IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY **No. S163 of 2012**

BETWEEN:

FORTESCUE METALS GROUP LIMITED
(ACN 002 592 872)
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

AMENDED

WRITTEN SUBMISSIONS OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

Date of Document: 27 February 2013 Prepared by:

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PART I: CERTIFICATION AS TO FORM

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

PART II: BASIS OF INTERVENTION

2. The Attorney General for Western Australia intervenes pursuant to s. 78A of the *Judiciary Act 1903* (Cth) in support of the Plaintiffs.

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

PART IV: LEGISLATIVE MATERIALS

4. *Commonwealth of Australia Constitution Act 1900* (Imp)*; Iron Ore (Cleveland-Cliffs) Agreement Act 1964* (WA); *Iron Ore (Hamersley Range) Agreement Act 1963* (WA); *Iron Ore (Marillana Creek) Agreement Act 1991* (WA); *Iron Ore (Mount Goldsworthy) Agreement Act 1962* (WA); *Iron Ore (Mount Goldsworthy) Agreement Act 1964* (WA); *Iron Ore (Mount Newman) Agreement Act 1964* (WA); *Iron Ore (Robe River) Agreement Act 1964* (WA); *Iron Ore (Tallering Peak) Agreement Act 1961* (WA); *Iron Ore (Tallering Peak) Agreement Amendment Act 1962* (WA); *Iron Ore (Yandicoogina) Agreement Act 1996* (WA); *Iron Ore Agreements Legislation Amendment Act 2010* (WA); *Land Act 1898* (WA), *Land Act 1933* (WA); *Land Act 1933* (WA); *Land Administration Act 1997* (WA); *Mineral Resource Rent Tax (Imposition – Customs) Act 2012* (Cth), *Mineral Resource Rent Tax (Imposition – Excise) Act 2012* (Cth) and; *Mineral Resource Rent Tax (Imposition General) Tax Act 2012* (Cth) (collectively "the *Imposition Acts*"); *Mineral Resource Rent Tax Act 2012* (Cth) ("the *MRRT Act*"); ~~*Mining Act 1898* (WA)~~; *Mining Act 1904* (WA) *Mining Act 1978* (WA); *Mining on Private Property Act 1898* (WA); *Mining Regulations 1981* (WA).

PART V: ARGUMENT

5. Western Australia supports the Plaintiffs' contention that the *MRRT Act* and the *Imposition Acts* are invalid, in that they infringe the *Melbourne Corporation* doctrine.

The operation of the *MRRT Act* and the *Imposition Acts*

6. This is set out in the Plaintiffs' Submissions at [8]-[27]. Of particular importance to the submissions advanced by Western Australia is the statement of effect of the *MRRT Act* at [22] of the Plaintiffs' Submissions.

7. If the State reduces a royalty that would otherwise be payable in respect of iron ore mined in Western Australia the MRRT liability of that iron ore miner would increase by the amount of the reduction[1].

Western Australia's *Melbourne Corporation* contention

8. It is central to the capacity of a State to function as a government under the *Constitution* that it have the power to determine the most appropriate means of financing the development of communities in Western Australia (particularly in remote areas), the construction of infrastructure for these communities, the mining and development of natural resources owned by the State and the construction of infrastructure necessary for such mining and development.

9. The *MRRT Act* and the *Imposition Acts* curtail this power and this function of government. They do so by excluding the power of the State to finance such developments by means of imposing discounted rates of royalty imposed on iron ore miners in return for the financing, by them, of such developments.

10. This contention has various premises.

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[1] This proposition is live on the pleadings; see the Further Amended Statement of Claim ("Statement of Claim") and the Further Amended Defence ("**Defence**") at [43] and [49].

The Crown's ownership of minerals in Western Australia

11. Iron ore existing in its natural condition on or below the surface of land in Western Australia (that was not alienated in fee simple from the Crown in right of Western Australia before 1 January 1899) is the property of the Crown in right of Western Australia[2]. The holder of a fee simple title alienated before 1 January 1899, owns minerals other than the royal metals. This prerogative of the Crown in right of Western Australia is now reflected in s.9 of the *Mining Act 1978* (WA)[3].

12. If any land the subject of iron ore exploration in Western Australia was alienated in fee simple title before 1 January 1899, it would be insignificant.

13. In Western Australia, as with other States, Crown (in right of the respective States) ownership of minerals, other than the royal metals, has been effected by legislation to the effect that grants of title contain a reservation in favour of the Crown confirming ownership of minerals. This was effected in Western Australia initially by s.15 of the *Land Act 1898* (WA). This was continued by s.15 of the *Land Act 1933* (WA), which repealed and replaced the *Land Act 1898,* and is now reflected in s.24 of the *Land Administration Act 1997* (WA), which repealed and replaced the *Land Act 1933.*

14. In Western Australia the grant of mining tenements under the *Mining Act 1978* does not necessarily confer a right to prospect for, explore for or mine iron ore[4].

