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

PLAINTIFFS' SUBMISSIONS IN REPLY

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Part I: PUBLICATION

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

Part II: ARGUMENT IN REPLY

2. **Re DS[5]-[13].** The Defendant's Submissions ("**DS**") make various assertions somewhat loftily described as "key, high level points". But the true "key" and "high level" points are found in the express and implied qualifications and limitations on Commonwealth legislative power found in ss. 51(ii), 91 and 99 of the *Constitution*, and in the *Melbourne Corporation* doctrine. The last sentence of DS[5] trivialises these matters. Parliament's powers are not unlimited and, as discussed in PS[32], [33] and below, the phrase "uniform rate of tax" is not an accurate description of the imposition. The plaintiffs' challenge is not because profits are taxed but because the tax is explicitly built to operate differently in different States, thus disregarding the constitutional limitations on Commonwealth power.

3. **Re DS[7], [8].** There is a material difference between the manner in which MRRT is imposed and the manner in which deductions for State imposts are permitted by the *ITAA*. The *ITAA*, s.8-1(1), unlike the MRRT legislation, is not structured to tax a specific amount (of profit) where that amount is, *of necessity*, derived by subtracting MRRT allowances (the first of which is the royalty allowance) where the royalty allowance differs in different States. Whilst the *ITAA* may presumably be defended on the basis that the Commonwealth income tax may practically happen to tax different amounts in different places, the MRRT legislation cannot be so defended. By design, MRRT is imposed on different amounts or at different effective rates in different States. That the adoption of such a course might contravene s.51(ii) was recognised as early as *Barger* (1908) 6 CLR 41: see PS[41].

4. **Re DS[9], [50(c)].** The US cases are not on point and should not be accepted as applicable to s.51(ii): see below at [17]ff. The last sentence of DS[9] highlights the error in the defendant's approach. The MRRT legislation was enacted in the face of existing and different State royalty regimes, and MRRT takes that difference directly into account by imposing Commonwealth tax differently or unequally in different States. That discrimination arose as soon as the MRRT legislation came into effect on 1 July 2012. The defendant has imposed MRRT discriminately by explicitly imposing it unequally in each State because it structured its tax to make the difference in State royalty rates matter as to the effective rate at which MRRT is levied. It is no answer to say that a State cannot complain because it set royalty rates differently to other States. The limitations relied on here are limitations on Commonwealth, not State, powers.

5. **Re DS[13], [14]-[29].** The assertions in DS[13] are, with respect, no more than posturing. However, the description of the operation of the provisions of the *MRRT Act* in these paragraphs does not appear to differ from that at PS[8]-[20].

6. **Re DS[22], [32], [61]-[63].** There is a material difference between the way other State-based taxes and State royalties are treated. Unlike State-based taxes as the defendant accepts (DS[24], [32]), State royalties are grossed-up before they are subtracted from "mining profit" before the 22.5% MRRT rate is applied to the difference.

7. The object of the *MRRT Act* is to ensure that MRRT is not payable to the extent that State royalties are payable. This is stated expressly in ss.60-1 and 60-5(a). The object was provided for by s.60-25, i.e. by providing that the "royalty credit" is calculated by dividing the State mining royalty by 22.5%. The grossing-up gives a "royalty credit" for State royalties by treating them *as if* they had been levied at 22.5%. (The object was apparently to avoid "double taxation": Defence at [60(d)xxvi.B] (QRB104)). This taxing structure discriminates as between States in that there is a direct but inverse relationship between the amount of

MRRT and State royalties. Further, the "grossing-up" to determine the "royalty credit" demonstrates that its subtraction from "mining profit" is not the same as allowing deductions for State-based taxes before levying income tax under the *ITAA*. Rather the amount paid by a miner by way of State royalties is an essential integer in the calculation of the MRRT payable by the miner.

