



HIGH COURT OF AUSTRALIA

NOTICE OF FILING

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Details of Filing

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Important Information

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**IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY**

B52 of 2020

BETWEEN:

CLIVE FREDERICK PALMER
Plaintiff

and

STATE OF WESTERN AUSTRALIA
Defendant

B54 of 2020

BETWEEN:

MINERALOGY PTY LTD (ACN 010 582 680)
First Plaintiff

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

and

STATE OF WESTERN AUSTRALIA
Defendant

**OUTLINE OF ORAL SUBMISSIONS OF THE
ATTORNEY GENERAL FOR NEW SOUTH WALES, INTERVENING**

PART I: PUBLICATION

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

PART II: ARGUMENT

Question of exercise of judicial power by WA Parliament

2. The Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020 (WA) (“the Amending Act”) does not involve a determination of a controversy about existing rights according to existing law, an adjudication upon a dispute as to rights and obligations arising from the operation of the law upon past events or conduct, or an application of a pre-existing standard. What the Amending Act does is to alter and terminate rights and liabilities. It is analogous to the legislation considered and held to be valid in Duncan v New South Wales (2015) 255 CLR 388. See also Nelungaloo Pty Ltd v The Commonwealth (1948) 75 CLR 495; Australian Building Construction Employees’ and Builders Labourers’ Federation v The Commonwealth (1986) 161 CLR 88; and R v Humby; Ex parte Rooney (1973) 129 CLR 231. See the Written Submissions for the Attorney General for New South Wales (“WS”) at [6]-[11].
3. If the Amending Act does not involve an exercise of judicial power, it is unnecessary for this Court to deal with the question of whether the WA Parliament could validly enact legislation that did have such an effect: Zhang v Commissioner of Police (2021) 95 ALJR 432 at 437 [21] (the Court); LibertyWorks Inc v The Commonwealth [2021] HCA 18 at [90] (Kiefel CJ, Keane and Gleeson JJ).
4. In any event, it is clear that a State Parliament can exercise judicial power: Building Construction Employees and Builders’ Labourers Federation of New South Wales v Minister for Industrial Relations (1986) 7 NSWLR 372 at 407-408 per Mahoney JA; see also Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51 at 93-94 (Toohey J), 65 (Brennan CJ), 77-78 (Dawson J) and 109 (McHugh J). This capacity is not affected by the decision of this Court in Kirk v Industrial Court (NSW) (2010) 239 CLR 531. See WS at [15]-[28].

Question of whether s 118 of the Constitution invalidates the Amending Act

5. In relation to the plaintiffs’ argument that the Amending Act does not give full faith and credit to s 35 of the uniform Commercial Arbitration Acts, there is no basis for such a submission in the authorities, amounting as it does to the proposition that s 118 dictates

a choice of law rule for Australia, which was rejected by this Court in John Pfeiffer Pty Ltd v Rogerson (2000) 203 CLR 503 at 533 [63] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ). See WS at [35]-[37]. The operative effect of s 118 is to preclude a court of one State from refusing to give effect to a law of another State on the ground that the law is contrary to public policy considerations: Breavington v Godleman (1988) 169 CLR 41 at 81 (Mason CJ), 96-97 (Wilson and Gaudron JJ), 116 (Brennan J), 136-137 (Deane J) and 150 (Dawson J).

6. The plaintiffs’ construction is also unsupported by United States jurisprudence regarding the Full Faith and Credit Clause. In Franchise Tax Board of California v Hyatt (2003) 538 US 488, the Supreme Court of the United States confirmed that Article IV, s 1 “does not compel ‘a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate’”: at 494 (O’Connor J delivering the opinion of the Court). The Full Faith and Credit Clause may, however, be violated where “a State has exhibited a ‘policy of hostility to the public Acts’ of a sister State”: Hyatt at 499. See WS at [31].

Dated: 17 June 2021



M G Sexton SC SG



J S Caldwell