

# HIGH COURT OF AUSTRALIA

KIEFEL CJ,  
GAGELER, KEANE, GORDON, EDELMAN, STEWARD AND GLEESON JJ

---

MINERALOGY PTY LTD & ANOR

PLAINTIFFS

AND

STATE OF WESTERN AUSTRALIA

DEFENDANT

*Mineralogy Pty Ltd v Western Australia*

[2021] HCA 30

*Dates of Hearing: 15, 16, 17 & 18 June 2021*

*Date of Judgment: 13 October 2021*

B54/2020

## ORDER

*The questions of law stated in the Special Case filed on 8 April 2021 be answered as follows:*

1. *Is the Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020 (WA) ("2020 Act") invalid or inoperative in its entirety?*

*Answer: No.*

2. *If the answer to question 1 is "no", are any of the following parts or provisions of the 2020 Act invalid or inoperative (and, if so, to what extent):*

- (a) *Part 3;*
- (b) *Subsections 8(3)-(5);*
- (c) *Subsections 9(1)-(2);*
- (d) *Subsections 10(4)-(7);*
- (e) *Subsections 11(1)-(7);*
- (f) *Subsections 12(1)-(2) and (4)-(7);*
- (g) *Subsections 13(4)-(8);*
- (h) *Section 14;*



2.

- (i) Subsection 15(5)(b);
- (j) Subsection 16(3);
- (k) Subsections 17(4)-(5);
- (l) Subsections 18(1)-(3) and (5)-(7);
- (m) Subsections 19(1)-(7);
- (n) Section 20;
- (o) Subsections 21(4)-(8);
- (p) Section 22;
- (q) Subsection 23(5)(b);
- (r) Subsection 24(3);
- (s) Subsections 25(4)-(5); and/or
- (t) Sections 30 and 31.

*Answer: Sections 9(1) and 9(2) and 10(4) to 10(7) of the Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002 (WA), as inserted by the 2020 Act, are not invalid or inoperative to any extent. The question is otherwise unnecessary to answer.*

3. *If the answer to question 2 is "yes", are any or all of the invalid provisions of the 2020 Act severable such that the 2020 Act is capable of operating to the extent of the remaining valid provisions?*

*Answer: The question does not arise.*

4. *By whom should the costs of this Special Case be paid?*

*Answer: The plaintiffs.*

## **Representation**

D F Jackson QC with M A Karam and H C Cooper for the plaintiffs  
(instructed by Jonathan Shaw)

J A Thomson SC, Solicitor-General for the State of Western Australia, with  
S J Free SC, J E Shaw and Z C Heger for the defendant (instructed by State  
Solicitor's Office (WA))

S P Donaghue QC, Solicitor-General of the Commonwealth, with  
F I Gordon, T M Wood and J G Wherrett for the Attorney-General of the  
Commonwealth, intervening (instructed by Australian Government  
Solicitor)



M G Sexton SC, Solicitor-General for the State of New South Wales, with J S Caldwell for the Attorney-General for the State of New South Wales, intervening (instructed by Crown Solicitor's Office NSW)

N Chrstrup SC, Solicitor-General for the Northern Territory, with L S Peattie for the Attorney-General for the Northern Territory, intervening (instructed by Solicitor for the Northern Territory)

R J Orr QC, Solicitor-General for the State of Victoria, with G A Hill and M-Q T Nguyen for the Attorney-General for the State of Victoria, intervening (instructed by Victorian Government Solicitor's Office)

E J Longbottom QC with F J Nagorcka for the Attorney-General of the State of Queensland, intervening (instructed by Crown Law Qld)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



## CATCHWORDS

### Mineralogy Pty Ltd v Western Australia

Constitutional law – State Parliament – Legislative power – Where State of Western Australia entered into agreement concerning mining projects in Pilbara region with Mineralogy Pty Ltd and other parties ("co-proponents") including International Minerals Pty Ltd – Where agreement and 2008 variation set out in schedules to, and thereby formed part of, *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA) ("State Act") – Where agreement provided that Mineralogy Pty Ltd, alone or with co-proponent, could submit proposals to relevant Minister regarding projects – Where two plaintiff companies submitted proposals to Minister in 2012 and 2013 – Where disputes in relation to 2012 proposal referred to arbitration, resulting in arbitral awards in favour of plaintiffs in 2014 and 2019 – Where in August 2020 Parliament of Western Australia passed *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA) ("Amending Act") – Where Amending Act purported to insert new Pt 3 into State Act, including provisions which would deprive 2012 and 2013 proposals of legal effect (s 9) and deprive 2014 and 2019 arbitral awards of legal effect (s 10) – Where plaintiffs commenced proceedings in High Court's original jurisdiction seeking declarations that Amending Act wholly or partly invalid – Whether manner of enactment of Amending Act contravened s 6 of *Australia Act 1986* (Cth) – Whether Amending Act exceeded limitation on legislative power of Parliament of Western Australia arising from rule of law or deeply rooted common law rights – Whether ss 9(1), 9(2) and 10(4)-(7) of State Act incompatible with Ch III of *Constitution* – Whether ss 9(1), 9(2) and 10(4)-(7) of State Act incompatible with s 118 of *Constitution*.

High Court – Practice – Special case – Where parties agreed to state questions of law for opinion of Full Court – Where special case stated facts and identified documents said to be necessary to enable Court to answer questions of law – Whether facts stated and documents identified sufficient to satisfy Court of necessity of answering questions of law stated in special case for determination of immediate right, duty or liability in controversy between parties.

Words and phrases – "adjudicative function", "advisory", "arbitral awards", "conflict between State laws", "deeply rooted common law rights", "exercise of judicial power", "full faith and credit", "government agreement", "institutional integrity", "interference with judicial power", "legislative power", "limitations on the scope of the legislative power", "manner and form", "necessity of answering the questions stated by the parties", "original jurisdiction", "prudential approach to resolving questions of constitutional validity", "rule of law", "severance", "special case".





*Constitution*, Ch III, ss 107, 118.

*Colonial Laws Validity Act 1865* (Imp), s 5.

*Australia Act 1986* (Cth), s 6.

*Judiciary Act 1903* (Cth), s 18.

*High Court Rules 2004* (Cth), rr 27.07, 27.08.

*Commercial Arbitration Act 2013* (Qld), ss 35, 36.

*Government Agreements Act 1979* (WA).

*Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA), Pts 2, 3, Schs 1, 2.

*Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA).



KIEFEL CJ, GAGELER, KEANE, GORDON, STEWARD AND GLEESON JJ.

## Introduction

1       The plaintiffs, Mineralogy Pty Ltd and International Minerals Pty Ltd, and the defendant, the State of Western Australia, in 2001 entered into an agreement known as the "Iron Ore Processing (Mineralogy Pty Ltd) Agreement" which in 2008 they varied by entering into a further agreement, known as the "Variation Agreement". The Iron Ore Processing (Mineralogy Pty Ltd) Agreement as varied by the Variation Agreement is conveniently referred to as the "State Agreement".

2       The *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA), as amended from time to time, is conveniently referred to as the "State Act". The Iron Ore Processing (Mineralogy Pty Ltd) Agreement and the Variation Agreement are set out in Schedules to the State Act. Through the operation of the *Interpretation Act 1984* (WA)<sup>1</sup>, the Schedules form part of the State Act.