8. **Re DS[30]-[32].** The contentions in these paragraphs should not be accepted. The MRRT legislation is structured so as to impose MRRT on miners in different States at different effective rates. It applies to miners differently because of their location in different States. It is not uniform across States. It is not to the point that MRRT is levied only on some residents in some States - it is levied on miners in each State unequally. That is sufficient for the limit on power in s.51(ii) to be engaged.

9. The equation in s.10-5 of the *MRRT Act requires* a different imposition of MRRT under s.3(1) of the *Imposition Acts* depending on the amount of MRRT allowances, the first of which includes State royalties. The argument that there is a uniform tax misstates the substance and effect of the MRRT legislation. Of necessity, the 22.5% "rate" is applied to a different amount in each State with respect to the allowance for State royalties. The fact that the allowance for royalties operates identically with Commonwealth, State and Territory royalties does not alter that.

10. **Re DS[34], [35].** The references to "a rule of reconciliation" and the complaint that the plaintiffs do not identify an appropriate such rule are quite inapposite. If the Commonwealth wishes to impose a tax on what it regards as "above normal" profits, it may do so. In doing so, however, it is bound by the constitutional limits on its powers to tax. It is not for the taxpayer to suggest means by which those limitations might be avoided. There are, however, obvious enough measures which would not offend the constitutional limitations. Thus the "above normal" profits could have been taxed uniformly and equally as between the States by identifying a sufficiently low rate of tax on "mining profit" and eliminating State royalty allowances. Section 96 of the *Constitution* could then have been utilised to compensate those States more affected. No such measure was adopted. Instead, by taxing at 22.5% on *different* amounts depending on the rate of State royalties, the MRRT captures more "above normal" profit from miners in those States that have lower royalties. That is impermissible.

11. **Re DS[36].** The contentions in DS[36] seek to diminish the importance of State royalties in the calculation of the MRRT payable by a miner in any year: PS[9]. But in no case can the amount of State royalty payable be disregarded. It has to be taken into account in calculating the miner's "MRRT allowances". The amount of those allowances will vary depending on the level of State royalties. An attempt to finesse that aspect, as in DS[36], should not be accepted. When MRRT is imposed and payable, it will of necessity be imposed and payable on different amounts in different States by force of the structure of the MRRT legislation and because State royalties differ. There will always be such a connection.

12. **Re DS[37]-[42].** Table 1 seeks to *isolate* the variable in the equation in s.10-5 that because it differs by State will result in a different imposition of MRRT in different States. That is most easily done by assuming that all other matters are equal. Even if they are not, the fact remains that MRRT will be payable as to different amounts in different States because of the account that is taken of different State royalty regimes. To dismiss the tables as "correct within their own limited universe" misunderstands the point, without addressing it. If Miners A and B were in the same State, the same royalty rates would apply to them. The point is that there will be a different impost of MRRT on these miners *because* their mining projects are in different States, and the base criterion for liability to MRRT is assessed at the mining project interest level (which is necessarily State based). The reason why State royalty rates differ

does not matter. The submissions in DS[37]-[42] also do not sit well with ss.60-1 and 60-5(a), and s.10-5 of the *MRRT Act*.

Section 51(ii)

13. **Re DS[48]-[63].** On the defendant's case the limitation on power in s.51(ii) does no real work, and is effectively a nullity. The defendant's arguments nowhere postulate a substantive meaning for the limitation.

14. **Re DS[48], [49].** In *Austin* at [117], the Court made the precise distinction noted by the plaintiffs at PS[37]-[38]. There is no discrimination if a Commonwealth tax is imposed uniformly even if its practical operation is unequal in different States. But that does not mean that there is no discrimination if a Commonwealth tax is structured so that it will always, so long as State royalty rates are different, tax at different effective rates in each State. The MRRT legislation does not in substance impose a uniform tax whose practical operation happens to be different; it is structured to collect more tax from lower royalty States. Its expressly stated object is that the MRRT will vary depending on the royalties payable to a State: *MRRT Act*, ss.1-10, 60-1, 60-5.