15. Large iron ore projects in Western Australia have been developed pursuant to State Agreements.

16. The *Mining Act 1904* (WA) provided for two principal forms of mining tenement; claims and mining leases. In addition, the *Mining Act 1904* (WA) provided for a

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2 See *Land Act 1898* (WA) s.15; *Mining Act 1904* (WA) s.138. These provisions were considered in *Worsley Timber Pty Ltd v Western Australia* [1974] WAR 115.

3 See also *Mining Act 1904* (WA) s.117; and *Mining on Private Property Act 1898* (WA) s.4.

4 *Mining Act 1978* (WA) s.111; Statement of Claim [17].

special form of tenure and tenement; the creation of "temporary reserves" over which applicants could obtain a "right to occupy"[5].

17. The Pilbara was explored, and the development of the iron ore industry of the Pilbara commenced, by use of temporary reserves and rights of occupancy pursuant to the *Mining Act 1904* (WA) and, in time, consolidated and supplemented by various State Agreements.

The iron ore industry in Western Australia

18. Western Australia, when compared to other States[6], has substantial deposits of iron ore, and mines in Western Australia produce the overwhelming majority of iron ore, by tonnage, in Australia[7].

19. Commercially viable deposits of iron ore are located in remote areas of Western Australia. The majority of iron ore deposits are located in the Pilbara region, with substantial deposits in the Kimberley, Wheatbelt and Mid West regions[8].

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5 The temporary reservation of land pursuant to s.276 of the Mining Act 1904 (WA) was (in effect) to excise that land from being Crown land under the Act and thereby exclude it from being available for the grant of claims and mining leases. Once the subject of a temporary reserve, the government could then grant rights of occupancy in respect of such land. Such rights of occupancy were of various types with varying terms and conditions. Section 277 of the Mining Act 1904 (WA) imposed conditions on the grant of rights of occupancy over land the subject of a temporary reservation.

6 Approximately ~~96%~~ 98% of Australia's iron ore resources are located within Western Australia. ~~103 billion tonnes of iron ore resources are located in Western Australia, of which 59.5 billion tonnes is hematite and 43.5 billion tonnes is magnetite. Approximately 3.9 billion tonnes of iron ore resources are located in the other States and Territories of Australia (figures based on data from the Department of Mines and Petroleum's Minedex database available at: http://minedexext.dmp.wa.gov.au/minedex/external/common/appMain.jsp).~~ See Geoscience Australia, *Australia's Identified Mineral Resources 2011*, 37; and Geoscience Australia, *Australian in Situ Iron Ore Resources: Sheet 1-2* (maps). These will be included in the Book of Materials to be provided by the State.

7 In 2009, 2010 and 2011 Western Australia produced approximately 99%, 91% and 88% respectively, by tonnage, of the total amount of iron ore produced in Australia (see Department of Mines and Petroleum, *Major Commodities: Iron ore*, 13 August 2012, Department of Mines, Resource Data Files, WA vs Australia, <http://www.dmp.wa.gov.au/documents/statistics_release/ironore2011.xlsx>). This will be included in the Book of Material to be provided by the State.

8 Western Australian Mineral and Petroleum Statistics Digest 2010-11, 12, 15 (map 2), 60, 77 (map 4), 79 (map 6). This will be included in a Book of Materials to be provided by the State.

20. Because of the remoteness of commercially viable deposits of iron ore in Western Australia the development of iron ore mining projects in these locations requires that the State work with iron ore miners to facilitate the construction of the infrastructure required to develop such projects.

The importance of royalties on iron ore in Western Australia

21. As observed by Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ in *The Native Title Act Case*, the mining industry of Western Australia, as a whole, is of great economic and social importance[9]. This observation is likely more prescient now than it was in 1994.

22. In the 2009-10 and 2010-11 financial years the State generated $1.813 billion and $3.647 billion respectively in royalty income from the mining of iron ore. This revenue comprised (respectively) 78% and 87% of the total mineral royalty payments paid to the State in those years[10].

23. In the 2009-10 and 2010-11 financial years the total royalty payments due to the State from the mining of iron ore comprised 8% and 15% respectively of the State's general government revenue (of $22.039 billion and $23.909 billion respectively)[11].

