IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S163 of 2012

BETWEEN

Fortescue Metals Group Limited
ACN 002 594 872
First Plaintiff

Chichester Metals Pty Limited
ACN 109 264 262
Second Plaintiff

FMG Pilbara Pty Limited
ACN 106 943 828
Third Plaintiff

FMG Magnetite Pty Limited
ACN 125 124 405
Fourth Plaintiff

FMG North Pilbara Pty Limited
ACN 125 154 243
Fifth Plaintiff

AND

The Commonwealth of Australia
Defendant

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

Part I - Publication on the internet

1. These submissions are suitable for publication on the internet.

Date of document: 21 December 2012
Filed on behalf of: the Attorney-General for the State of Queensland

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Part II – Basis for intervention

2. The Attorney-General for the State of Queensland intervenes pursuant to s.78A of the *Judiciary Act* 1903 (Cth).

Part III – Leave to intervene

3. Leave to intervene is not required.

Part IV – Relevant Legislative Provisions

4. The relevant legislative provisions are extracted in the Plaintiff's submissions.

Part V – Statement of Argument

1. It is submitted that this case raises questions which can be posed in this way:

(a) Two polities each seek to exact an economic rent from an investor in a mining project in respect of the same mineral resource in order to fulfil their governmental functions. The first polity determines that the appropriate rent is a low one and imposes a rent by way of royalty. The second polity determines that the appropriate rent is a higher one; it therefore determines to impose an economic rent in whatever amount, when added to the lower rent imposed by the first polity, will result in its chosen higher figure.

(b) If the second polity is the Commonwealth and it exacts its rent by way of a tax, does the resulting tax breach the limitation of power in s.51(ii) because the tax will vary from one mineral resource to another according to the rate of royalty applied by State legislation?

(c) Does the law which imposes the tax impermissibly curtail an important capacity of a State,[1] namely the scope of its power to exact economic rent for its mineral resources?

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[1] *Austin v Commonwealth* (2003) 215 CLR 185 at 249

2. The exaction of "economic rent" by a government from a person in respect of the privilege of mining resources within its jurisdiction may be regarded as a duty of government.[2] That is so for a number of reasons. First, in Australia, as in some other countries, mineral rights are treated as belonging to the state representing the community and it is right that persons who wish to exploit those resources should pay the community what they are worth. Second, the exaction of rents, as royalties or as taxes, yields substantial amounts of revenue for public use. Third, the encouragement of mining, with its hoped-for resulting economic benefits, is a proper function of government (as is appropriate discouragement of mining).[3]

3. The States, as well as the Commonwealth, are all possessive and jealous of this governmental power and the ability to use it both to derive revenue and to stimulate investment. This can be seen, for example, from the history of the legislation and agreements pertaining to off-shore petroleum mining. The scope of the respective rights of the Commonwealth and the States to resources under the seabed adjacent to the States was a matter of controversy and so that history is a demonstration of the competition (and some co-operation) between the Commonwealth (utilizing its superior power to tax by way of excise) and the States (using their powers as putative owners of the resource and exacting a royalty).[4] As part of that competition, for example, Victoria's attempt to impose an economic rent by way of pipeline licensing fees was held to constitute an invalid excise.[5] An agreement in 1967 led to a legislative scheme which involved mirror Commonwealth and State legislation providing for a

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[2] *cf. Seamen's Union of Australia v Utah* (1978) 144 CLR 120 at 133.5 per Gibbs CJ

[3] The impugned Acts in this case recognise these matters in a number of ways. First, the objects of the *Mineral Resources Rent Tax Act* 2012 includes the object of ensuring that "the Australian community receives an adequate return for its taxable resources": Section 1.10. The Explanatory Memorandum speaks of Australia having "some of the world's largest and most valuable deposits of iron ore and coal": paragraph 2.2. And see *Taxation of Mineral Rents* Garnaut and Clunies–Ross, Clarendon Press, (1983) at 19-20.