3       Part 2 of the State Act contains provisions expressed in identical terms with respect to the Iron Ore Processing (Mineralogy Pty Ltd) Agreement<sup>2</sup>, including "as varied from time to time in accordance with its provisions"<sup>3</sup>, and to the Variation Agreement<sup>4</sup>. Their cumulative effect is to provide that the State Agreement "is ratified"<sup>5</sup>, that the implementation of the State Agreement "is authorised"<sup>6</sup>, and that ("[w]ithout limiting or otherwise affecting the application of the *Government Agreements Act 1979* [(WA)]") the State Agreement "operates and takes effect despite any other Act or law"<sup>7</sup>. Implicit in the qualification to the last of those

---

1     Section 31(2) of the *Interpretation Act*.

2     Section 4 of the State Act.

3     Section 3 (definition of "the Agreement") of the State Act.

4     Section 6 of the State Act.

5     Sections 4(1) and 6(1) of the State Act.

6     Sections 4(2) and 6(2) of the State Act.

7     Sections 4(3) and 6(3) of the State Act.

Kiefel CJ  
 Gageler J  
 Keane J  
 Gordon J  
 Steward J  
 Gleeson J

2.

provisions is an acknowledgement that the State Agreement is also a "Government agreement" within the meaning of the *Government Agreements Act*<sup>8</sup>, which provides that "each provision of a Government agreement shall operate and take effect ... according to its terms notwithstanding any other Act or law"<sup>9</sup> and that "any purported modification of any other Act or law contained, or provided for, in [a provision of a Government agreement] shall operate and take effect so as to modify that other Act or law for the purposes of the Government agreement ... according to its terms notwithstanding any other Act or law"<sup>10</sup>.

4 The *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA) purports to further amend the State Act by inserting a new Pt 3 into the State Act without altering the text of Pt 2. It is conveniently referred to as the "Amending Act".

5 In a proceeding commenced by writ of summons in the original jurisdiction of the High Court under s 30(a) of the *Judiciary Act 1903* (Cth), the plaintiffs seek against the defendant a declaration that the Amending Act is invalid or alternatively declarations that the whole or each of numerous specified provisions of Pt 3 of the State Act as inserted by the Amending Act is invalid. The relief is framed to focus on the operation of the Amending Act, recognising that the State Act as amended by the Amending Act must operate in accordance with its terms if and to the extent that the Amending Act is not invalid<sup>11</sup>.

6 The principal allegation of the plaintiffs in the proceeding is that the manner of enactment of the Amending Act, as an ordinary Act of the Parliament of Western Australia, contravened s 6 of the *Australia Act 1986* (Cth). They also allege that the Amending Act as a whole exceeds one or more asserted limitations on the scope of the legislative power of the Parliament of Western Australia continued by s 107 of the *Constitution*. Their alternative allegations are to the effect that the

---

8 See s 2 of the *Government Agreements Act*.

9 Section 3(a) of the *Government Agreements Act*.

10 Section 3(b) of the *Government Agreements Act*.

11 cf *Commissioner of Taxation v Clyne* (1958) 100 CLR 246 at 267-268; *Attorney-General (NSW) v Ex rel McKellar v The Commonwealth* (1977) 139 CLR 527 at 550, 560, 562, 582; *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462 at 472.

<i>Kiefel</i>	<i>CJ</i>
<i>Gageler</i>	<i>J</i>
<i>Keane</i>	<i>J</i>
<i>Gordon</i>	<i>J</i>
<i>Steward</i>	<i>J</i>
<i>Gleeson</i>	<i>J</i>

### 3.

whole of Pt 3 of the State Act, or in the alternative each of the numerous provisions of Pt 3 which they specify, is invalid either on the basis that it exceeds one or more asserted limitations on the scope of the legislative power of the Parliament of Western Australia or on the basis that it exceeds one or more limitations imposed on the exercise of State legislative power by Ch III or by one or more provisions within Ch V of the *Constitution*.

7 By special case in the proceeding, the plaintiffs and the defendant agreed in stating questions of law for the opinion of the Full Court. The questions of law were framed by the parties in the drafting of the special case, and written and oral argument was joined between the parties on the hearing of the special case, with a view to obtaining the opinion of the Full Court on each of the multifarious legal bases on which the plaintiffs seek declarations of invalidity in respect of the Amending Act and in respect of the numerous challenged provisions within Pt 3 of the State Act.

8 A measure of imprecision as to the scope of the plaintiffs' challenges to provisions within Pt 3 of the State Act became apparent in the course of oral argument on the hearing of the special case. To ensure that no challenge to a provision was overlooked or misunderstood, the plaintiffs were asked to provide a schedule setting out each ground of invalidity claimed with respect to each provision sought to be impugned. To the extent that the challenges identified in the schedule provided in response to that request depart from those which might have been thought to emerge from the manner in which the plaintiffs framed the relief sought in the proceeding, from the manner in which the parties framed the questions of law in the special case, or from the detail of the written and oral arguments, the plaintiffs are held to the challenges identified in the schedule in the reasons which follow.

9 The special case procedure adopted by the parties is appropriate to obtain judicial resolution of the issues as to whether the Amending Act is non-compliant with s 6 of the *Australia Act* or exceeds the legislative power of the Parliament of Western Australia as well as to obtain judicial resolution of issues as to whether certain central provisions of Pt 3 of the State Act are compatible with Ch III and s 118 of the *Constitution*. To the extent that the questions of law stated in the special case raise those issues, the questions must be answered adversely to the plaintiffs for reasons to be explained.

10 The procedure adopted by the parties is inappropriate to obtain judicial resolution of legal issues which might or might not arise in relation to the numerous other legal bases on which the plaintiffs seek declarations of invalidity in respect

*Kiefel* CJ  
*Gageler* J  
*Keane* J  
*Gordon* J  
*Steward* J  
*Gleeson* J

4.

of Pt 3 of the State Act. The reason is that the facts agreed between the parties for the purpose of the special case provide an inadequate foundation upon which to crystallise those legal issues or to demonstrate the necessity of their resolution to the determination of any immediate right, duty or liability in controversy between the parties.

- 11 Before explaining in more detail why some but not all questions of law stated in the special case are appropriate to be answered, and then proceeding to answer each question that is appropriate to be answered, it will be fitting to say something at the level of principle about the proper and improper use of the special case procedure. To allow that to occur, it is necessary at the outset to record the terms of the State Agreement, to recount certain events leading up to the enactment of the Amending Act, and to set out the central provisions and outline the structure of Pt 3 of the State Act.

### **The State Agreement**

- 12 The State Agreement refers to the first plaintiff, Mineralogy Pty Ltd, as "the Company" and to the defendant as "the State". The Minister in the Government of the State for the time being responsible for the administration of the State Act, it refers to as "the Minister". Other parties to the State Agreement, including the second plaintiff, International Minerals Pty Ltd, it refers to as "the Co-Proponents".

- 13 The State Agreement recites that "[t]he Company is the holder of mining tenements in the Pilbara region" and "has granted various rights in relation to certain of the said mining tenements to the Co-Proponents". The recital continues by stating that "[t]he Company by itself or in conjunction with one or more of the Co-Proponents wishes to develop projects" incorporating, amongst other potential elements, the mining and concentration of iron ore in delineated portions of areas covered by mining tenements held by the Company and the processing of that iron ore. The recital concludes by stating that the State "has agreed to assist the establishment of the proposed projects upon and subject to the terms of" the State Agreement "for the purpose of promoting employment opportunity and industrial development in Western Australia".

- 14 Clause 4(3) of the State Agreement makes provision to the effect that, upon the commencement of the State Act, the State Agreement "shall operate and take effect according to its terms notwithstanding the provisions of any Act or law of Western Australia".

<i>Kiefel</i>	<i>CJ</i>
<i>Gageler</i>	<i>J</i>
<i>Keane</i>	<i>J</i>
<i>Gordon</i>	<i>J</i>
<i>Steward</i>	<i>J</i>
<i>Gleeson</i>	<i>J</i>

5.

15            Clause 6 of the State Agreement requires the Company, either alone or with a Co-Proponent, to submit to the Minister detailed proposals for one or more or a combination of projects of the type described in the State Agreement as "Project 1", "Project 2" or "Project 3".

16            Clause 7 of the State Agreement requires the Minister to take one of three specified courses of action in respect of a proposal submitted pursuant to cl 6. The first is to approve the proposal without qualification or reservation. The second is to defer considering or making a decision on the proposal pending submission of a further proposal or proposals in respect of matters not covered by the proposal. The third is to require, as a condition precedent to approval of the proposal, that there be alteration of the proposal or compliance with conditions in respect of the proposal that the Minister for stated reasons thinks reasonable. What the Minister cannot do is to reject the proposal.