15. **Re DS[49], [50(b)].** In *Conroy*, at 103.6, in the sentence immediately before the sentence quoted by the defendant at DS[49], Menzies J said: what the provisions of s.51(ii) "forbid is a taxation law which would impose a taxation burden upon a person because of some connexion with a State ... which would not fall upon other persons not having that connexion". The MRRT legislation is forbidden precisely because it *imposes* MRRT on miners in different States which burdens them differently because of their connexion with a particular State. The sentence quoted by the defendant supports the plaintiffs: looking at the Commonwealth law alone, its explicit structure differentiates between States by levying MRRT because, from the outset, State royalty regimes differed and continue to differ. Taylor J was not in the majority and had a narrower view of s.51(ii). He suggested at 101.4 that there is no discrimination if deductions are allowed for land tax even when some States do not impose such tax. However, such deductions under the 1936 *ITAA* are not comparable to the structure of the *MRRT Act*. State royalties are grossed-up and subtracted before MRRT is imposed on different amounts in different States. Such a structure treats the States unequally by design, not practical outcome. Taylor J was referring to how a uniform tax *may practically* operate differently, which is not the issue here.

16. **Re DS[50(a)].** At 347-8 in *WR Moran*, the Privy Council said no more than that a tax in practice may operate differently in different States because of the inequality of riches as between States. MRRT, however, is *imposed* unequally; it is more than a difference that arises from its practical operation.

17. **Re DS[50(c)].** The US cases on Art 1, s.8 of the US *Constitution* are not on point and should not be followed. In *DFCT v Brown* (1958) 100 CLR 32 at 39.5, Dixon CJ expressly noted that "Section 51(ii) with its prohibition of discrimination may not be the same as art. 1, s. 8 of the Constitution of the United States requiring uniformity" and then continued to say, "but what the Supreme Court has said about State law in the collection of federal taxes seems to me to be true of our system". Because of the difference in language, a decision on uniformity cannot automatically be treated as applicable to s.51(ii). Equally, in *Conroy* at 100-101, Taylor J referred to *Knowlton v Moore* (1900) 178 U.S. 41 at 108, *Florida v Mellon* (1927) 273 U.S. 12 and *Gottlieb v White* (1934) 69 F. (2d) 792 but noted the differences between the language of the Australian and US provisions. Thus, the US cases, dealing with the uniformity requirement are not necessarily applicable.

18. Further, when the US cases are considered, the conclusion reached in them appears

illogical and appears to neuter the requirement for uniformity. For example, in *US v Ptasynski* (1983) 462 U.S.74 at 84-86, it was held that a windfall tax on crude oil which was applied across the US but with an exemption for crude oil produced in *geographically* identified parts of Alaska was justified as not prohibited by the requirement of uniformity. The US cases have been strongly criticised: eg L Claus, "'Uniform Throughout the United States: Limits on Taxing as Limits on Spending" (2001) 18 *Constitutional Commentary* 517 at 522-529. Dealing with *Florida v Mellon*, Claus refers to the passage in it on which the defendant relies at DS[50(c)] fn 30 and then states at 525:

> "Was the Court reading a different statute? The case did not involve a single federal tax rate working 'unlike results' because of the 'dissimilar laws' and 'diverse conditions to be found in the various states.' This was a federal tax rate which explicitly varied by reference to those 'dissimilar laws.' It was not 'the same tax' in Florida as it was in states which had homegrown death duties. The *federal tax regime* treated taxpayers differently, and different treatment depended on the policies of their States. Citizens of Florida were required to pay much higher rates of federal inheritance tax than citizens of other states had to pay".

19. The above logic is even more applicable to s.51(ii) which prohibits *discrimination* between States. *Florida v Mellon* should not be treated as applicable to s.51(ii). Moreover, the MRRT legislation, by its very structure in grossing-up State royalties and requiring the grossed-up amount to be subtracted from "mining profit" before levying MRRT at 22.5% is necessarily imposing tax which discriminates between States where the amount of State royalties payable differ. It is debatable whether even the reasoning in *Florida v Mellon* would justify a conclusion that the MRRT is imposed uniformly.