[4] See the discussion in *Federalism in Action,* Richard Cullen, Federation Press, 1990, at 65 - 71

[5] *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599

national offshore mining regime and a revenue sharing arrangement.[6] This was subsumed in a further agreement in 1979 which foreshadowed legislation to vest proprietary rights and title in the seabed under the territorial sea.[7]

4. The result of those successive agreements was to establish statutory schemes to exact an economic rent in consideration of the grant of a right to mine for petroleum. The revenue constituted by that rent was shared between State and Commonwealth.

5. The present case concerns a conflict between the desire of the Commonwealth and a State both of which wish to exact an economic rent from the same resource but upon different bases. It therefore involves the attempt (whether successful or not) by the Commonwealth to exact an economic rent from mineral resources while avoiding the obstacles constituted by:

   (a) The fact that the resources are not its "property";
   (b) The absence of a head of power in respect of minerals or mining;
   (c) The use instead of the taxation power which is expressly limited;
   (d) The limitation upon Commonwealth legislative power represented by the Melbourne Corporation Doctrine.

6. It is submitted that it is necessary to apprehend the character and content of the taxes in question in order to be able accurately to determine whether the Acts offend the Constitution in any way.

7. The Explanatory Memorandum states:

> A resource rent tax collects a percentage of the resource project's economic rent.[8]

8. This raises the question: what is "economic rent"?

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[6] see *Petroleum (Submerged Lands) Act* 1967 (Cth); *Petroleum (Submerged Lands)(Royalty) Act* 1967 (Cth); and, eg, *Petroleum (Submerged Lands) Act* 1967 (WA). Other States had mirror legislation.
[7] See *Federalism in Action, (supra),* at 108; and eg *Coastal Waters (State Title) Act 1980*
[8] *Explanatory Memorandum,* paragraph 1.9

9. As the Explanatory Memorandum to the Acts shows,[9] the immediate Australian progenitor of the tax is the work of Professors Ross Garnaut and Anthony Clunies-Ross, whose book, *Taxation of Mineral Rents,*[10] was the seminal work which articulated and clarified the available tax systems for mining and identified, by reference to economic theory, the theoretical foundation for those systems. Those authors drew upon the work of the economist David Ricardo in connection with agricultural land:[11]

> Rent is that portion of the produce of the earth, which is paid to the landlord for the use of the original and indestructible powers of the soil. It is often, however, confounded with the interest and profit of capital, and, in popular language, the term is applied to whatever is annually paid by a farmer to his landlord. If, of two adjoining farms of the same extent, and of the same natural fertility, one had all the conveniences of farming buildings, and, besides, were properly drained and manured, and advantageously divided by hedges, fences and walls, while the other had none of these advantages, more remuneration would naturally be paid for the use of one, than for the use of the other; yet in both cases this remuneration would be called rent. But it is evident, that a portion only of the money annually to be paid for the improved farm, would be given for the original and indestructible powers of the soil; the other portion would be paid for the use of the capital which had been employed in ameliorating the quality of the land, and in erecting such buildings as were necessary to secure and preserve the produce...
>
> If, indeed, after the timber was removed, any compensation were paid to the landlord for the use of the land, for the purpose of growing timber or any other produce, with a view to future demand, such compensation might justly be called rent, because it would be paid for the productive powers of the land...
>
> In the future pages of this work, then, whenever I speak of the rent of land, I wish to be understood as speaking of that compensation, which is paid to the owner of land for the use of its original and indestructible powers.[12]

10. Economic rent is, therefore, the reward that a landowner could derive simply by being a landowner and without exerting any effort; it could be taken to refer

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[9] *Explanatory Memorandum,* paragraph 1.10 to 1.15.