17            The State Agreement contains numerous other provisions designed to facilitate implementation of approved proposals. One example is cl 10, which obliges the State in specified circumstances to cause the Company to be granted mining leases under the *Mining Act 1978* (WA) as modified in specified respects for the purposes of the State Agreement. Another is cl 27, which empowers the State to resume and dispose of land for the purposes of the State Agreement under the *Land Administration Act 1997* (WA) and the *Public Works Act 1902* (WA) as also modified in specified respects for the purposes of the State Agreement.

18            Clause 32 of the State Agreement, which is central to the plaintiffs' argument that the manner of enactment of the Amending Act contravened s 6 of the *Australia Act*, deals with variation of the State Agreement. The clause provides in full:

- "(1) The parties to this Agreement may from time to time by agreement in writing add to substitute for cancel or vary all or any of the provisions of this Agreement or of any lease licence easement or other title granted under or pursuant to this Agreement for the purpose of more efficiently or satisfactorily implementing or facilitating any of the objects of this Agreement.
- (2) The Minister shall cause any agreement made pursuant to subclause (1) in respect of any addition substitution cancellation or variation of the provisions of this Agreement to be laid on the Table of each House of Parliament within 12 sitting days next following its execution.

Kiefel CJ  
Gageler J  
Keane J  
Gordon J  
Steward J  
Gleeson J

6.

- (3) Either House may, within 12 sitting days of that House after the agreement has been laid before it pass a resolution disallowing the agreement, but if after the last day on which the agreement might have been disallowed neither House has passed such a resolution the agreement shall have effect from and after that last day."

19 Clause 42 of the State Agreement deals with arbitration. Read with cl 2(f) of the State Agreement, which gives ambulatory operation to references to legislation, cl 42(1) provides that "[a]ny dispute or difference between the parties arising out of or in connection with this Agreement the construction of this Agreement or as to the rights duties or liabilities of the parties or any of them under this Agreement or as to any matter to be agreed upon between the parties under this Agreement shall in default of agreement between the parties and in the absence of any provision in this Agreement to the contrary be referred to and settled by arbitration under the provisions of the [*Commercial Arbitration Act 2012* (WA)]".

### **Events leading up to the enactment of the Amending Act**

20 Nine years ago, in or around August 2012, the plaintiffs submitted to the Minister responsible for the administration of the State Act documents entitled "Balmoral South Iron Ore Project: Project Proposal for the Western Australian Government" and "Balmoral South Iron Ore Project: Project Proposal addendum for the Western Australian Government". Those documents are together referred to in Pt 3 of the State Act as the "first Balmoral South proposal"<sup>12</sup>.

21 Nearly a year later, in June 2013, the plaintiffs submitted to the Minister then responsible for the administration of the State Act further documents entitled "Balmoral South Iron Ore Project: Project Proposal for the Western Australian Government". Those further documents are referred to in Pt 3 of the State Act as the "second Balmoral South proposal"<sup>13</sup>.

22 The plaintiffs and the defendant took different views about whether the submission of the first Balmoral South proposal amounted to the submission of a proposal within the meaning of cl 6 of the State Agreement: the plaintiffs took the view that it did; the defendant took the view that it did not. The dispute between

---

12 Section 7(1) (definition of "first Balmoral South proposal") of the State Act.

13 Section 7(1) (definition of "second Balmoral South proposal") of the State Act.



7.

them was eventually referred to arbitration pursuant to cl 42(1) of the State Agreement.

23       The outcome of the arbitration was an arbitral award dated 20 May 2014. The arbitral award declared that the first Balmoral South proposal was a proposal submitted pursuant to cl 6 of the State Agreement with which the Minister was required to deal under cl 7 of the State Agreement. The arbitral award also ordered the State to pay the arbitrator's costs and expenses, which the State subsequently did.

24       Against the background of the arbitral award dated 20 May 2014 having declared that the first Balmoral South proposal was a proposal submitted pursuant to cl 6 of the State Agreement with which the Minister was required to deal under cl 7 of the State Agreement, the Premier on 22 July 2014 purported pursuant to cl 7 of the State Agreement to require that the plaintiffs comply with 46 conditions precedent to his approval of the first Balmoral South proposal.

25       More than four years later, in December 2018, the parties referred to arbitration a procedural dispute about whether the arbitral award dated 20 May 2014 precluded the plaintiffs from pursuing a claim for damages for breach of the State Agreement based on the initial failure of the Minister to deal with the first Balmoral South proposal. A procedural dispute was also referred to arbitration about whether inordinate or inexcusable delay precluded the plaintiffs from pursuing a further claim for damages for breaches of the State Agreement based on an allegation that the conditions precedent to approval of the first Balmoral South proposal imposed by the Premier on 22 July 2014 were so unreasonable as to give rise to a further failure to deal with the first Balmoral South proposal. The outcome was an arbitral award dated 11 October 2019 which declared that the plaintiffs were not precluded from pursuing either claim for damages.

26       Ultimately, in July 2020, the parties referred to arbitration the substantive disputes foreshadowed in the procedural disputes which had resulted in the arbitral award dated 11 October 2019. The substantive disputes were about the liability of the defendant to the plaintiffs in damages for breach of cl 7 of the State Agreement based on the initial failure of the Minister to deal with the first Balmoral South proposal and based on the allegation that the conditions precedent to approval imposed by the Premier on 22 July 2014 were unreasonable. The arbitration of those disputes was cut short by the enactment of the Amending Act.

Kiefel CJ  
Gageler J  
Keane J  
Gordon J  
Steward J  
Gleeson J

8.

### **The Amending Act and Pt 3 of the State Act**

27 The Bill for the Amending Act was introduced into the Legislative Assembly on 11 August 2020 and passed the next day. The Bill was then introduced into and passed by the Legislative Council on 13 August 2020. The Governor assented to the Bill on the same day.

28 The Amending Act was expressed to operate to amend the State Act to insert Pt 3 on the day it received assent<sup>14</sup>. The effect of the amendment, read with the *Interpretation Act*, was to cause Pt 3 to commence at midnight on 12 August 2020<sup>15</sup>, a time referred to in Pt 3 as "commencement"<sup>16</sup>. The Part is expressed to have extra-territorial operation so far as the legislative power of the Parliament of Western Australia permits<sup>17</sup>.

29 Machinery provisions within Pt 3 of the State Act are noteworthy. Section 8(1) combines with s 8(2) to provide that Pt 3 "has effect despite Part 2 and any other Act or law" and that, "[s]ubject to" Pt 3, the State Agreement "continues to operate in accordance with its provisions and as provided for under" Pt 2.

30 Importantly, s 8(4) and s 8(5) make specific and complementary provision for the substantive provisions of Pt 3 to have distinct and severable operations in the event of invalidity. Noting that s 8(1) displaces the operation of the standard severance provision in the *Interpretation Act*<sup>18</sup> for the purposes of Pt 3, s 8(4) and s 8(5) leave no room for inference<sup>19</sup> that those provisions can in turn themselves be displaced through discernment of a contrary intention in Pt 3<sup>20</sup>. Despite being

---

14 Section 2 and s 7 of the Amending Act.

15 Section 21 of the *Interpretation Act*.

16 Section 7(1) (definition of "commencement") of the State Act.

17 Section 8(6) of the State Act.

18 Section 7 of the *Interpretation Act*.

19 cf s 3 of the *Interpretation Act*.

20 *Knight v Victoria* (2017) 261 CLR 306 at 325 [35].

9.

mentioned in a question stated in the special case, the validity of neither is separately challenged in the proceeding. Sufficient for present purposes is therefore to note the terms of s 8(5), which provides that if "a provision of [Pt 3], or a part of a provision of [Pt 3], is not valid for any reason, the rest of [Pt 3] is to be regarded as divisible from, and capable of operating independently of, the provision, or the part of a provision, that is not valid".