24. In the 2009-10 and 2010-11 financial years the State received $10.206 billion and $9.339 billion respectively in Commonwealth grants[12]. In the 2009-10 and 2010-11 financial years the State's general government revenue, independent of Commonwealth grants, was $11.833 billion and $14.57 billion respectively. In the 2009-10 and 2010-11 financial years the royalty income that became due to the

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9 *Western Australia v The Commonwealth (The Native Title Act Case)* (1995) 183 CLR 373 at 479 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

10 The total was respectively $2.324 billion and $4.213 billion. See, Government of Western Australia, *2011-12 Budget, Economic and Fiscal Outlook Budget Paper No. 3*, 90; Government of Western Australia, *2012-13 Budget, Economic and Fiscal Outlook Budget Paper No. 3*, 110. Relevant extracts from these documents will be included in a Book of Materials to be provided by the State.

11 See Government of Western Australia, *Annual Report on State Finances: 2010-11*, 149. The relevant extract from this document will be included in a Book of Materials to be provided by the State.

12 Government of Western Australia, *Annual Report on State Finances*: 2010-11, 149-150; Government of Western Australia, *2012-13 Budget, Economic and Fiscal Outlook Budget Paper No. 3*, 97 and 251. Relevant extracts from these documents will be included in a Book of Materials to be provided by the State.

State from the mining of iron ore comprised 15% and 25%, respectively, of the general government revenue derived by the State in those years, independent of Commonwealth grants.

Construction of critical infrastructure

25. The State has, frequently, required that iron ore miners and proponents construct large scale infrastructure in the course of the development of iron ore projects. Such infrastructure includes town sites, railways, roads, airports and ports. As will be explained, much of this infrastructure is not limited in its use to the miners who have paid for its construction.

26. The following are examples.

The *Iron Ore (Mount Goldsworthy) Agreement Act 1962* (WA)

27. Pursuant to the original Iron Ore (Mount Goldsworthy) Agreement 1962[13], obligations were imposed on the proponent to lay out a town site, and provide suitable housing, school facilities, roads, amenities, water, power and other services in the vicinity of the mining area[14].

28. The proponent was also required to lay out a town site in the vicinity of Depuch Island, which is situated between Port Hedland and Karratha, including providing for adequate and suitable housing, recreational facilities and other services[15].

29. At both Goldsworthy and the proposed townsite near Depuch Island, the proponent was to build schools and teachers' accommodation[16]. It was also to construct a causeway between Depuch Island and the mainland[17]; a railway from the mining area to a wharf at Depuch Island[18]; a wharf, workshops, screening, stockpiling, bulk handling and loading installations at Depuch Island and to undertake all necessary

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13 Approved by s.3(1) of the *Iron Ore (Mount Goldsworthy) Agreement Act 1962* (WA).
14 *Iron Ore (Mount Goldsworthy) Agreement Act 1962* (WA) (as passed) clause 5(1)(c) of the Schedule.
15 *Iron Ore (Mount Goldsworthy) Agreement Act 1962* (WA) (as passed) clause 5(7) of the Schedule.
16 *Iron Ore (Mount Goldsworthy) Agreement Act 1962* (WA) (as passed) clause 5(8) of the Schedule.
17 *Iron Ore (Mount Goldsworthy) Agreement Act 1962* (WA) (as passed) clause 5(4) of the Schedule.
18 *Iron Ore (Mount Goldsworthy) Agreement Act 1962* (WA) (as passed), clause 5(2) of the Schedule.

dredging of channels and approaches to Depuch Island[19]; and to construct required roads[20].

The *Iron Ore (Mount Goldsworthy) Agreement Act 1964* (WA)

30. The Iron Ore (Mount Goldsworthy) Agreement 1964[21] imposed similar obligations on the proponent to those imposed under the Iron Ore (Mount Goldsworthy) Agreement 1962[22].

The *Iron Ore (Hamersley Range) Agreement Act 1963* (WA)

31. Pursuant to the original Iron Ore (Hamersley Range) Agreement 1963[23], obligations were imposed on the proponent to lay out and develop town sites at the harbour and mining areas including housing, recreational and other facilities and services[24]. The proponent was also required to construct and provide roads, school facilities, water and power supplies and other amenities and services[25].

32. The proponent was required to construct a wharf and to dredge the channels and approaches to the wharf[26]. The proponent was also required to construct a railway from the relevant mining areas to the wharf to be constructed by the proponent[27]. In this case, the proponent subsequently constructed the wharf at Dampier.