[10] Clarendon Press (1983)

[11] Economist, (1772-1823), *On the Principles of Political Economy and Taxation, Chapter 2*

[12] The case of the rent of a mine is different from that of rent for agricultural land, for a mine can be exhausted while agricultural land, for this theoretical purpose, cannot. But otherwise, the analysis remains the same Ricardo, *op. cit.* Chapter 3; see also, for example, *Rent under the assumption of exhaustibility,* (1914) *Quarterly Journal of Economics* 466, L.C.Gray

to the reward accruing purely and simply to the possession of any property.[13] It is calculated by reference to the value of the mined material less all the costs of production.[14]

11. Garnaut and Clunies-Ross, in an article which preceded their book, observed that "control of the terms of access to natural resources gives governments *the power to extract Ricardian rent from the use of these resources.*"[15] (italics added).

12. They identified six main methods by which such rent might be determined and imposed as a tax.[16]

10 13. The premise of their analysis was that some extra tax (beyond the ordinary profit tax) must be imposed so as to collect for the public some part at least of "the rent or property value of a mineral resource" that is handed over to a private contractor.[17] In countries, such as Australia, in which mineral rights are treated as belonging to the public, taxation or additional charges on private parties who are granted the right to remove minerals can thus be seen, they said, as the price of exploitation of a public asset.[18]

14. The "Resource Rent Tax" was the method developed by these economists by which a State could collect the "rent or property value of the mineral

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[13] *Taxation of Mineral Rents* at 27
[14] *Taxation of Mineral Rents* at 17-18
[15] *Uncertainty, risk aversion and the taxing of natural resource projects,* Garnaut and Clunies-Ross, (1975) 85 *Economic Journal* 272
[16] *Taxation of Mineral Rents, op. cit.,* Charging a flat fee independent of the outcome of the investment; specific or *ad valorem* duty, that is to say, "royalties"; imposition of a higher-than-normal rate of income tax upon miners; Progressive Profit Tax; Resource Rent Tax; Brown Tax. *ibid,* at 91- 103 (with some variants)
[17] *ibid* at 91
[18] *ibid* at 18

resource".[19] They regarded it as superior to a royalty scheme (for reasons which they describe but which it is not necessary to consider).[20]

15. Their method involves the following considerations:

(a) The rent is assessed on a project rather than on a company (because it is a payment in respect of a quantity of minerals and not in respect of company profits).[21]

(b) It is a tax that is a proxy of the rent that can be charged by a reason of ownership of minerals in the ground. (It is only a "tax" because the State, rather than an individual, owns the resource and collect "revenue from their mineral endowments" and so it is not paid in consideration for anything.)[22];

(c) It is a charge that is imposed in respect of the removal of minerals;

(d) The tax, or economic rent, represents the value of the resource,[23] which is commonly taken to belong to the community;[24]

(e) The economic rent, is equal to the value of the produce of the resource less the costs of production. The tax will be a proportion of that amount.

16. Consequently, two of the ineradicable characteristics at the heart of the concept of a royalty are equally so in the case of a resource rent tax:

(a) They are exactions imposed upon a person in respect of that person's removal of minerals;[25]

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[19] Uncertainty risk aversion and taxing of natural resource projects, (1975) 85 *Economic Journal* 272

[20] It is submitted that, but for the feature that a royalty is paid in consideration of the right to take minerals, it would be a tax and, if imposed by a State, an invalid excise. Whether an economic rent is exacted by a polity in the form of a tax or in the form of a royalty, it remains the same thing in substance.

[21] *Taxation of Mineral Rents, op. cit.,* 97

[22] *Ibid.* at 2

[23] *Ibid.* at 3

[24] *Ibid.* at 3

(b) The amount of these exactions is calculated in respect of the quantity or value of minerals taken.[26]

17. The Explanatory Memorandum and the recommendations of the "Policy Transition Group"[27] whose members performed the "detailed design" of the tax, provide accurate summaries of significant features of the tax imposed by the Acts.[28] The Policy Transition Group said:

(a) A resource rent tax is designed to capture a portion of the rents earned from the extraction of non-renewable resources... It is one mechanism for pricing the resource from which mining companies earn their profits, by transforming the resource in the ground to a saleable commodity.[29]