20. **Re DS[51], [60].** As is apparent from s.10-5 of the *MRRT Act* the amount of "MRRT liability" will vary depending on the royalty allowance applicable in the relevant State. It is a normal, and not misleading, usage to describe the *rate* of tax payable as varying from State to State. To fasten upon the definition of "MRRT rate" is to prefer form to substance, an approach which is inappropriate when considering constitutional limitations: see PS[33].[1]

21. **Re DS[52]-[55].** The defendant does not recognise the explicit structure of the MRRT legislation, and the simple formula it uses to ensure that MRRT is levied at a different effective rate in different States. Permitted deductions of other State taxes under the *ITAA* are not *structured* to effect a differential result in each State like the MRRT legislation. The plaintiffs rely on *Cameron v DFCT* because it is directly on point. There, profits were to be calculated by applying different values for livestock in different States. Here, the "above normal" mining profit on which MRRT is levied is derived by subtracting different amounts of "royalty credits". The dictum in *Barger* is directly on point because there is a direct inverse relationship between the Commonwealth tax and State royalties. By design, the allowance for grossed-up State royalties will always affect the effective rate on which MRRT is levied.

22. **Re DS[55]-[57].** *Irving* is properly distinguishable for the reasons in PS[43]-[46]. In particular, as is submitted at PS[43], the Commonwealth Act did not impose different rates of duty on goods in different States. It simply provided that duty was not payable on goods on which a State duty had earlier been paid. It did not matter at what rate the State duty had been imposed.

23. The defendant's reference, at DS[57], to [128] of *Permanent Trustee* is in error. It is a reference to McHugh J's dissenting judgment, not the majority's judgment. In any event, what McHugh J said is inapplicable here. Unlike in *Irving*, MRRT is not "*uniformly* imposed" (by

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[1] Indeed, at DS[69], the defendant itself refers to "a higher rate" which appears to be a reference to a higher effective rate, in the same manner that the plaintiffs have used "rate".

its very own structure). The levy of MRRT does not differ because of the independent "operation of State law" but because the defendant has chosen to require the different imposition of its tax.

24. **Re DS[64]-[70].** Assuming the defendant's objectives of taxing "above normal" profit are proper objectives (whatever that entails), it is not correct that a law that is reasonably appropriate and adapted to meet such objectives is valid under s.51(ii) even if it imposes tax differently in each State. If the law is unequally imposed, it is prohibited by s.51(ii) regardless of the objectives. That is why the additional issue of whether the law is appropriate and adapted adds nothing to the proper inquiry. The reason the gloss cannot be added is because s.51(ii) does not, in its simple terms, permit the gloss. *Bayside v Telstra* makes it plain that the gloss is not always applicable. The reference in *Bayside* to Gibbs J's judgment in the *Payroll Tax Case* does not assist the defendant. In *Bayside*, the Court accepted at [41] that differentiation "based upon criteria within its constitutional power" was open for the Parliament to regard as appropriate. A differentiation caught by the constitutional limit in s.51(ii) can never be saved because it is regarded as appropriate.

25. **Re DS[72].** If the appropriate and adapted criterion is part of the core concept of "discrimination", it is difficult to understand why the defendant pleads its assertions about the appropriate and adapted criterion in its Defence at [60(d)] as "further and alternative" matters. If the criterion is subsumed into the determination of whether there is "discrimination", it cannot be an alternative basis to save an otherwise discriminatory tax. In any event a tax that meets a proper objective can still be prohibited by the constitutional limit on power in s.51(ii).

Section 99

26. **Re DS[78]-[79].** The reason a preference is given is because States with higher royalty rates are advantaged in that miners in those States are levied with less MRRT. The plaintiffs' complaint is not that there will be different revenue outcomes. It is that MRRT is levied in a manner that levies more tax from lower royalty rate States.

27. **Re DS[81]-[82].** The majority in *Permanent Trustee* applied the appropriate and adapted criterion. The plaintiffs' complaint is that such a gloss does not inform what is involved in the giving of preference.