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19 *Iron Ore (Mount Goldsworthy) Agreement Act 1962* (WA) (as passed), clause 5(5) and (6) of the Schedule.
20 *Iron Ore (Mount Goldsworthy) Agreement Act 1962* (WA) (as passed), clause 5(3) of the Schedule.
21 The Iron Ore (Mount Goldsworthy) Agreement 1962 was cancelled by clause 3(2)(e) of the Iron Ore (Mount Goldsworthy) Agreement 1964, as approved by s.4(1) of the *Iron Ore (Mount Goldsworthy) Agreement Act 1964* (WA).
22 *Iron Ore (Mount Goldsworthy) Agreement 1964* (WA) (as passed) clauses 5(1), 9(1) of the Schedule.
23 Approved by s.3(1) of the *Iron Ore (Hamersley Range) Agreement Act 1963* (WA).
24 *Iron Ore (Hamersley Range) Agreement Act 1963* (WA) (as passed) clause 10(1)(f)(ii) of the Schedule.
25 *Iron Ore (Hamersley Range) Agreement Act 1963* (WA) (as passed) clause 10(1)(f)(iii) of the Schedule.
26 *Iron Ore (Hamersley Range) Agreement Act 1963* (WA) (as passed) clause 10(1)(e) of the Schedule.
27 *Iron Ore (Hamersley Range) Agreement Act 1963* (WA) (as passed) clause 10(1)(c) of the Schedule.

The *Iron Ore (Mount Newman) Agreement Act 1964* (WA)

33. Under the original Iron Ore (Mount Newman) Agreement 1964[28], obligations were imposed on the proponent to lay out and develop town sites at the harbour and mining areas including housing, recreational and other facilities and services[29]. The proponent was also required to construct and provide roads, school facilities, water and power supplies and other amenities and services[30].

34. The proponent was required to construct a wharf and to dredge channels and approaches to the wharf[31]. The proponent was also required to construct a railway from the relevant mining areas to the proponent's wharf[32]. In this case, the proponent subsequently constructed the wharf at Port Hedland.

The *Iron Ore (Robe River) Agreement Act 1964* (WA)

35. Under the original Iron Ore (Cleveland-Cliffs) Agreement 1964[33], obligations were imposed on the proponent in terms similar to the *Iron Ore (Mount Newman) Agreement Act 1964* (WA) and the *Iron Ore (Hamersley Range) Agreement Act 1963* (WA)[34].

36. The port facilities developed are at Cape Lambert. Again, the Agreement required the construction of rail from the mining area to the port[35].

Towns created pursuant to State Agreements

37. The towns of Tom Price, Dampier and Paraburdoo[36], Newman[37], Wickham and Pannawonica[38] have been created and developed by proponents of iron ore mines in

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28 Approved by s.3(1) of the *Iron Ore (Mount Newman) Agreement Act 1964* (WA).
29 *Iron Ore (Mount Newman) Agreement Act 1964* (WA) (as passed) clause 9(1)(f)(ii) of the Schedule.
30 *Iron Ore (Mount Newman) Agreement Act 1964* (WA) (as passed) clause 9(1)(f)(iii) of the Schedule.
31 *Iron Ore (Mount Newman) Agreement Act 1964* (WA) (as passed) clause 9(1)(e) of the Schedule.
32 *Iron Ore (Mount Newman) Agreement Act 1964* (WA) (as passed) clause 9(1)(c) of the Schedule.
33 Since renamed the Iron Ore (Robe River) Agreement. Approved by s.3(1) of the *Iron Ore (Cleveland-Cliffs) Agreement Act 1964* (WA), which has been renamed the *Iron Ore (Robe River) Agreement Act 1964* (WA).
34 *Iron Ore (Cleveland-Cliffs) Agreement Act 1964* (WA) (as passed) clause 9(1)(c), (e) to (f) of the Schedule.
35 *Iron Ore (Cleveland-Cliffs) Agreement Act 1964* (WA) (as passed) clause 9(1)(c) of the Schedule.

Western Australia pursuant to obligations imposed by State Agreements and State Agreement legislation. In addition, substantial areas of Port Hedland have been developed.

Railways constructed pursuant to State Agreements

38. The following rail infrastructure has been constructed as a result of iron ore projects undertaken pursuant to State Agreements[39]; the Hamersley Iron Railway[40], the Goldsworthy Railway[41]; the Newman Railway[42] and the Robe River and West Angelas railways[43].

Ports, airports and roads constructed pursuant to State Agreements

39. Port development that has occurred as result of iron ore projects undertaken pursuant to State Agreements, includes port development at Port Hedland (Finnucane Island and Nelson Point[44]) and at Dampier (Parker Point and East Intercourse Island[45]).

40. Airports at Tom Price, Dampier and Paraburdoo were constructed pursuant to the Iron Ore (Hamersley Range) Agreement 1963 and at Newman pursuant to the Iron Ore (Mount Newman) Agreement 1964. The airstrip at Newman is used by commercial operators and others.

