



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

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Registry: Brisbane  
Document filed: Form 27F - Outline of oral argument  
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IN THE HIGH COURT OF AUSTRALIA  
BRISBANE REGISTRY

No. **B52 of 2020**

BETWEEN:

**CLIVE FREDERICK PALMER**  
Plaintiff

and

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**STATE OF WESTERN AUSTRALIA**  
Defendant

IN THE HIGH COURT OF AUSTRALIA  
BRISBANE REGISTRY

No. **B54 of 2020**

BETWEEN:

**MINERALOGY PTY LTD (ACN 010 582 680)**  
First Plaintiff

and

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**INTERNATIONAL MINERALS PTY LTD (ACN 058 341 638)**  
Second Plaintiff

and

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**STATE OF WESTERN AUSTRALIA**  
Defendant

**OUTLINE OF ORAL SUBMISSIONS**  
**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND**

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

17 June 2021

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## **PART I: Internet publication**

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

## **PART II: Outline**

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### **Severance**

- 10 2. Queensland relies on its written submissions, save that Queensland now adopts the Commonwealth's submissions as to which provisions are determinative.

### **Manner and form**

3. Assuming cl 32 is engaged, Queensland makes three points on the manner and form question.
- 20 (a) *First*, cl 32 does not have the force of 'a law made...by the Parliament' as prescribed by s 6 of the *Australia Act 1986* (Cth) (**QS [45] adopting B52DS [94]-[96]**).
- (b) *Second*, in the alternative, if cl 32 is construed to remove Parliament's power to amend the agreement unilaterally (which it should not be: **cf QS[48]**), it is not a 'manner and form' provision because it impermissibly purports to prohibit Parliament from legislating on the subject matter of variation of the Agreement in 'any manner and form' (*Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394, 419 (Rich J), 431 (Dixon J), 443 (McTiernan J) [**JBA 2.39.667;679;691**]; *Commonwealth Aluminium Corporation Ltd v Attorney-General* [1976] Qd R 231, 237 (Wanstall J) [**JBA 19.126.7770**]; see also *West Lakes v South Australia* (1980) 25 SASR 389 at 398 (King J).
- 30 (c) *Third*, 'the operation that [the *Australia Act 1986* (Cth)] is to be given as a law of the Commonwealth in relation to State law [is] by s 109 of the Constitution': *Attorney-General (WA) v Marquet* (2003) 217 CLR 545, 570-1 [67] (Gleeson CJ, Gummow, Hayne and Heydon JJ) [**JBA 2.41.761,787**].
- 40 - An analysis of the 'extent of the inconsistency' for the purposes of s 109 begins with the proper construction of the Commonwealth Act, and, here, the meaning of 'a law made ... by the Parliament of a State' in s 6.

- Another construction of ‘law’ for s 6 of the *Australia Act 1986* (Cth) is that it does not necessarily refer to a statute ‘taken as a unit’. A ‘law’ is not the instrument, but the ‘rule’ resolved upon and adopted by the legislative organ.
- cf *Momcilovic v The Queen* (2011) 245 CLR 1, 106 [226]-[228] (Gummow J) [**JBA 11.86.4633**]
- It is only a ‘law’, as so understood, which s 6 of the *Australia Act* provides ‘shall be of no force or effect’ if enacted in non-compliance with a valid and applicable manner and form provision

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### Section 118

4. Queensland adopts the submissions of the defendant that prior to a positive act of recognising an award, ss 35 and 36 of the CAAs have no operation.

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- cf *TCL Air Conditioner v Federal Court* (2013) 251 CLR 533 [22]-[23] [**JBA 16.110.6630-1**]

5. In the alternative, Queensland supplements its written submissions (**QS [50]-[60]**) in the following respects. The Amendment Act has the effect that the first and second awards are not ‘arbitral awards’ for the purposes of s 35 of the *Commercial Arbitration Act* of any jurisdiction. (**QS [54]-[58]**).

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- (a) Section 35 of each CAA applies only to an ‘arbitral award’.
- (b) The CAA (WA) made the first and second awards, ‘arbitral awards’ for the purposes of s 35 of the CAA of each jurisdiction.
- (c) That is made explicit by s 31, which stipulates the form and content requirements of an award. Section 31 of the CAA (WA) applies only if the place of the arbitration is Western Australia (s 1(2)).
- (d) Having given the awards the status of an ‘arbitral award’ for the purposes of s 35, the Western Australian Parliament can take away that status. That is the effect of sections 10(4) and (6) of the Amendment Act.

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- (e) There is therefore no inconsistency between the Amendment Act, and s 35 of the CAAs of other jurisdictions. Nor can it be said that the Amendment Act fails to give ‘full faith and credit’ to s 35 of the laws.
- (f) The point is conceptually no different from the operation of s 34 and a 34A of the CAA (WA) (which also only apply if the place of the arbitration is Western Australia – s 1(2)). These laws similarly remove the status of an award as an ‘arbitral award’ for the purposes of s 35.
- (g) For that reason, if ss 10(4) and (6) are valid, there can never be ‘enforcement’ of the awards under s 36 of any CAA, because they are not ‘arbitral awards’ for the purposes of that section.
- (h) Were ss 10(4) and (6) invalid, then ss 10(5) and (7) would make the arbitration agreements ‘not valid under the law to which the parties have subjected it’ for the purposes of s 36(1)(a).

Dated: 17 June 2021.

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