HIGH COURT OF AUSTRALIA

NOTICE OF FILING

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Details of Filing

File Number:	B52/2020
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Registry:	Brisbane
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Important Information

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IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY

NO B52 OF 2020

BETWEEN: **CLIVE FREDERICK PALMER**

Plaintiff

AND: **WESTERN AUSTRALIA**

Defendant

NO B54 OF 2020

BETWEEN: **MINERALOGY PTY LTD (ACN 010 582 680)**

First Plaintiff

INTERNATIONAL MINERALS PTY LTD

(ACN 058 341 638)

Second Plaintiff

AND: **WESTERN AUSTRALIA**

Defendant

OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

Filed on behalf of the Attorney-General of the Commonwealth (intervening)

PART I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Appropriate approach to resolving the proceeding

2. The Amendment Act seeks to achieve its objective in multiple, cumulative ways. Each of the 7 layers identified by WA (**WA OOA [3]; WA/B54 [34]-[42]**) can be usefully conceived as a series of defensive walls. If the Court holds that each of ss 9, 10, 11(1) and (2), and 19(1) and (2) are valid (the **determinative provisions** — effectively the first 2 layers identified by WA), that would determine the rights and liabilities of the parties, and obviate the occasion for most of the other provisions to operate (**Cth/B54 [56]**).

3. The validity of the determinative provisions does not depend on whether any other provisions of the Amendment Act are invalid, because, if necessary, those other provisions could be partially disapplied or severed (as ss 8(4) and (5) require). It would defeat the obvious purpose of enacting multiple lines of defence to construe the Amendment Act as operating so that, if any line of defence is invalid, the entire Act is invalid.

   - *Clubb* (2019) 267 CLR 171 at [140], [141], [148] (Gageler J), [339]-[341] (Gordon J), [426]-[443] (Edelman J) (**Vol 7, Tab 57**).

4. To the extent that it is unnecessary to answer constitutional questions in order to determine the rights and liabilities of the parties, it is ordinarily inappropriate to answer those questions (**Cth/B54 [57]**).

   - *Zhang* (2021) 95 ALJR 432 at [21]-[22] (the Court) (**Vol 23, Tab 157**).
   - *LibertyWorks* [2021] HCA 18 at [90] (Kiefel CJ, Keane and Gleeson JJ).

5. There are four reasons that apply (in different combinations) to make it unnecessary, and therefore inappropriate, to determine the validity of the remainder of the Amendment Act. They are: (1) if the determinative provisions are valid, that will determine the rights and liabilities of the parties, leaving no room for other provisions to affect those rights or liabilities; (2) some provisions can never have any operation; (3) for some provisions a state of facts does not yet exist — and may never exist — that requires the legal efficacy of those provisions to be determined; and (4) some provisions are not the subject of individual challenge (not being included in Question 2). In applying those reasons, it is convenient to analyse the balance of the Act by reference to six categories.

6. **Category 1 (ss 11(3)-(4), 13(4), 19(3)-(4), 21(4))**: These provisions are properly construed as applying only if WA pleads them as a defence. As there is nothing in the Special Case to indicate that WA has done so, a state of facts does not exist (and may never exist) that makes it necessary to determine their validity (reason 3) (**Cth/B54 [58]**). Further, for **ss 11(3)-(4) and 19(3)-(4)**, if the determinative provisions are valid, then that will obviate any occasion for these provisions to operate, as they concern proceedings about liabilities that the Court will have ruled have been extinguished (reason 1).

- *DMA18* (2020) 95 ALJR 14 at [4], [26]-[28], [31] (the Court) (**Vol 20, Tab 143**).

7. **Category 2 (s 18(5)-(7))**: The Special Case identifies only one proceeding in which these provisions could apply, being a proceeding in the Federal Court (sitting in Queensland). There is nothing in the Special Case that indicates that their operation has been raised in those proceedings (reason 3). The parties correctly recognise that these provisions cannot apply for their own force in federal jurisdiction (**MS [120]**; **WA/B54 [123]**). It is neither necessary nor appropriate for the Court to decide whether these provisions would be picked up by s 79(1) of the Judiciary Act, because: (a) the Special Case does not reveal the existence of a proceeding in federal jurisdiction in WA; and (b) the questions reserved for the Full Court do not raise that issue (**Cth/B54 [59]**). For those reasons, no question arises as to whether s 64 of the Judiciary Act "otherwise provides".