41. Roads that have been developed and constructed by iron ore miners pursuant to State Agreement obligations include the Tom Price to Dampier rail access road[46],

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36 All pursuant to the Iron Ore (Hamersley Range) Agreement 1963.
37 Pursuant to the Iron Ore (Mount Newman) Agreement 1964.
38 Pursuant to the Iron Ore (Robe River) Agreement 1964.
39 A map depicting these railways will be included in the Book of Materials to be provided by the State.
40 Pursuant to the Iron Ore (Hamersley Range) Agreement 1963 and ~~the Iron Ore (Goldsworthy-Nimingarra) Agreement 1972~~ the Iron Ore (Yandicoogina) Agreement 1996.
41 Pursuant to the Iron Ore (Mount Goldsworthy) Agreement 1964 and the Iron Ore (Goldsworthy-Nimingarra) Agreement 1972.
42 Pursuant to the Iron Ore (Mount Newman) Agreement 1964.
43 Pursuant to the Iron Ore (Robe River) Agreement 1964.
44 Pursuant to the Iron Ore (Mount Goldsworthy) Agreement 1964 and the Iron Ore (Mount Newman) Agreement 1964.
45 Pursuant to the Iron Ore (Hamersley Range) Agreement 1963.
46 Constructed pursuant to the Iron Ore (Hamersley Range) Agreement 1963.

the road from the North West Coastal Highway to Millstream[47] and the access road to Weeli Wolli Springs[48]. These roads[49] are used by the public.

Third party access to infrastructure

42. Many State Agreements provide for State and third party access to infrastructure constructed by the proponent including railway infrastructure, wharves and port facilities, and roads. This is the case with a number of iron ore State Agreements[50].

Transfer of infrastructure to the State

43. A range of infrastructure once owned or operated by proponents pursuant to State Agreement imposed obligations have been, or may in the future be, transferred to or vested in the State, an instrumentality of the State, or local authorities.

44. This is the case with the towns of Tom Price, Dampier and Paraburdoo, Newman and Wickham, including schools and police stations in those towns[51].

45. This is the case with the port at Port Hedland and the airstrip at Newman[52].

The use of royalties to facilitate development in Western Australia, and in particular in rural Western Australia

46. The State has imposed discounted rates of royalty on iron ore miners for the purpose of attracting investment in Western Australia and to encourage the development of industry and population centres in Western Australia and, in particular, in the regions of Western Australia[53]. Second Reading Speeches relating

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47 Constructed pursuant to the Iron Ore (Robe River) Agreement 1963.

48 Constructed pursuant to the Iron Ore (Rhodes Ridges) Agreement 1972.

49 A map depicting these roads will be included in a Book of Materials to be provided by the State.

50 *Iron Ore (Hamersley Range) Agreement Act 1963* (WA) (as passed) clause 10(2)(a), (b) and (f) of the Schedule; *Iron Ore (Mount Goldsworthy) Agreement Act 1964* (WA) (as passed) clause 9(2)(a), (b) and (f) of the Schedule; *Iron Ore (Mount Newman) Agreement Act 1964* (WA) (as passed) clause 9(2)(a), (b) and (f) of the Schedule; *Iron Ore (Robe River) Agreement Act 1964* (WA) (as passed) clause 9(2)(a), (b) and (f) of the Schedule. In relation to the Newman Railway, see *Hancock Prospecting Pty Ltd & Ors v BHP Mineral s Pty Ltd & Ors* [2002] WASC 224 at [6]-[25].

51 The State will seek to agree these uncontroversial facts with the parties.

52 The State will seek to agree these uncontroversial facts with the parties.

53 See *Iron Ore (Tallering Peak) Agreement Act 1961* (WA) (as passed) clause 5(7) of the Schedule; *Iron Ore (Tallering Peak) Agreement Amendment Act 1962* (WA) (as passed) clause 10 of the Second

to certain State Agreement Acts state that royalty rates have been reduced on some projects to encourage the development of downstream processing and related industries[54].

47. The State imposes a reduced rate of royalty on beneficiated iron ore, which encourages the development of beneficiation processing[55].

48. The State has, in setting royalty rates for iron ore, reduced the rate which it could otherwise have imposed having regard to the initial capital costs to iron ore proponents and miners, and to encourage the construction of large scale infrastructure in Western Australia or parts of Western Australia.

49. An example is the setting the rates of royalty under the original Iron Ore (Mount Goldsworthy) Agreement 1962. The rate imposed took into consideration the cost to the proponent of funding the infrastructure referred to in paragraphs [27]-[29] above[56].

50. Following the Iron Ore (Mount Goldsworthy) Agreement 1962, the State set similar rates of royalty in relation to iron ore projects with similar large scale infrastructure obligations under various State Agreements[57].