31 Machinery provisions within Pt 3 also include those which empower the making of "subsidiary legislation" in the form of regulations under s 29 and orders under s 30. The regulation-making power conferred by s 29 is expressed in familiar form<sup>21</sup> to empower the Governor to make regulations prescribing matters "necessary or convenient" to be prescribed for giving effect to Pt 3. Section 30 is in a less familiar – perhaps unprecedented – form, being described by the Attorney-General in the Legislative Assembly as "the Henry VIII clause of all Henry VIIIs"<sup>22</sup>. The section is expressed to empower the Governor, if the Minister is of the opinion that one or more specified circumstances exist or may exist and on the Minister's recommendation, by order to amend Pt 3 to address those circumstances or to make any other provision necessary or convenient to address those circumstances. Section 31 goes on to provide that subsidiary legislation may be expressed to operate retrospectively, to have effect despite the State Agreement, Pt 2, Pt 3 or any other Act or law, and to provide that a specified provision in the State Agreement, Pt 3 or a written law applies with specified modifications to or in relation to any matter or thing. Section 29 is not, but ss 30 and 31 are, separately challenged in the proceeding. There was nothing in the special case to suggest that any subsidiary legislation has been made within the scope of s 30 or s 31.

32 Turning from the machinery provisions to the substantive provisions of Pt 3, s 8(3) provides that the State Agreement "is taken not to have been, and never to have been, repudiated by any conduct of the State, or of a State agent, occurring or arising on or before commencement". Although the validity of s 8(3) is separately challenged in the proceeding, the plaintiffs have not contended that the State Agreement has been repudiated.

---

21 See *Shanahan v Scott* (1957) 96 CLR 245 at 249-250.

22 Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 12 August 2020 at 4834.

*Kiefel* CJ  
*Gageler* J  
*Keane* J  
*Gordon* J  
*Steward* J  
*Gleeson* J

10.

33 Section 9, the validity of which is separately challenged in the proceeding, provides:

- "(1) To the extent that it would not otherwise be the case, on and after commencement, neither the first Balmoral South proposal nor the second Balmoral South proposal has, nor can have, any contractual or other legal effect under the Agreement or otherwise.
- (2) For the Balmoral South Iron Ore Project –
  - (a) only proposals submitted under the Agreement on or after commencement can be proposals for the purposes of the Agreement; and
  - (b) no document provided to the State, or of which the State is otherwise aware, before commencement can be proposals for the purposes of the Agreement."

34 Section 10 needs to be understood in light of the definition of "relevant arbitration"<sup>23</sup>. The definition is tailored to capture each of the arbitrations concluded by the arbitral awards of 20 May 2014 and 11 October 2019 as well as the arbitration of the substantive disputes as to the entitlement of the plaintiffs to damages for alleged breaches of the State Agreement commenced in July 2020 and ongoing as at 12 August 2020.

35 Section 10(1) speaks to the ongoing arbitration in providing that "[a]ny relevant arbitration that is in progress, or otherwise not completed, immediately before commencement is terminated". The validity of s 10(1) is not separately challenged in the proceeding. It follows that, if the Amending Act and Pt 3 of the State Act are not wholly invalid, the arbitration commenced in July 2020 which was ongoing as at 12 August 2020 must be treated as having ended at midnight on that date by force of s 10(1).

36 Section 10(4) to s 10(7), which are separately challenged in the proceeding, speak in turn to each of the concluded arbitrations in providing:

---

23 Section 7(1) (definition of "relevant arbitration") of the State Act.

11.

- "(4) The arbitral award made in a relevant arbitration and dated 20 May 2014 is of no effect and is taken never to have had any effect.
- (5) The arbitration agreement applicable to that relevant arbitration, and under which that arbitral award is made, is not valid, and is taken never to have been valid, to the extent that, apart from this subsection, the arbitration agreement would underpin, confer jurisdiction to make, authorise or otherwise allow the making of that arbitral award.
- (6) The arbitral award made in a relevant arbitration and dated 11 October 2019 is of no effect and is taken never to have had any effect.
- (7) The arbitration agreement applicable to that relevant arbitration, and under which that arbitral award is made, is not valid, and is taken never to have been valid, to the extent that, apart from this subsection, the arbitration agreement would underpin, confer jurisdiction to make, authorise or otherwise allow the making of that arbitral award."

37 Most of the remaining provisions of Pt 3 separately challenged in the proceeding hinge on the elaborately defined expressions "disputed matter" and "protected matter"<sup>24</sup>. The definitions of those expressions repeatedly employ the expression "connected with", which is in turn elaborately defined to encompass a range of causal and other relationships<sup>25</sup>.

38 The definition of "disputed matter" encompasses the conduct of the Minister then responsible for the administration of the State Act which gave rise to the subject matter of each of the three arbitrations addressed in s 10 and encompasses more broadly conduct of the Minister connected with the first Balmoral South proposal or the second Balmoral South proposal<sup>26</sup>. The definition

---

24 Section 7(1) (definitions of "disputed matter" and "protected matter") of the State Act.

25 Section 7(1) (definition of "connected with") and s 7(3) of the State Act.

26 Section 7(1) (paras (a)-(e) of the definition of "disputed matter") of the State Act.

<i>Kiefel</i>	<i>CJ</i>
<i>Gageler</i>	<i>J</i>
<i>Keane</i>	<i>J</i>
<i>Gordon</i>	<i>J</i>
<i>Steward</i>	<i>J</i>
<i>Gleeson</i>	<i>J</i>

12.

encompasses even more broadly conduct of the State or any State agent that is or was connected with the Balmoral South Iron Ore Project as proposed or described from time to time as well as conduct of the State or any State agent connected with the making of the State Agreement<sup>27</sup>.

39 In respect of a disputed matter, s 11(1) to s 11(4) provide:

- "(1) On and after commencement, the State has, and can have, no liability to any person that is or would be –
  - (a) in respect of any loss, or other matter or thing, that is the subject of a claim, order, finding or declaration made against the State in a relevant arbitration; or
  - (b) in respect of any other loss, or other matter or thing, that is, or is connected with, a disputed matter (whether the loss, or other matter or thing, occurs or arises before, on or after commencement); or
  - (c) in any other way connected with a disputed matter.
- (2) Any liability of the type described in subsection (1) that the State has to any person before commencement is extinguished.
- (3) On and after commencement, no proceedings can be brought, made or begun against the State to the extent that the proceedings are or would be –
  - (a) for the purpose of establishing, quantifying or enforcing a liability of the type described in subsection (1); or
  - (b) otherwise –
    - (i) in respect of any loss, or other matter or thing, that is the subject of a claim, order, finding or declaration made against the State in a relevant arbitration; or

---

27 Section 7(1) (paras (f)-(h) of the definition of "disputed matter") of the State Act.

13.

- (ii) in respect of any other loss, or other matter or thing, that is, or is connected with, a disputed matter (whether the loss, or other matter or thing, occurs or arises before, on or after commencement); or
  - (iii) in any other way connected with a disputed matter.
- (4) Any proceedings brought, made or begun against the State, to the extent that they are of the type described in subsection (3), are terminated if either or both of the following apply –
- (a) the proceedings are brought, made or begun before commencement but are not completed before commencement;
  - (b) the proceedings are brought, made or begun before the end of the day on which the amending Act receives the Royal Assent but are not completed before the end of that day."

40 Use of the time-honoured expression "no proceedings can be brought" indicates that the operation of s 11(3) is not to extinguish a right or cause of action or to affect jurisdiction but rather to create a statutory defence that can be raised by the State in answer to proceedings and that, conversely, has no operation unless raised by the State in answer to proceedings<sup>28</sup>. The operation of s 11(4) to terminate proceedings that have already been brought is through the creation of a statutory defence of the same nature.

41 Section 11(5) and s 11(6) go on to make provision in respect of proceedings of the type described in s 11(3) brought and completed before commencement. Section 11(7) concerns legal costs in proceedings referred to in s 11(4) and s 11(6). Although s 11(5) to s 11(7) are challenged in the proceeding along with s 11(1) to

---

**28** *Minister for Home Affairs v DMA18* (2020) 95 ALJR 14 at 18 [4], 23-24 [26]-[31]; 385 ALR 16 at 19, 26-27, citing *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 405-406, 425-426, 456, 473-474, 486-488, *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 562 and *The Commonwealth v Mewett* (1997) 191 CLR 471 at 507-509, 511, 516, 534; *Price v Spoor* (2021) 95 ALJR 607 at 613-614 [9]-[11], 618 [40], 625-626 [78]-[79], 627 [85]; 391 ALR 532 at 535, 541, 551, 553.

