled' by the Amendment Act was not a 'matter … between a State and a resident of another State' for the purposes of s 75(iv). The Amendment Act concerns the plaintiff in a very limited respect. Materially, it creates a right of indemnity should the plaintiff seek to commence litigation in respect of a 'disputed matter' or a 'protected matter'. The creation of those liabilities, however, cannot be said to 'quell' any pre-existing controversy between Western Australia and the plaintiff. '[16]

17. In *Crouch v Commissioner for Railways (Qld)*, the plurality said:[17]

> the question whether a particular "matter" lies within the original jurisdiction of the Court under s 75(iv) as a matter "[b]etween States" or as a matter "between a State and a resident of another State" falls to be determined by reference to the substantial subject matter of the controversy and not by reference only to the form in which the legal proceedings involving it happen to be framed.

18. The 'substantial subject matter of the controversy', prior to the enactment of the Amendment Act, was not between Western Australia and the plaintiff. Rather, it was

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12 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 585 [139] (Gummow and Hayne JJ).
13 *Fencott v Muller* (1983) 152 CLR 570, 603 (Mason, Murphy, Brennan and Deane JJ).
14 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ).
15 Cf *Felton v Mulligan* (1971) 124 CLR 367.
16 Sections 14-16 and 22-24 of the Amendment Act and the definition of 'disputed matter' and 'protected matter' in s 7.
17 (1985) 159 CLR 22, 37 (Mason, Wilson, Brennan, Deane and Dawson JJ).

between Western Australia, Mineralogy Pty Ltd and International Minerals Pty Ltd.[18] That is not a dispute capable of constituting a 'justiciable controversy', or 'matter', within s 75(iv).[19]

19. The same conclusion would follow, even if it could be shown that the plaintiff was capable of being considered 'a necessary or proper party' to any proceedings which might have been commenced.[20] The 'substantial subject matter of the controversy' would nonetheless remain between the State and the companies, with the result that the matter could not be characterised as a 'matter between' a State and a resident of another State within s 75(iv).[21]

Amendment Act is not a bill of pains and penalties

20. The plaintiff submits that the Amendment Act is 'invalid as being, or being akin to, a bill of pains and penalties'.[22] In *Haskins v Commonwealth*,[23] a majority of this Court considered a bill of pains and penalties in the Australian constitutional context, by reference to the earlier decision in *Polyukhovich v Commonwealth*:[24]

> In *Polyukhovich*, it was pointed out that in the Australian constitutional context, an Act that is a bill of pains and penalties is not prohibited merely because it matches that description. As Dawson J said, "the real question is not whether the Act amounts to a bill of attainder [or a bill of pains and penalties], but whether it exhibits that characteristic of a bill of attainder which is said to represent a legislative intrusion upon judicial power". And Mason CJ, Toohey and McHugh JJ each made the same point.

21. In the State context, the 'real question' would be different. It is not whether the law satisfied the 'stricter tests' required with respect to the judicial power of the Commonwealth but instead whether it satisfied the 'lesser hurdle' presented by the

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18 See DS [26]; see also the Special Case at [22]-[42] (Special Case Book, 126-30).
19 *The Australasian Temperance and General Mutual Life Assurance Society Ltd v Howe* (1922) 31 CLR 290.
20 Cf *Burge v Commonwealth Bank of Australia* [2016] HCATrans 224 1432-49 (Gordon J).
21 *Cox v Journeaux* (1934) 52 CLR 282, 283-4 (Dixon J); *Union Steamship Co of New Zealand v Ferguson* (1969) 119 CLR 191, 196 (Windeyer J); *Rochford v Dayes* (1989) 63 ALJR 315, 316 (Gaudron J).
22 PS [69].
23 (2011) 244 CLR 22, 37 [25] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) (footnotes omitted).
24 (1991) 172 CLR 501.

reasoning in *Kable*.[25] In that respect, it is apt to emphasise that, as explained in Queensland's submission in B54/2020,[26] if Ch III would not prevent the Commonwealth from enacting a law of the same kind, then the 'less stringent' requirements of *Kable* are met.[27] For that reason, the *Kable* principle does not arise for separate consideration here.

22. If the Court rejects the submission of the plaintiffs in the B54/2020 proceedings, that the Act is an 'interference with or usurpation of judicial power', then it follows that the plaintiff's contention that the Amendment Act is a bill of pains and penalties must also fail.

23. Further, in *Duncan v New South Wales*, the Court explained that:[28]

> Two features are commonly identified as underlying the characterisation of a law as a bill of pains and penalties, and as thereby "a legislative intrusion upon judicial power". One is legislative determination of breach by some person of some antecedent standard of conduct. The other is legislative imposition on that person (alone or in company with other persons) of punishment consequent on that determination of breach.

24. As in *Haskins v Commonwealth*, here there has been no 'legislative finding of contravention of a norm of conduct'.[29] Accordingly, there can have been no legislative imposition of punishment 'consequent on [a] determination of breach'.