(b) The tax is one which is "levied on the net value of a resource at a defined point in the production value chain".[30]

(c) State royalties imposed upon the same project as the resources rent tax "are viewed as another way of taxing[31] the resource, and so are credited against the liability for" resources rent tax "to avoid double taxation."[32]

18. The Explanatory Memorandum observes that:

(a) The majority of Australia's non-renewable resources are publicly owned. The rights to these non-renewable resources are vested in "the Crown".[33]

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[25] see *Stanton v FCT* (1955) 92 CLR 630 at 641.9 per Dixon CJ, Williams, Webb, Fullagar and Kitto JJ

[26] see *Stanton v FCT (supra)* at 642; *McCauley v FCT* (1944) 69 CLR 235 at 241.5 per Latham CJ, at 243-244 per Rich J

[27] *Technical Design of the Mineral Resources Rent Tax,* 1 October, 2010, Policy Transitions Group Issues paper.

[28] *Explanatory Memorandum*, at 1.22

[29] Issues Paper at page 7; and at page 9: "Resource rent taxes ... are a mechanism for charging for the use of non-renewable resources through the taxation of resource profits".

[30] *Ibid.* at page 9

[31] the use of the word "taxing" used in relation to State royalties may be misleading; if royalties were a tax, they would be duties of excise. Rather, they are payments for the right to exploit resources.

[32] *Ibid.* at page 9

(b) States and Territories typically tax non-renewable energy sources by applying a royalty to production;

(c) But such royalties "may only recover a portion of mining rents when mining profits are high":[34]

(d) A resource rent tax collects a percentage of the resource project's economic rent.[35]

(e) A key purpose of the tax is to tax the economic rents from the non-renewable resources after they have been extracted. The profit attributed to the resource at this point represents the value of the resource to the Australian community.[36]

19. The following submissions can be made.

Section 51(ii)

20. Minerals in the ground of Western Australia are property of that State. Section 3 of the *Western Australia Constitution Act* 1890 (*Imp.)* provides:

> The entire management and control of the waste lands of the Crown in the colony of Western Australia, and of the proceeds of the sale, letting and disposal thereof, including all royalties, mines and minerals, shall be vested in the legislature of that colony.[37]

21. Section 9(1) of the *Mining Act* 1978 (WA) provides:

> Subject to this Act-
> all gold, silver and any other precious metal existing in its natural condition on or below the surface of any land whether alienated or not alienated from the Crown and if alienated whenever alienated is the property of the Crown;

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[33] *Explanatory Memorandum* at 1.4. The particular "the Crown" is a matter not adverted to.
[34] *Ibid.* at 1.8
[35] *Ibid.* at 1.9
[36] *Ibid.* at 2.8
[37] New South Wales and Victoria had identical provisions as part of the *New South Wales Constitution Statute* 1855 and the *Victorian Constitution Statute* 1855. Queensland had an equivalent provision in its *Constitution Act* 1867 section 40 (now part of attachment4 to the *Constitution of Queensland* 2001

> all other minerals existing in their natural condition on or below the surface of any land that was not alienated in fee simple from the Crown before 1 January 1899 are the property of the Crown[38]

22. In *Western Australia v Ward,*[39] Gleeson CJ, Gaudron, Gummow and Hayne JJ said:

> But unlike the fauna legislation in considered in *Yanner v Eaton*, the vesting of property in minerals was no mere fiction expressing the importance of the power to preserve and exploit these resources. Vesting of property and minerals was the conversion of radical title to land which was taken at sovereignty to full dominion over the substances in question no matter whether the substances were on or under alienated or unalienated land.[40]

23. Therefore, although the word "property" is protean,[41] the use of that word, as well as the word "vested", in the context of these State Acts dealing with minerals, is apt to constitute such minerals "property of the State" within the meaning of s.114 of the Constitution. Consequently, unlike the position it enjoys with respect to the seabed, the Commonwealth can neither claim to be the owner of these resources; nor does it have any head of power to legislate directly in relation to them.