*Kiefel* CJ  
*Gageler* J  
*Keane* J  
*Gordon* J  
*Steward* J  
*Gleeson* J

14.

s 11(4), there is no suggestion in the special case that any proceeding covered by them ever existed.

42 The definition of "protected matter" encompasses past, present and future consideration of courses of action for resolving, addressing or otherwise dealing with a disputed matter or liabilities or proceedings, or potential liabilities or proceedings, connected with a disputed matter and extends to processes involved in enacting the Amending Act<sup>29</sup>. The definition also encompasses past, present and future consideration of courses of action for resolving, addressing or otherwise dealing with matters or things to be, or potentially to be, the subject of a regulation under s 29 or an order under s 30 and extends to processes that might be involved in promulgating such regulations or making such an order<sup>30</sup>.

43 In respect of a protected matter, s 18(1) is expressed to prevent the matter from giving rise to a cause of action or legal right or remedy against the State after commencement and s 18(2) provides that the protected matter is taken never to have had the effect of giving rise to any cause of action or legal right or remedy against the State which may have existed before commencement. For those purposes, a protected matter is required by s 18(3) to be taken to include both "a protected matter combined with another matter or thing" and "a matter or thing connected with a protected matter". Section 18(5) to s 18(7) are expressed to impose restrictions on the admissibility and compellability of testimony as well as on the discovery and production of documents connected with a protected matter.

44 In respect of a protected matter, s 19(1) to s 19(4) substantially reproduce the language of s 11(1) to s 11(4), substituting "protected matter" for "disputed matter". Like s 11(3) and s 11(4), s 19(3) and s 19(4) must each be read as creating a statutory defence that has no operation unless and until raised by the State in answer to proceedings. Section 19(5) and s 19(6) mirror s 11(5) and s 11(6) in going on to make provision in respect of proceedings of the type described in s 19(3) brought and completed before commencement. Section 19(7) mirrors s 11(7) in going on to deal with legal costs in proceedings referred to in s 19(4) and s 19(6). Although s 19(5) to s 19(7) are challenged in the proceeding, there is yet again no suggestion in the special case that any proceeding covered by them ever existed.

---

**29** Section 7(1) (paras (a)-(e) of the definition of "protected matter") of the State Act.

**30** Section 7(1) (paras (f)-(j) of the definition of "protected matter") of the State Act.



15.

45 Other provisions separately challenged in the proceeding can be grouped into three main categories. Within each category, substantially identical provision is made in respect of disputed matters and in respect of protected matters.

46 The first category of other provisions separately challenged can be described as "administrative law provisions". The category comprises provisions expressed to exclude "[a]ny conduct of the State that is, or is connected with, [a disputed or protected] matter" from judicial review<sup>31</sup>, other than for jurisdictional error<sup>32</sup>, and from the application of "the rules of natural justice (including any duty of procedural fairness)"<sup>33</sup>. The category includes provisions stating that "no proceedings can be brought, made or begun to the extent that the proceedings are connected with seeking, by or from the State, discovery, provision, production, inspection or disclosure of any document or other thing connected with [a disputed or protected] matter"<sup>34</sup> as well as provisions which deal with judicial review proceedings and discovery proceedings of types not suggested in the special case ever to have existed<sup>35</sup>.

47 The second category of other provisions separately challenged can be described as "indemnity provisions". The category comprises provisions expressed to impose joint and several liability on "relevant persons" to indemnify the State against any amount that might be recovered from the State in respect of a disputed matter or a protected matter<sup>36</sup> or that might be recovered from the Commonwealth in respect of a disputed matter or a protected matter<sup>37</sup>. The definition of "relevant

---

31 Section 12(1) and s 12(3) and s 20(1) and s 20(3) of the State Act.

32 Section 26(6) of the State Act.

33 Section 12(2) and s 12(3) and s 20(2) and s 20(3) of the State Act.

34 Sections 13(4) and 21(4) of the State Act.

35 Section 12(4) to s 12(7), s 13(5) to s 13(8), s 20(4) to s 20(7) and s 21(5) to s 21(8) of the State Act.

36 Sections 14 and 15 and 22 and 23 of the State Act.

37 Sections 16 and 24 of the State Act.

*Kiefel* CJ  
*Gageler* J  
*Keane* J  
*Gordon* J  
*Steward* J  
*Gleeson* J

16.

person" refers by name to each of the plaintiffs and to Mr Clive Frederick Palmer<sup>38</sup>, who is identified as a director of the first plaintiff<sup>39</sup>.

48 The third category of other provisions separately challenged can be described as "non-enforcement provisions". The category comprises provisions expressed to prevent a liability of the State connected with a disputed matter or a protected matter being charged to or paid out of the Consolidated Fund or enforced against any asset of the State<sup>40</sup>.

49 A provision to the effect that "[a]ny conduct of the State that occurs or arises before, on or after commencement, and that is, or is connected with, a protected matter does not constitute an offence and is taken never to have constituted an offence"<sup>41</sup> is also separately challenged. The special case does not suggest that the State has engaged in any such conduct.

50 Lastly, a provision to the effect that "[t]he State has, and can have, no liability, and is taken never to have had any liability, to any person to pay damages, compensation or any other type of amount connected with" certain conduct of the Minister administering the State Act or of the State or an agent of the State "occurring or arising" after midnight on 11 August 2020<sup>42</sup> is separately challenged. Yet again, the special case contains no suggestion that the Minister, the State or any agent of the State has engaged in any such conduct.

### **Use and misuse of the special case procedure**

51 The procedures of the High Court make provision for three alternative means by which a question of law thought to arise in a proceeding in its original jurisdiction can be raised in that proceeding for the consideration of the Full Court.

---

38 Sections 14(2) and 22(2) of the State Act.

39 Section 7(1) (definition of "Mr Palmer") of the State Act.

40 Sections 17 and 25 of the State Act.

41 Section 20(8) of the State Act.

42 Section 27 of the State Act read with s 7(1) (definition of "introduction time") of the State Act.

One can be invoked only by a Justice, acting on his or her own initiative or on the application of a party. The others can be invoked by a party or the parties together.

52        The procedure that can be invoked by a Justice is to "direct any case or question to be argued before a Full Court" in the exercise of the power conferred by s 18 of the *Judiciary Act*. The power can be exercised by the Justice stating a "case" on the basis of facts found or agreed, in which event the Full Court "is limited to ascertaining from the contents of the case stated what are the ultimate facts, and not the evidentiary facts, from which the legal consequences ensue that govern the determination of the rights of [the] parties"<sup>43</sup>. Alternatively, the power can be exercised by the Justice reserving a "question" which the Justice is satisfied requires resolution in order to determine or facilitate determination of the rights of the parties, in which event the Justice can be expected to make further directions to establish the basis, whether of fact or evidence or pleading, on which the Full Court is being asked by the Justice to resolve the question.

53        The procedure that can be invoked by a party is the filing of a demurrer to the whole or part of a pleading of the opposite party accompanied by an application to a Justice to set the demurrer down for hearing before the Full Court, as provided for in r 27.07 of the *High Court Rules 2004* (Cth). A demurrer admits for the purpose of its disposal allegations of fact in the pleading of the opposite party but denies the asserted legal consequence of those facts on a ground of law identified in the demurrer<sup>44</sup>. The demurrer procedure "proceeds from the premise that a party whose pleading is challenged will have set out, in that pleading, the case which the party seeks to make"<sup>45</sup> and "presupposes a pleading which is drawn so as to allege with distinctness and clearness the constituent facts of the cause of action or defence set up"<sup>46</sup>.

54        The procedure that can be invoked by the parties together – and which has been invoked by the parties in the present proceeding – is the special case procedure for which provision is made in r 27.08 of the *High Court Rules*. That

---

43    *R v Rigby* (1956) 100 CLR 146 at 150-151.

44    *Kathleen Investments (Aust) Ltd v Australian Atomic Energy Commission* (1977) 139 CLR 117 at 135.

45    *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 368 [121].