Schedule; *Iron Ore (Mount Goldsworthy) Agreement Act 1962* (WA) clause 6 of the Schedule; *Iron Ore (Hamersley Range) Agreement Act 1963* (WA)n (as passed) clause 10(2)(j) of the Schedule; *Iron Ore (Yandicoogina) Agreement Act 1996* (WA) (as passed) clause 12(2) of the Schedule; *Irone Ore (Robe River) Agreement Act 1964* (WA) clause 9(2)(j)(v) of the Schedule; *Iron Ore (Marillana Creek) Agreement Act 1991* (WA) (as passed) clause 13(1)(a) of the Schedule.

54 Parliamentary Debates, Western Australia, Legislative Assembly, 25 October 1961, 2018 (D Brand); Parliamentary Debates, Western Australia, Legislative Council, 14 November 1962, 2741 (A Griffith); Parliamentary Debates, Western Australia, Legislative Assembly, 16 August 1962, 523-524 (W Bovell); Parliamentary Debates, Western Australia, Legislative Assembly, 26 September 1963, 1422 (C Court); Parliamentary Debates, Western Australia, Legislative Assembly, 24 October 1996. 7219 (C Barnett); Parliamentary Debates, Western Australia, Legislative Assembly, 19 November 1964, 2815 (C Court).

55 For example, see *Mining Regulations 1981* (WA) r 86 and the *Iron Ore (Mount Goldsworthy) Agreement Act 1964* (WA) and *Iron Ore (Marillana Creek) Agreement Act 1991* (WA) as amended by ss 9 and 16 of the *Iron Ore Agreements Legislation Amendment Act 2010* (WA). Beneficiation is a form of processing of ore.

56 Parliamentary Debates, Western Australia, Legislative Assembly, 28 November 1963, 3399 (D Brand).

57 *Iron Ore (Hamersley Range) Agreement Act 1963* (WA) (as passed) clause 10(2)(j) of the Schedule *Iron Ore (Mount Newman Agreement Act 1964* (WA) (as passed) clause 9(2)(j) of the Schedule; *Iron Ore (Robe River) Agreement Act 1964* (WA) (as passed) clause 9(2)(j) of the Schedule; and *Iron Ore (Mount Goldsworthy) Agreement Act 1964* (WA) (as passed) clause 9(2)(j) of the Schedule.

The relevant effect of the *MRRT Act* and the *Imposition Acts*

51. As noted above, if the State imposes a reduced royalty or reduces a royalty that would otherwise be payable in respect of iron ore mined in Western Australia the MRRT liability of that iron ore miner would increase by the amount of the reduction. If the State chooses to reduce royalty so that the miner will expend sums on (say) the construction of towns, railways, roads, airports and ports, the miner will derive no saving from the reduced royalty[58].

52. This fact affects the capacity of the State to facilitate the development of communities, construction of infrastructure for these communities, mining and development of natural resources owned by the State and the construction of infrastructure necessary for such mining and development.

The *Melbourne Corporation* contention

53. As stated above, the State's contention is that the *MRRT Act* and the *Imposition Acts* curtail the capacity of the State to function as a government under the *Constitution* by significantly interfering with the power of the State to finance the development of communities in Western Australia (particularly in remote areas), the construction of infrastructure for these communities, the mining and development of natural resources owned by the State and the construction of infrastructure necessary for such mining and development by imposing discounted rates of royalty on iron ore miners in return for the financing, by them, of such developments.

The *Melbourne Corporation* doctrine

54. The joint judgment of Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ in *Re Australian Education Union & Australian Nursing Federation; Ex Parte Victoria*[59] identifies the doctrinal basis or bases of the *Melbourne Corporation* limitation on Commonwealth legislative and executive power. That said, the

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[58] Again, this proposition is live on the pleadings; see fn. 1 hereof.

[59] *Re Australian Education Union & Australian Nursing Federation; Ex Parte Victoria* [1995] HCA 71; (1995) 184 CLR 188 at 227.

observation of Walsh J in the *Payroll Tax Case*[60] that "the [*Melbourne Corporation*] limitations ... have not been completely and precisely formulated", is doubtless still correct[61].

55. As to the doctrinal basis of the doctrine see also the more recent observations in *Austin v Commonwealth*[62], *Clarke v Federal Commissioner of Taxation*[63] and *The Industrial Relations Act Case*[64].

56. The context of many of the recent cases involving the doctrine is Commonwealth legislation affecting the relationship between the State and its employees[65] or impacting upon State judges[66] and parliamentarians[67] who, as constituents of the different arms of State government, are central to "the existence of the States [and] their continuing to function as such"[68]. These cases make it clear that the context of the doctrine's putative application is critical.