25. In *Kariapper v Wijesinha*,[30] Sir Douglas Menzies said, of the disabilities imposed by the statute in that case, that 'the principal purpose which they serve is clearly enough not to punish but to keep public life clean for the public good.' That passage was cited with approval by the Court in *Duncan v New South Wales*,[31] with the observation that the legislation at issue in *Duncan* also did not punish but 'serve[d] the legislative purpose of

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25 *Baker v The Queen* (2004) 223 CLR 513, 534 [51] (McHugh, Gummow, Hayne and Heydon JJ) ('*Baker*').
26 See [4(b)], [15] of Queensland's submissions filed in the B54/2020 proceedings.
27 *Baker* (2004) 223 CLR 513, [51] (McHugh, Gummow, Hayne and Heydon JJ).
28 *Duncan v New South Wales* (2015) 255 CLR 388, 408 [43] (French CJ, Hayne, Kiefel, Bell, Gageler, Keane and Nettle JJ) (footnotes omitted) ('*Duncan*').
29 *Haskins v Commonwealth* (2011) 244 CLR 22, 39 [33] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). See also at 43 [49] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
30 [1968] AC 717, 736.
31 *Duncan* (2015) 255 CLR 388, 409-10 [49]-[50] (French CJ, Hayne, Kiefel, Bell, Gageler, Keane and Nettle JJ).

promoting integrity in public administration'. Here, the legislative purpose is plainly not to punish any person for any contravention of an antecedent standard, but to preserve public monies in Western Australia from a potentially devastating private claim for damages.[32]

Amendment Act not an 'extreme law' falling outside the meaning of 'law' of a State

10 26. In *Minogue v Victoria*, the plaintiff submitted that the impugned legislation was invalid because it was 'inconsistent with the constitutional assumption of the rule of law'.[33] However, in circumstances where the legislation did not impose punishment on Mr Minogue additional to that imposed by the Supreme Court of Victoria at the time of his sentencing, the plurality concluded that his submissions as to the rule of law, fell away.[34] The same conclusion applies here: if the Amendment Act is not a bill of pains and penalties, the plaintiff's submissions regarding 'extreme laws', fall away.

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27. In any event, the submissions should not be accepted.

28. The plaintiff submits that this Court should recognise 'a constitutional limit on the powers of State Parliaments in the case of "extreme" laws'.[35] This limit is said to be 'a previously identified qualification' to the proposition in *Durham Holdings Pty Ltd v New South Wales*[36] that the State has no obligation to provide compensation on just
30 terms.[37] The Amendment Act is said to be invalid by reason of exceeding that constitutional limitation.

29. In *Durham Holdings*, this Court unanimously held that a State Parliament has the legislative power to deprive a person of property without just compensation.[38] In a separate judgment, Kirby J considered in *obiter dicta* that State Parliaments 'must be of a kind appropriate to a State of the Commonwealth and to a legislature that can fulfil
40 functions envisaged for it by the Constitution'. It followed, Kirby J reasoned, that 'a law

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32 DS [11].
33 (2019) 93 ALJR 1031, 1035 [6] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
34 (2019) 93 ALJR 1031, 1038 [25] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
35 PS [76].
36 (2001) 205 CLR 399 ('*Durham Holdings*').
37 PS [76].
38 *Durham Holdings* (2001) 205 CLR 399, 408 [7], 410 [14] (Gaudron, McHugh, Gummow and Hayne JJ, Callinan J agreeing at 433 [79]), 425 [56] (Kirby J).

of a State', made by such a Parliament, 'could only be a "law" of a kind envisaged by the Constitution'. His Honour postulated that '[c]ertain "extreme" laws might fall outside that constitutional presupposition'.[39] No other justice considered that question[40] and Kirby J's reasons in this regard have never been adopted by any other justice in this Court.

10 30. The plaintiff asserts that the Amendment Act falls outside Kirby J's constitutional presupposition and in truth is not a 'law' at all. However, he does not develop or make good that proposition.[41]

31. In the result in *Durham Holdings*, Kirby J held that although the law in that case, which denied compensation, 'apparently involve[ed] discrimination and arguably injustice to the applicant', it fell 'far short of the extreme instance that would enliven any of the foregoing constitutional implications'.[42] His Honour observed:[43]

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> The complaints of discrimination and injustice in these proceedings are therefore complaints of a political and not of a legal character. They must be addressed to the government and members of the Parliament of the State and ultimately to the electors. The courts cannot respond to them.

32. The plaintiff has not shown why the result here should be any different.

30 33. It is therefore unnecessary for the Court to decide in this matter whether State legislative power might be limited in the way suggested by Kirby J in *Durham Holdings*. If the Court were to consider that question, it should find no such limit exists.

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39 *Durham Holdings* (2001) 205 CLR 399, 431 [74] (Kirby J).
40 Although Callinan J at 433 [79] did reserve his position on 'the existence or otherwise, or the nature of, any unexpressed limits upon the legislative powers of the States', considering it unnecessary to decide.
41 PS [77]-[78].
42 *Durham Holdings* (2001) 205 CLR 399, 432 [76] (Kirby J).
43 *Durham Holdings* (2001) 205 CLR 399, 432 [77] (Kirby J).

PART IV: Time estimate

34. It is estimated that 5 minutes will be required for presentation of Queensland's oral argument.

Dated 28 May 2021

EJ Longbottom QC
Counsel for the Attorney-General for Queensland
Telephone: 07 3012 8221
Facsimile: 07 3175 4666
e.longbottom@qldbar.asn.au

Felicity Nagorcka
Counsel for the Attorney-General for Queensland
Telephone: 07 3031 5616
Facsimile: 07 3031 5605
felicity.nagorcka@crownlaw.qld.gov.au

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BETWEEN:

CLIVE FREDERICK PALMER
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and

STATE OF WESTERN AUSTRALIA
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ANNEXURE TO THE SUBMISSIONS OF

THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND

	Description	**Relevant date in force**	**Provision**
1.	*Commonwealth Constitution*	Current	Ch III, ss 75, 76 and 117
Statutes			
2.	*Interpretation Act 1984* (WA)	Current (version as in force from 12.09.2020)	s 19
3.	*Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA)	As enacted 13.08.2020	
4.	*Parliamentary Privileges Act 1891* (WA)	Current (version as in force from 12.09.2014)	s 1