46    *South Australia v The Commonwealth* (1962) 108 CLR 130 at 142.

<i>Kiefel</i>	<i>CJ</i>
<i>Gageler</i>	<i>J</i>
<i>Keane</i>	<i>J</i>
<i>Gordon</i>	<i>J</i>
<i>Steward</i>	<i>J</i>
<i>Gleeson</i>	<i>J</i>

18.

rule provides that "the parties to a proceeding may", "[b]y leave of the Court or a Justice", "agree in stating the questions of law arising in the proceeding in the form of a special case for the opinion of the Full Court". The rule goes on to provide that "[t]he special case shall state the facts and identify the documents necessary to enable the Court to decide the questions raised" and that "[t]he Court may draw from the facts stated and documents identified in the special case any inference, whether of fact or law, which might have been drawn from them if proved at a trial".

55        The special case procedure has come in this century to be the predominant means by which the High Court has resolved questions of constitutional validity in proceedings commenced in its original jurisdiction. Experience has demonstrated that agreement between the parties about the questions of law that arise in their proceeding and about the facts and documents necessary for a decision to be made on those questions can enable the opinion of the Full Court on the questions stated in a special case to result in final determination of the rights in controversy in the proceeding in an efficient and timely manner. The agreement of the parties about facts and documents has in most cases provided the Full Court with an adequate basis upon which to determine "adjudicative facts" (being "ordinary questions of fact which arise between the parties because one asserts and the other denies that events have occurred bringing one of them within some criterion of liability or excuse set up by the law") and upon which also to be satisfied of "constitutional facts" (being "matters of fact upon which ... the constitutional validity of some general law may depend" and which "cannot and do not form issues between parties to be tried like the former questions")<sup>47</sup>. Sometimes overlooked, however, has been the need for the parties to bring no less precision to the framing of adjudicative facts to be stated in a special case than is necessary to be brought to the framing of adjudicative facts to be alleged in a pleading that is appropriate to be the subject of a demurrer.

56        More than once in recent years, the Full Court giving judgment on a special case has had occasion to remind parties that they have no entitlement to expect an

---

47    *Breen v Sneddon* (1961) 106 CLR 406 at 411-412. See also *Thomas v Mowbray* (2007) 233 CLR 307 at 482-483 [526], 512-522 [613]-[639]; *Aytugrul v The Queen* (2012) 247 CLR 170 at 200-201 [70]; *Maloney v The Queen* (2013) 252 CLR 168 at 298-299 [351]-[353]; *Re Day* (2017) 91 ALJR 262 at 268-269 [20]-[24]; 340 ALR 368 at 374-375.

answer to a question of law they have agreed in stating in a special case unless the Full Court can be satisfied by reference to the facts and documents they have agreed in the special case that "there exists a state of facts which makes it necessary to decide [the] question in order to do justice in the given case and to determine the rights of the parties"<sup>48</sup>.

57 That cautious and restrained approach to answering questions agreed by the parties in a special case is a manifestation of a more general prudential approach to resolving questions of constitutional validity "founded on the same basal understanding of the nature of the judicial function as that which has informed the doctrine that the High Court lacks original or appellate jurisdiction to answer any question of law (including but not confined to a question of constitutional law) if that question is divorced from the administration of the law"<sup>49</sup>. Prudential considerations supporting the approach have been identified to include "avoiding the formulation of a rule of constitutional law broader than required by the precise facts to which it is to be applied" and "avoiding the risk of premature interpretation of statutes on the basis of inadequate appreciation of their practical operation"<sup>50</sup>.

58 Underlying the prudential approach is recognition that the function performed by the Full Court in answering a question of law stated for its opinion is not advisory but adjudicative. Underlying it also is recognition that performance of an adjudicative function in an adversary setting "proceeds best when it proceeds if, and no further than is, warranted to determine a legal right or legal liability in

---

48 *Lambert v Weichelt* (1954) 28 ALJ 282 at 283. See *Duncan v New South Wales* (2015) 255 CLR 388 at 410 [52]; *Knight v Victoria* (2017) 261 CLR 306 at 324 [32]; *Zhang v Commissioner of the Australian Federal Police* (2021) 95 ALJR 432 at 437 [21]; 389 ALR 363 at 368; *LibertyWorks Inc v The Commonwealth* (2021) 95 ALJR 490 at 511 [90]; 391 ALR 188 at 210.

49 *Clubb v Edwards* (2019) 267 CLR 171 at 216-217 [136], citing *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289 at 303-305 explaining *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 266-267.

50 *Zhang v Commissioner of the Australian Federal Police* (2021) 95 ALJR 432 at 438 [22]; 389 ALR 363 at 368-369, citing *Tajjour v New South Wales* (2014) 254 CLR 508 at 588 [174].

Kiefel CJ  
 Gageler J  
 Keane J  
 Gordon J  
 Steward J  
 Gleeson J

20.

controversy"<sup>51</sup>. That is to say, "the adjudicatory process is most securely founded when it is exercised under the impact of a lively conflict between antagonistic demands, actively pressed, which make resolution of the controverted issue a practical necessity"<sup>52</sup>.

59 Two implications of the prudential approach repeatedly spelt out are that "a party will not be permitted to 'roam at large' but will be confined to advancing those grounds of challenge which bear on the validity of the provision in its application to that party"<sup>53</sup> and that "it is ordinarily inappropriate for the [Full] Court to be drawn into a consideration of whether a legislative provision would have an invalid operation in circumstances which have not arisen and which may never arise if the provision, if invalid in that operation, would be severable and otherwise valid"<sup>54</sup>.

60 Two further implications of the prudential approach should also be spelt out. One is that the application of an impugned legislative provision to the facts must appear from the special case with sufficient clarity both to identify the right, duty or liability that is in controversy and to demonstrate the necessity of answering the question of law to the judicial resolution of that controversy<sup>55</sup>. The other is that the necessity of answering the question of law to the judicial resolution of the controversy may not sufficiently appear where there remains a prospect that the controversy can be judicially determined on another basis.

61 The special case in the present proceeding has been framed by the parties with insufficient attention to those principles.

---

51 *Clubb v Edwards* (2019) 267 CLR 171 at 217 [137].

52 *Poe v Ullman* (1961) 367 US 497 at 503.

53 *Knight v Victoria* (2017) 261 CLR 306 at 325 [33], quoting *The Real Estate Institute of NSW v Blair* (1946) 73 CLR 213 at 227.

54 *Knight v Victoria* (2017) 261 CLR 306 at 324 [33]; *LibertyWorks Inc v The Commonwealth* (2021) 95 ALJR 490 at 511 [90]; 391 ALR 188 at 210.

55 eg *Duncan v New South Wales* (2015) 255 CLR 388 at 411 [53]-[54].

### Questions appropriate to determine in this special case

62 Each for reasons sufficient unto itself, the plaintiffs and the defendant have seen fit to agree on identifying facts in the special case which do much to reveal the sequence of events that led to the enactment of the Amending Act but little to reveal the practical effect of Pt 3 of the State Act on the rights of the plaintiffs beyond the immediate extinguishment of their rights purportedly effected by s 9(1) and s 9(2) and by s 10(4) to s 10(7).

63 If the Amending Act is not wholly invalid, the effect of s 8(5) of the State Act, which it will be recalled is not separately challenged in the proceeding, is that each part of each provision of Pt 3 of the State Act that is for any reason invalid is severable with the result that each other part of the provision and each other provision remains valid. And the effect of s 10(1) of the State Act, which it will be recalled is also not separately challenged in the proceeding, is that the arbitration commenced in July 2020 concerning the liability of the defendant to the plaintiffs in damages for breach of the State Agreement must be treated as having ended at midnight on 12 August 2020.

64 What then is left in fact to engage the remaining provisions of the State Act separately challenged in the proceeding? The special case reveals two possibilities. On analysis, they remain nothing more than possibilities.