Melbourne Corporation

28. The *Melbourne Corporation* issue needs to be dealt with separately if the Court is not satisfied the *MRRT Act* contravenes ss.51(ii) or 99. However, that is not to deny the relevance of *Melbourne Corporation* (ultimately rooted in the fact that all Commonwealth legislative power is "*subject to this Constitution*", with its federal structure) to a proper understanding of ss.51(ii) and 99.[2] They are necessarily interwoven. So it is that a differential curtailment of a constitutional function of the several States effected by a tax law may be understood as contravening s.51(ii), or s.99. Whatever the royalty rates when the *MRRT Act* and *Imposition Acts* came into force on 1 July 2012, those Acts affect thereafter the capacity of the States to alter royalties, thus attracting the *Melbourne Corporation* principle.

29. **Re DS[83]-[84].** The plaintiffs do not assert that *Melbourne Corporation* "guarantees" to a State "untrammelled authority" over mining or development, or that matters "important" to a State justify its protection on that ground alone. However, the Commonwealth's conception of the principle in DS[85]-[90] is unduly narrow. The present case, like *Melbourne*

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[2] This is demonstrated by *Melbourne Corporation* itself, where s 48 of the *Banking Act 1945* (Cth) was supported by s 51(xiii) of the *Constitution*, a grant of power subject to an exception concerned with States specially. The law there did not offend s 51(xiii), but was nonetheless invalid.

Corporation, is closely connected with the States' ability to choose how to deal with their property (namely minerals and the royalty revenues which may be derived from them). This is by and large ignored in DS[83]ff.

30. **Re DS[89].** In *Melbourne Corporation*, the law's effect was to curtail the States' ability to choose with whom to bank, which was part of their function of receiving, having custody of, and paying public money (see 74 CLR 31 at 84, 98). The law did not in terms impose any prohibition on the States; the offending effect of the law was indirect and substantive.[3] Moreover, the law did not prevent the States from dealing with their property (funds); however it did constrain their choice, and so placed them under what Dixon J described as a "special disability" in respect of their function in relation to public money (at 84).

31. **Re DS[88], [102].** To say that the States remain free to increase or decrease mining royalties may be true in a formalistic sense, but it is not to the point. Prior to the *MRRT Act*, the States had a choice as to whether to increase or decrease mining royalties (and so increase or decrease the return to the public from the disposition of State property). The only point of a State decreasing royalties is to either provide assistance to miners, or to increase the benefit to the community in other ways, such as by increasing employment, or improving infrastructure. The effect of the *MRRT Act* is to curtail the States' ability to choose to do that. It is irrelevant that the State could use other property it may have to provide assistance in other ways.

32. **Re DS[90]-[96]**. Whilst validly made Commonwealth laws apply within the States, and may affect their ability to develop their territory in particular ways, it is too narrow a conception of the constitutional principle to seek to confine it to what might be described as internal executive governmental functions. A State's ability to use a banker of its choice is no more necessary to the constitutional purpose for which the States exist as the "ordinary governments of the country" making general laws for the peace, order and good government of the people within their territories (See *Melbourne Corporation at* 47), than the ability of a State to choose how to use its own property (such as minerals). The passages selected in DS[92]-[94] should be read in the light of more recent decisions.[4]

33. **Re DS[97]-[98]**. No earlier Commonwealth legislation has sought to negate the effect of mining royalty reductions in the manner sought to be achieved by the *MRRT Act*. The present issue arises for the first time. Submissions about "taxation burdens" at the level of generality in DS[97]-[98] do not assist.

34. **Re DS[11]-[12], [45]-[47], [99]-[101]**. The contention that there is no significant curtailment or impairment of State functions should not be accepted.

(a) The defendant's analysis of the way in which the *MRRT Act* operates is inadequate for the reasons set out in the PS and above; the *MRRT Act* is structured to increase federal tax when State mining royalties are reduced.