57. A case more like the circumstances of this matter, and a context more relevant, is the *Melbourne Corporation* case itself. At issue, was the validity of s.48 of the *Banking Act 1945* (Cth) which prohibited banks (other than the Commonwealth Bank) from "conducting any banking business for a State"[69] without the consent of the Commonwealth Treasurer.

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60 (1971) 122 CLR 353 at 410. See also Gibbs J at 424. To similar effect, though in a different reasoning process are the observations of Barwick CJ at 382-383.

61 See also *Re Australian Education Union & Australian Nursing Federation; Ex Parte Victoria* [1995] HCA 71; (1995) 184 CLR 188 at 226.

62 *Austin and Another v The Commonwealth of Australia* [2003] HCA 3; (2003) 215 CLR 185 at 249 [124] (Gaudron, Gummow and Hayne JJ), 217 [24] (Gleeson CJ).

63 *Clarke v Federal Commissioner of Taxation* ~~(2009)~~ [2009] HCA 33; (2009) 240 CLR 272 at 307 [66] (Gummow, Heydon, Kiefel and Bell JJ), 312 [93] (Hayne J).

64 *Victoria v The Commonwealth (The Industrial Relations Act Case)* (1996) 187 CLR 416 at 498 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

65 *Re Australian Education Union & Australian Nursing Federation; Ex Parte Victoria* [1995] HCA 71; (1995) 184 CLR 188; *Victoria v Commonwealth (The Payroll Tax Case)* (1971) 122 CLR 353.

66 *Austin and Another v The Commonwealth of Australia* [2003] HCA 3; (2003) 215 CLR 185.

67 *Clarke v Federal Commissioner of Taxation* ~~(2009)~~ [2009] HCA 33; (2009) 240 CLR 272.

68 *Re Australian Education Union & Australian Nursing Federation; Ex Parte Victoria* [1995] HCA 71; (1995) 184 CLR 188 at 227.

69 Which included all State authorities and local governments.

58. As Gleeson CJ observed in *Austin* in referring to *Melbourne Corporation*[70]:

> Legislating to deprive States and State agencies of the capacity to bank with any bank other than the Commonwealth Bank might or might not have been to their financial disadvantage. That was not the point. The point was that it substantially impaired their capacity to decide where to place their funds and, in that respect, it impaired their capacity to act as governments.

59. The impairment of the capacity of the State to determine the most appropriate means of financing the development of communities in Western Australia (particularly in remote areas), the construction of infrastructure for these communities, the mining and development of natural resources owned by the State and the construction of infrastructure necessary for such mining and development can be no less important to the capacity of the State to act as a government than the impairment of its decision where to bank.

60. In *Melbourne Corporation* Latham CJ observed that[71]:

> "It may be difficult to determine in some cases whether a function in fact undertaken by a Government is a governmental function which, under a federal constitution, cannot be controlled by another Government established under the constitution. But there can be no doubt that not only the raising of money by taxation, but also provision for the custody, management and disposition of public revenue moneys are activities which are essential to the very existence of a Government. It is equally essential that a Government should have the power of borrowing money and of providing for the custody and expenditure of loan moneys. ... It would be impossible in practice for a State Government to exist without making provision for the custody and expenditure of public moneys, and it could not do this in modern conditions without using a bank."

61. Likewise, in *Melbourne Corporation* Rich J considered that[72]:

> "... while power in a State and in its essential agencies to carry on the business of banking cannot be impaired, the power freely to use the facilities provided by banks, under modern conditions, must be regarded as essential to the efficient working of the business of government, and that power also cannot be impaired."

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[70] *Austin and Another v The Commonwealth of Australia* [2003] HCA 3; (2003) 215 CLR 185, 219 [27].
[71] *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 53.
[72] *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 67.

62. Starke J, whose reasoning focused on whether the impugned legislation destroyed, curtailed or interfered with the operations of the State, observed that[73]:

> "... [t]he management and control by the States ... of their revenues and funds is a constitutional power of vital importance to them. Their operations depend upon the control of those revenues and funds. And to curtail or interfere with the management of them interferes with their constitutional power".

63. Dixon J's conclusion was founded upon discrimination, but his Honour observed that[74]:

> There is thus a law directly operating to deny to the States banking facilities open to others, and so to discriminate against the States or to impose a disability upon them. The circumstance that the primary prohibition is laid upon the banks and not upon the States does not appear to me to be a material distinction. It is just as effectual to deny to the States the use of the banks and that is its object. This I think is not justified by the power to make laws with respect to banking.

64. The importance of his Honour's observation to this matter is that, similarly, it is not determinative that the interference with the capacity of the State here arises by a tax imposed upon the iron ore miner, rather than directly upon the State.