8. **Category 3 (ss 11(5)-(6), 12(4)-(7), 13(5)-(8), 19(5)-(6), 20(4)-(7) and 21(5)-(8))**: These provisions will never have any operation, as there were not, and cannot now be, any proceedings of the kind to which they would apply (**Cth/B54 [60]**). Any question as to the validity of these provisions is therefore wholly hypothetical (reason 2).

9. **Category 4 (ss 14, 15, 16, 22, 23 and 24)**: If the determinative provisions are valid, these indemnity provisions at least substantially concern proceedings about liabilities that the Court will have ruled have been terminated or extinguished (reason 1). With the exception of s 14(4), a state of facts does not exist, and may never exist, that makes it necessary for the Court to determine their validity (reason 3) (**Cth/B54 [61]**).

10. **Category 5 (ss 17 and 25)**: If the determinative provisions are valid, then the "liability" of the State to which all these provisions refer do not exist (reason 1) (**Cth/B54 [62]**). The Court should not rule on how these provisions would operate in the hypothetical situation that there is a judgment that the State proposes not to meet (reason 3).

11. **Category 6 (s 30)**: The Minister has not exercised the s 30 power, and there are no facts in the Special Case to suggest that the Minister is intending to do so. There is therefore

no state of facts that would make it necessary to determine the validity of s 30 (reason 3) (**Cth/B54 [63]**).

Determinative provisions are consistent with Ch III

12. The determinative provisions, as well as s 14(4), alter the substantive rights and liabilities of the parties (**Cth/B54 [36], [43], [46]**). The fact that legislation gives past events different legal consequences than they would otherwise have had does not lead to invalidity, even if its operation can be characterised as harsh.

    - *Kuczborski* (2014) 254 CLR 51 at [217]-[221] (Crennan, Kiefel, Gageler and Keane JJ) (**Vol 10, Tab 79**).

13. This Court has held on many occasions that a law that modifies substantive rights and liabilities is not inconsistent with Ch III, even if those rights and liabilities are the subject of pending litigation. Those authorities establish that a change in the substantive law — including a change brought about by a provision that something is "taken always to have been valid" — is <u>not</u> an impermissible direction to a court (**Cth/B54 [14]-[16]**).

    - *BLF Case* (1986) 161 CLR 88 at 94, 96-97 (the Court) (**Vol 3, Tab 43**);
    - *Duncan v ICAC* (2015) 256 CLR 83 at [25]-[28] (French CJ, Kiefel, Bell and Keane JJ), [41]-[42] (Gageler J), [45] (Nettle and Gordon JJ) (**Vol 8, Tab 63**).

No inconsistency between the Amendment Act and the Commercial Arbitration Acts

14. There is no conflict between the Commercial Arbitration Acts and the Amendment Act. The effect of s 36(1)(a)(i) of the Commercial Arbitration Acts is that WA may resist enforcement or recognition on the basis that, by reason of s 10(5) and (7) of the Agreement Act, the arbitration agreement is invalid under WA law (**Cth/B54 [34]-[35]**).

    - *Dallah Real Estate* [2011] 1 AC 763 at [67]-[68] (Lord Mance), [127]-[128] (Lord Collins) (**Vol 19, Tab 129**).

15. The possibility that a court might refuse to apply a law of another State that makes an arbitration agreement invalid on public policy grounds cannot arise with respect to s 10 of the Amendment Act, because s 118 of the Constitution prevents refusal to apply the law of another State on that basis (**Cth/B54 [10] fn 3**).

16. Even if there were a conflict, s 118 of the Constitution would not operate to resolve the inconsistency in the manner advanced by the Plaintiffs.

Stephen Donaghue **Frances Gordon** **Thomas Wood** **Jackson Wherrett**

17 June 2021