24. By reason of its ownership of, or dominion over, mineral resources within its borders, the State has a right to demand and be paid a mineral rent. Because the Commonwealth cannot obliterate that rent, it has chosen to impose a tax liability upon a taxpayer which will vary from project to project and from State to State by reference to the State laws exacting mineral rent. In the recommendations of the Policy Transition Group, State royalties imposed upon the same project as the resources rent tax "are viewed as another way of

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[38] Queensland has an equivalent provision in s.8 of the *Mineral Resources Act 1989;* These provisions were an Australian deviation from the English common law position under which royal metals were owned by the Crown but other minerals belonged to the owner of the land; see discussion in *Resources Law and Public Policy,* Michael Crommelin, (1983) *University of Western Australian Law Review* 1 and statutes referred to in footnote 18 therein.
[39] (2002) 213 CLR 1
[40] *Ibid.* at 186
[41] *Yanner v Eaton* (1999) 201 CLR 351 at 388-389

taxing[42] the resource, and so are credited against the liability for" resources rent tax "to avoid double taxation."[43] In terms of economic substance (although not in legal terms) that observation is true. It results in the consequence that, the tax imposed by the Commonwealth will vary, in its rate, according to the level of "tax" imposed by a State. If one looks at the sum of the Commonwealth tax and the State "tax", the rate will be uniform across the country.

25. But s.51(iv) directs attention to the uniformity of Commonwealth tax – not the sum of that tax and a State impost of the same nature[44] and s.51(ii) requires that consideration be given to the Commonwealth tax alone for it is only that tax which must not "discriminate between States". Under these Acts, in their operation, it is by force of Commonwealth law alone that the rate of tax changes according to the State in which the tax payer has its project.

26. The converse would be true if the Commonwealth tax imposed a uniform rate of tax so that the total economic rent payable by a taxpayer varied by reason of variations in State rents. In such a case, the discrimination would be due to the imposition of differing State rents.

27. The decision of the Privy Council in *Colonial Sugar Refining Co Ltd v Irving*[45] is not to the contrary. In that case, pursuant to a tariff made in 1902 under the *Excise Act 1901,* a duty of excise was imposed upon certain goods. The "imposition of uniform duties of excise" pursuant to the tariff was backdated to 8 October 1901. At that time, the States had still been free to impose their own duties of customs and excise: see ss.88 and 90 of the Constitution; and, from federation until the uniform imposition of Commonwealth customs duties, the Commonwealth would collect such State revenues: s.89 of the Constitution. It

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[42] the use of the word "taxing" used in relation to State royalties may be misleading; if royalties were a tax, they would be duties of excise. Rather, they are payments for the right to exploit resources.

[43] *Ibid.* at page 9

[44] The position of income tax, which is assessed by reference to criteria which go to make up "assessable income", a legal construct, is different: see *Conroy v Carter* (1968) 118 CLR 90 at 101

[45] (1906) AC 360

was in this legal context that s.5 of the *Excise Act 1901* imposed duties only upon goods that had the characteristics that they were manufactured before the imposition of Commonwealth excise duty, were subject to customs or excise control or supervision or in stock and on which no duty of customs or excise had already been paid.[46]

28. In short, goods in any State were dutiable at the full Commonwealth rate provided they answered the statutory description. The tariff was accordingly held not to involve discrimination between the States.

29. In *The King v Barger*[47] the majority observed, about *Irving,* that if the excise duty had been made to vary in inverse proportion to the Customs duties in the several States, so as to make the actual incidence of the burden practically equal, that would have been a violation of the rule of uniformity in s.51(ii).