65. Relevant also are the observations of Gaudron, Gummow and Hayne JJ in *Austin*[75]:

> "The question presented by the doctrine in any given case requires assessment of the impact of particular laws by such criteria as "special burden" and "curtailment" of "capacity" of the States "to function as governments". These criteria are to be applied by consideration not only of the form but also "the substance and actual operation" of the federal law. Further, this inquiry inevitably turns upon matters of evaluation and degree and of "constitutional facts" which are not readily established by objective methods in curial proceedings." (footnotes omitted)

66. In this matter, one of the practical effects and consequences of the impugned Commonwealth legislation is that the legislative and executive power of the State to decide the most appropriate means to finance the construction of the large scale infrastructure needs of Western Australia, the development of towns and

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73 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 75.
74 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 84.
75 *Austin and Another v The Commonwealth of Australia* [2003] HCA 3; (2003) 215 CLR 185, 249 [124].

communities in rural Western Australia, and in particular the needs of those living in the remote regions of Western Australia is substantially affected. Indeed, in a practical sense, having regard to the manner in which these matters have been financed historically, this capacity is denuded.

67. This limitation on power imposes, in a real and practical sense, a far more substantial impairment to the capacity of the State of Western Australia to act as a government than did the restrictions held to be invalid in the *Melbourne Corporation* case.

The *Native Title Act Case*

68. It is necessary to address passages from the judgment of Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ in the *Native Title Act Case*[76]:

> "These effects touch upon the scope of State power and the difficulty of its exercise, not upon the machinery of the government of the State. They are, no doubt, of considerable political significance, for the effective scope of State powers and the efficiency of their exercise are the concern of the governments of the States. ...
>
> The *Native Title Act* may diminish the breadth of the discretions available to the Executive Government [of Western Australia] but that is not sufficient to stamp it with invalidity. Brennan J said in *The Tasmanian Dam Case* (1983) 158 CLR at 214-215):
>
> > "The Commonwealth measures diminish the powers of the executive government but they do not impede the processes by which its powers are exercised. ..."
>
> The Act does not purport to affect the machinery of the government of the State. The constitution of the three branches of government is unimpaired; the capacity of the State to engage the servants it needs is unaffected; the acquisition of goods and services is not impeded; nor is any impediment placed in the way of acquiring the land needed for the discharge of the essential functions of the State save in one respect, namely, the payment of compensation. The Act does not impair what Dawson J described as "the capacity to exercise" constitutional functions though it may affect the ease with which those functions are exercised.

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[76] *Western Australia v Commonwealth (The Native Title Act Case)* (1995) 183 CLR 373, 480-481.

69. This passage can not be understood to mean that the *Melbourne Corporation* doctrine applies only where a Commonwealth law, "affect[s] the machinery of the government of the State". The impugned legislation in *Melbourne Corporation* did not do that. Neither did the impugned legislation in *Re Australian Education Union & Australian Nursing Federation; Ex Parte Victoria.*

70. Aspects of the passage are (with respect) opaque. The distinction drawn by Brennan J in the passage quoted between Commonwealth laws which simply "diminish" State executive power and those that "impede the processes" by which such power is exercised is obscure. It might be thought to have a clear enough meaning in the context of State legislative power, but not as regards executive power.

71. Likewise, the passage cannot be understood to mean that the doctrine does not apply where a Commonwealth law merely "diminishes" the breadth of the discretions available to a State executive government. Again, in this sense, the practical effect of the provision considered in *Melbourne Corporation* was to diminish the discretion of a State executive government in the conduct of its banking. A distinction between "diminishing" and precluding discretion is no more precise. The practical effect of the legislation considered in *Austin* was to affect the discretion of the executive as to setting the remuneration of State judges. Unless understood correctly, the passage cannot be reconciled with the proposition that a State's capacity to function can be destroyed as readily by a thousand small cuts as by the efforts of a single broad sword[77].

72. In the majority judgment of Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ in the *Industrial Relations Act Case*[78], their Honours analysis of the juridical basis of the doctrine referred approvingly to the analysis of the majority in *AEU*

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[77] *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192, 208-209 (Gibbs CJ) and at 230 (Wilson J).

[78] *Victoria v The Commonwealth (The Industrial Relations Act Case)* (1996) 187 CLR 416, 498 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

and cites various other relevant authorities[79] without reference to the above analysis in the *Native Title Act Case.*

PART VI: LENGTH OF ORAL ARGUMENT

73. It is estimated that the oral argument for the Attorney General for Western Australia will take 2 hours.

Dated: 27 February 2013.

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[79] *Victoria v The Commonwealth (The Industrial Relations Act Case)* (1996) 187 CLR 416, 498 (FN 259) (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).