65 First, the special case reveals that the plaintiffs commenced a proceeding against the defendant in the Federal Court of Australia on 12 August 2020 seeking, amongst other things, damages for breach of contract and under the *Australian Consumer Law* arising from the introduction of the Bill for the Amending Act into the Parliament of Western Australia. The proceeding has the potential to engage s 11(1), s 11(2) and s 11(4) as well as the potential to engage s 19(1), s 19(2) and s 19(4). But whether it will and, if so, how and to what extent cannot now be known. The defendant has not to date raised any defence in reliance on s 11(4) or s 19(4) and the proceeding has been adjourned pending the result of the present proceeding without the plaintiffs having formulated their claims with precision<sup>56</sup>.

66 Second, the special case reveals that the defendant put the plaintiffs on notice on 9 December 2020 that it intended to rely on an indemnity provision to claim an indemnity from the plaintiffs in connection with its costs in an identified proceeding in the Supreme Court of Queensland. The special case reveals nothing

---

56 See *Mineralogy Pty Ltd v Western Australia* [2020] FCA 1517.

Kiefel	CJ
Gageler	J
Keane	J
Gordon	J
Steward	J
Gleeson	J

22.

more about the proceeding and, in particular, reveals nothing about whether any costs have in fact been ordered in the proceeding or about whether any order for costs that might have been made in the proceeding is the subject of an undetermined appeal or application for leave to appeal to the Court of Appeal of the Supreme Court of Queensland.

67 In the result, the facts and documents identified in the special case provide a basis on which to be satisfied of the necessity of answering the questions stated by the parties in the special case as to the validity of the Amending Act and as to the validity of s 9(1) and s 9(2) and of s 10(4) to s 10(7) of the State Act. The facts and documents identified in the special case provide no basis on which to be satisfied of the necessity of answering questions as to the validity of any other provision of the State Act.

68 Asked in the course of hearing the special case to identify the basis or bases on which they asserted each provision of the State Act separately challenged in the proceeding to be invalid, the plaintiffs specified as the bases on which they challenged validity of s 9(1) and s 9(2) and s 10(4) to s 10(7) of the State Act only Ch III and s 118 of the *Constitution*.

69 Addressing the questions stated by the parties in the special case, it is therefore appropriate to determine whether the Amending Act is non-compliant with s 6 of the *Australia Act* and whether the Amending Act as a whole exceeds one or more asserted limitations on the scope of the legislative power of the Parliament of Western Australia. It is also appropriate to determine whether s 9(1) and s 9(2) and s 10(4) to s 10(7) of the State Act are compatible with Ch III and s 118 of the *Constitution*. That is all.

70 The question whether the Amending Act as a whole exceeds asserted limitations on the scope of the legislative power of the Parliament of Western Australia can be dealt with quite shortly. The limitations asserted by the plaintiffs were identified as limitations "concerning the rule of law and deeply rooted common law rights". No operative limitation arises from the rule of law, for reasons set out in *Palmer v Western Australia*<sup>57</sup>. No deeply rooted common law right was identified.

71 The remaining questions can be addressed in order.

---

57 [2021] HCA 31.



## Manner of enactment of the Amending Act

72 Section 5 of the *Colonial Laws Validity Act 1865* (Imp) provided in part:

"[E]very Representative Legislature shall, in respect to the Colony under its Jurisdiction, have, and be deemed at all Times to have had, full Power to make Laws respecting the Constitution, Powers, and Procedure of such Legislature; provided that such Laws shall have been passed in such Manner and Form as may from Time to Time be required by any ... Colonial Law for the Time being in force in the said Colony."

Within the meaning of the section, at the time of federation, the Commonwealth Parliament and each State Parliament was a "Representative Legislature" and a law enacted by the Commonwealth Parliament or by a State Parliament was a "Colonial Law".

73 The *Colonial Laws Validity Act* ceased to apply to a law made by the Parliament of the Commonwealth upon the adoption by the *Statute of Westminster Adoption Act 1942* (Cth) of the *Statute of Westminster 1931* (Imp).

74 The *Colonial Laws Validity Act* ceased to apply to a law made by the Parliament of each State by force of the *Australia Act*<sup>58</sup>, enacted by the Parliament of the Commonwealth under s 51(xxxviii) of the *Constitution* at the request of the Parliaments of all the States. Restating in positive terms an aspect of the proviso to s 5 of the *Colonial Laws Validity Act*<sup>59</sup>, s 6 of the *Australia Act* provided henceforth that "a law made ... by the Parliament of a State respecting the constitution, powers or procedure of the Parliament of the State shall be of no force or effect unless it is made in such manner and form as may from time to time be required by a law made by that Parliament".

75 The plaintiffs advanced three main propositions in arguing that the Parliament of Western Australia contravened s 6 of the *Australia Act* in the manner in which it enacted the Amending Act. The first was that the Amending Act answers the description of "a law made ... by the Parliament of [Western Australia] respecting the constitution, powers or procedure of the Parliament of [Western Australia]". The second was that cl 32 of the State Agreement, either by reason of

---

58 *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 at 570-571 [67]-[68].

59 *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 at 572 [73].

Kiefel CJ  
Gageler J  
Keane J  
Gordon J  
Steward J  
Gleeson J

24.

having been set out in a Schedule to the State Act or otherwise by operation of the State Act or the *Government Agreements Act*, answers the description of "a law made by that Parliament". The third was that cl 32 of the State Agreement prescribes a requirement as to the "manner and form" in which a law is to be "made" by the Parliament of Western Australia.

76 The argument can be rejected by reference to the third of those propositions without need to examine either of the first two propositions.

77 In giving force to a requirement imposed by an existing law of the Parliament of a State concerning the manner and form in which a law is to be made by the Parliament of that State, s 6 of the *Australia Act* is not confined to ensuring compliance with the intra-mural processes of the Houses of Parliament so far as those processes might have been legislated. Like the proviso to s 5 of the *Colonial Laws Validity Act* before it, s 6 "relates to the entire process of turning a proposed law into a legislative enactment" and can be taken to have been "intended to enjoin fulfilment of every condition and compliance with every requirement which existing legislation imposed upon the process of law-making"<sup>60</sup>. That said, s 6 of the *Australia Act* is confined to ensuring compliance with requirements which an existing law of the Parliament of a State imposes upon a process of making a law by the Parliament of that State.

78 Determinative for the purpose of s 6 of the *Australia Act* is that cl 32 of the State Agreement says nothing about any process by which the Parliament of Western Australia might make any law, including any law affecting any right which may have accrued under the State Agreement or affecting the operation of the State Act or the *Government Agreements Act*.

79 Neither in form nor in substance does cl 32 of the State Agreement prescribe a requirement as to the manner or as to the form in which a law is to be made by the Parliament of Western Australia. Rather, cl 32(1) prescribes the parameters within which the parties to the State Agreement may agree to a variation of the State Agreement. Clause 32(2) and cl 32(3) then combine to prescribe a procedure that must be followed in order for a variation of the State Agreement agreed to by the parties within the parameters prescribed by cl 32(1) to take effect so as then to become subject to the operation of the State Act and the *Government Agreements Act*. That cl 32(2) should require the Minister in the Government of the State for

---

60 *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394 at 419. See also at 424, 432-433.

<i>Kiefel</i>	<i>CJ</i>
<i>Gageler</i>	<i>J</i>
<i>Keane</i>	<i>J</i>
<i>Gordon</i>	<i>J</i>
<i>Steward</i>	<i>J</i>
<i>Gleeson</i>	<i>J</i>

25.

the time being responsible for the administration of the State Act to cause the variation to be tabled in each House of Parliament and that cl 32(3) should allow for disallowance of the variation by resolution of either House is hardly surprising given the political accountability of the Government to each House of Parliament for agreeing to the variation and given the legislated consequences that the variation coming into effect can have through the operation of the State Act or the *Government Agreements Act*. The involvement of the Houses of Parliament does not make the process for which the clause provides a process of making a law by the Parliament.

80         Adapting language used by King CJ in *West Lakes Ltd v South Australia*<sup>61</sup> to describe the operation of a provision of a contract entered into by the Government of South Australia which was required by a South Australian statute to "be carried out and have effect as if the provisions thereof ... were agreed to between the parties thereto and expressly enacted", cl 32 of the State Agreement "is a provision controlling the amendment of the [contract] by agreement", making "no reference, either expressly or impliedly, to the amendment by parliament of the [statute] itself". The operation of the State Act and the *Government Agreements Act* provides no basis upon which to "discern any indication of a legislative intention to take the drastic step of attempting to limit the legislature's freedom to legislate for the peace, order and good government of the State".