30. It is respectfully submitted that that dictum is correct and should be applied here for the following reasons.

31. The Constitution contains several provisions whose terms exist in order to ensure that the *general* government by the Commonwealth of all of the people of Australia should not, in the case of trade, finance and taxation, vary from State to State despite local differences. The equal treatment of non-equals is required by ss.51(ii) and s51(iii) which concern taxes and, their obverse, bounties. It is also supported by ss.88, 90, 92, 99 and 102. Section 117 provides a requirement of equality from a further and different direction. The express exception in relation to State bounties contained in s.91 is an exception which emphasises the importance of the rule. It was inserted by reason of the perceived special need of the States in relation to the mining of metals.[48] Indeed, s.24, which provides for a House of Representatives chosen in proportion to the numbers of people in each State is an instance of the intention

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[46] (1906) AC at 365
[47] (1908) 6 CLR 41
[48] see *Convention Debates, Adelaide, 1897,* at 846 *et seq.*

of the Constitution to disregard local differences in the pursuit of a uniformly governed nation.

32. In *Bank of NSW v The Commonwealth*[49] Dixon J said:

> Moreover, when a constitution undertakes to forbid or restrain some legislative course, there can be no prohibition to which it is more proper to apply the principle embodied in the maxim *quando aliquid prohibitur, prohibitur et omne per quod devenitur ad illud.*

33. The restriction on legislative power in s.51(ii) should not be capable of circumvention by matters of form. The restriction is itself a matter of real substance which defines the character of the federation created by the Constitution.

34. For these reasons the *dicta* of the majority in *Barger*[50] should be accepted as a correct statement of the law. The Acts, in their own terms, seek to equalise the position of taxpayers by imposing a law which discriminates between them according to the State statutory regime under which the taxpayer is granted a right to extract minerals.

Melbourne Corporation Doctrine

35. The States' power over wastelands is a fundamental aspect of its character as a polity. The significance of the control of minerals and of mining, for good government, at least in Queensland and Western Australia, need not be described further.

36. The power to grant and to withhold the grant of permission to mine, accompanied by the power to impose terms upon a grant, is a power which States have as a consequence of their status as sovereign owners. In this respect, the status of a polity as "owner" of minerals is different from the status of an individual as such an owner. The latter may choose to profit personally

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[49] (1948) 76 CLR 1 at 350-351

[50] which, on this point, were not based on discarded constitutional doctrines

and must do so in the environment of the laws which the State has created. The former seeks to profit only for the benefit of the people and may choose to do so upon any terms constitutionally permitted. The permissible purpose of the exercise of the power of a polity to exploit natural resources is therefore more limited but also less trammelled by ordinary laws, which it can change.

37. The intrusion of the Commonwealth into the field of mining, by a law that concerns mining as such, risks intrusion into an area prohibited by the Melbourne Corporation doctrine.

38. It is submitted that consideration of the "substance and actual operation"[51] of the Acts is that they affect powers of the State inherent in State ownership of minerals and do so in a way that substantially weakens the ability of the State to use its power to permit or not to permit mining for the purposes identified in the Plaintiffs' submission at paragraph [110] – [122].

39. These laws discriminate directly against States by virtue of their express provisions which seek to negate the governing effect of the power to vary royalties under State laws. It is not surprising that the discriminatory effects in terms of s.51(ii) should also feature in a contravention of the *Melbourne Corporation* doctrine, for in both areas it is the Commonwealth law's effect in singling out State laws as objects of attention that attracts the constitutional limitations.

40. It is significant for this analysis that the subject of the Commonwealth law is mineral rent just as it is the subject of the relevant State laws. The whole purpose and effect of the Acts is to substitute a Commonwealth regime, as the dominate factor in governance of mining, for that of the States, so far as mineral rents are concerned in each jurisdictional sphere.

41. That the ability of the State to continue to obtain revenue from mining remains unimpaired is beside the point. The Acts do operate so as to obliterate a

[51] *Austin v The Commonwealth* (2003) 215 CLR 185 at [124]

significant governmental function, that of applying varying rates of royalty according to different State requirements.

Part VI – Time estimate for oral argument

42. Queensland estimates that its oral argument will take up to 1 hour.

Dated 21 December 2012

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