(b) The defendant's suggestion in DS[11] that further evidence is required of contemporaneous State reductions in royalty rates to incentivise mining is not correct. Whether there is a curtailment or impairment of State capacity does not depend upon whether the State is actually exercising its capacity at any single point in time. The

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[3] Nor did the provisions held invalid in *Clarke* and *Austin*. DS[89] is an unwarranted attempt to narrow the operation of *Melbourne Corporation*. See the discussion by French CJ in *Clarke* (2009) 240 CLR 272 at 298-299 [32]-[34], and by Gummow, Heydon, Kiefel and Bell JJ at 306 [65]-[66], and Hayne J at 305 [101].

[4] See, e.g., *Clarke* (2009) 240 CLR 272 at 298-299 [32]-[34], 306 [65]-[66], 305 [101]. As to DS[91], no *Melbourne Corporation* issue arose for consideration in *Murphyores Incorporated Pty Ltd v Commonwealth* (1976) 136 CLR 1.

evidence contained in the Parties Relevant Documents Vols 1 to 4 shows a consistent and frequent utilisation by a number of States over a long period of time of the ability to effect royalty reductions for purposes connected with development of the State. The application of *Melbourne Corporation* depends upon the effect of Commonwealth legislation on States' functions, not on the likely frequency of their exercise.

(c) DS[46] obfuscates the position. The plaintiffs' *Melbourne Corporation* submission does not depend upon any theory as to competition between States. The impact of the *MRRT Act* on a State's ability to reduce royalties depends on a consideration of the terms of the *Act*. No expert economic evidence is required in order for the Court to find that a reduction in one cost is an incentive, and that where such a reduction is offset by the increase in another cost, that a miner is no better off so there is no incentive.

Section 91

35. **Re DS[105]-[106].** As is apparent from *Seamens' Union*, Mason J's dictum, referred to at DS[105], related to the issues raised in that case. His use of the phrase "if not exclusively" left open the possibility that the words "Nothing in this Constitution" referred to more than s.90. Further, as referred to at PS[151]-[152], the reasoning does not give sufficient effect to the presence of the words "any aid" in addition to "bounty".

36. The Commonwealth's approach is a very formalistic view of the operation of the opening words of s.91. Those words render invalid laws otherwise made pursuant to the *Constitution* which would prohibit the grant of any aid to mining for gold, silver or other metals. See, e.g., PS[149],[150].

37. **Re DS[108].** The discussion of drafting history leaves out of account the matters referred to at PS[143]. It should not be used to read down the breadth of the expression "*[n]othing in this Constitution*". The adopted text must be given primacy.[5]

38. **Re DS[110].** It is, with respect, difficult to see how relief from royalties could be regarded otherwise than as pecuniary assistance. Relief from liability to make a payment is in substance no different from a grant offsetting a payment made. Both are pecuniary in nature and are intended to assist the miner. It may be noted that both amount to recoupment[6] of a royalty, as dealt with under s 60-30 of the *MRRT Act*. That section reduces "royalty credits", and so increases MRRT payable, by the amount of the recoupment (concession or grant).

39. **Re DS[112].** Characterisation of the law cannot save it if it would prohibit a State from granting aid to mining for metals. That the *MRRT Act* is a law of taxation does not prevent it from also being a law which has the effect of prohibiting a State from granting such aid. If the intended "aid" ceases to be of assistance because it is offset by increased federal tax, then it is proper to describe the law imposing the federal tax as prohibiting that aid.

Dated: 8 February 2013.

D.F. Jackson Q.C	B. Dharmananda S.C.	W.A.D. Edwards

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5 See *New South Wales v Commonwealth (Work Choices Case)* (2006) 229 CLR 1 at 96-97.

6 "Recoupment" is defined in the *MRRT Act* (s 300-1) by reference to the *ITAA*, which provides in s 995-1 and s 20-25 a broad definition including "*any kind of recoupment, reimbursement, refund, insurance, indemnity or recovery, however described*" and "*a grant in respect of the loss or outgoing*".