### **Compatibility of provisions of the State Act with Ch III**

81         The plaintiffs' argument that s 9(1) and s 9(2) and s 10(4) to s 10(7) of the State Act are incompatible with Ch III of the *Constitution* has two principal strands. The plaintiffs argue that the provisions impair the institutional integrity of a State court to an extent that is incompatible with its status as a repository or potential repository of federal jurisdiction. They argue further or in the alternative that the provisions constitute an exercise of judicial power by the Parliament of Western Australia. They go on to argue that an exercise of judicial power by the Parliament of a State is precluded by the integrated judicial system prescribed by Ch III.

82         To support both strands of their argument, the plaintiffs urge the need to consider the substantive operation of s 9(1) and s 9(2) and of s 10(4) to s 10(7) within the context of the State Act as a whole and against the background of the

---

61     (1980) 25 SASR 389 at 398. See also *Commonwealth Aluminium Corporation Ltd v Attorney-General* [1976] Qd R 231 at 237.

Kiefel CJ  
 Gageler J  
 Keane J  
 Gordon J  
 Steward J  
 Gleeson J

26.

long history of disputation between the plaintiffs and the defendant concerning the operation of cl 6 and cl 7 of the State Agreement on past events. They point to the targeted application of the provisions to those past events. They point to the obvious purpose and effect of the provisions being to remove any liability of the defendant to the plaintiffs in damages for breach of the State Agreement by reference to those past events.

83 Without denying the importance of considering the substantive operation of the impugned provisions within the context of the State Act as a whole or of considering the circumstances of the enactment of the Amending Act, there is a need to be clear about precisely what that importance is. The importance is as was identified in the following passage in *H A Bachrach Pty Ltd v Queensland*<sup>62</sup> in relation to the Queensland Act impugned in that case, which purported to extinguish rights accrued under the *Local Government (Planning and Environment) Act 1990* (Qld) that had been the subject of long-running and ongoing litigation between the plaintiff and the responsible Minister:

"Whether the Act constitutes an impermissible interference with judicial process, or offends against Ch III of the Constitution, does not depend upon the motives or intentions of the Minister or individual members of the legislature. The effect of the legislation is to be considered in context, and the plaintiff is entitled to point to the litigious background for such assistance as may be gained from it. However, it is the operation and effect of the law which defines its constitutional character, and the determination thereof requires identification of the nature of the rights, duties, powers and privileges which the statute changes, regulates or abolishes. An adequate appreciation of the operation of the Act, and its proper characterisation, as a matter of substance and not merely of form, may require consideration of the history of the plaintiff's pursuit of its legal rights under the Planning and Environment Act. However, it does not advance the plaintiff's argument to attribute malevolent designs to the Minister or to other persons who promoted or supported the legislation."

84 Properly considered within the context of the State Act as a whole against the background of the events leading up to the enactment of the Amending Act, the substantive operation and effect of each of s 9(1) and s 9(2) and s 10(4) to

---

62 (1998) 195 CLR 547 at 561 [12] (footnote omitted).

27.

s 10(7) of the State Act goes no further than to ascribe new legal consequences to past events and thereby to alter substantive legal rights.

85 In *Duncan v Independent Commission Against Corruption*<sup>63</sup>, four members of the Court pointed out by reference to a long line of cases, including *H A Bachrach Pty Ltd v Queensland*, that "[i]t is now well settled that a statute which alters substantive rights does not involve an interference with judicial power contrary to Ch III of the *Constitution* even if those rights are in issue in pending litigation". Much less does a statute which alters substantive rights involve an exercise of judicial power even if those rights have been the subject of a concluded arbitration or are the subject of a pending arbitration.

86 In *Kuczborski v Queensland*<sup>64</sup>, the plurality had earlier pointed out that "to demonstrate that a law may lead to harsh outcomes, even disproportionately harsh outcomes, is not, of itself, to demonstrate constitutional invalidity" by reference to a principle "concerned to preserve the integrity of the judicial function". The institutional integrity of a court as an independent and impartial tribunal cannot readily be threatened by a mere alteration of substantive legal rights even if the alteration might be regarded as extreme or drastic.

87 Given that none of the impugned provisions can be characterised as an exercise of judicial power, there is here, as in *Duncan v New South Wales*<sup>65</sup>, no occasion to examine the large question of whether the integrated nature of the judicial system prescribed by Ch III might preclude the exercise of judicial power directly by a State Parliament, as distinct from by a repository of State statutory power subject to the constitutionally entrenched supervisory jurisdiction of a State Supreme Court.

### **Compatibility of provisions of the State Act with s 118**

88 The plaintiffs' argument that s 9(1) and s 9(2) and s 10(4) to s 10(7) of the State Act are incompatible with s 118 of the *Constitution* focuses on the direct operation of s 10(4) and s 10(6) to deprive the arbitral awards dated 20 May 2014 and 11 October 2019 of legal effect and on the indirect operation of s 9(1) and

---

<sup>63</sup> (2015) 256 CLR 83 at 98 [26].

<sup>64</sup> (2014) 254 CLR 51 at 116 [217].

<sup>65</sup> (2015) 255 CLR 388 at 410 [51].

Kiefel	CJ
Gageler	J
Keane	J
Gordon	J
Steward	J
Gleeson	J

28.

s 9(2) and of s 10(5) and s 10(7) independently to deprive those arbitral awards of legal effect.

89        The argument of the plaintiffs involved three propositions. The first was that s 35(1) of the *Commercial Arbitration Act 2013* (Qld) and uniform provisions in the *Commercial Arbitration Act* of each of New South Wales, Victoria, South Australia and Tasmania operated to recognise the two arbitral awards as binding on the parties from the dates on which the arbitral awards were made. The next proposition was that subsequent operation of s 9(1) and s 9(2) and s 10(4) to s 10(7) of the State Act to deprive the awards of legal effect was in conflict with the earlier and ongoing recognition of the arbitral awards as binding on the parties under the laws of those other States. The final proposition was that s 118 of the *Constitution* resolved that conflict between the law of Western Australia and the laws of those other States by invalidating the law of Western Australia to the extent of the conflict. The principle by which s 118 brought about that resolution of a conflict between State laws was not developed in the argument.

90        The premise of the argument that the operation of s 9(1) and s 9(2) and s 10(4) to s 10(7) of the State Act conflicted with the earlier and ongoing operation of s 35(1) of the uniform *Commercial Arbitration Act* in each other State paid insufficient attention to the operation of s 36(1)(a)(i) of each uniform *Commercial Arbitration Act* to permit a court to refuse recognition or enforcement of an arbitral award at the request of the party against whom the arbitral award is invoked if that party furnishes proof to the court that "the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication in it, under the law of the State ... where the award was made". The law applicable to the arbitration agreement for the purposes of s 36(1)(a)(i) is the law as it stands when the jurisdiction of the court is invoked to refuse recognition or enforcement. Through the operation of s 36(1)(a)(i), s 35(1) therefore accommodates a change in the law applicable to the arbitration agreement at least up until the time that the jurisdiction of the court is invoked to refuse recognition or enforcement of an arbitral award.

91        There being no suggestion in the special case that the law applicable to the arbitration agreement that resulted in each of the arbitral awards dated 20 May 2014 and 11 October 2019 was other than that of Western Australia, and there being no suggestion in the special case that the jurisdiction of any court has been invoked to refuse recognition or enforcement of either of those awards in any other State, the asserted conflict between s 9(1) and s 9(2) and s 10(4) to s 10(7) of the State Act and s 35(1) of the *Commercial Arbitration Act* of each of

<i>Kiefel</i>	<i>CJ</i>
<i>Gageler</i>	<i>J</i>
<i>Keane</i>	<i>J</i>
<i>Gordon</i>	<i>J</i>
<i>Steward</i>	<i>J</i>
<i>Gleeson</i>	<i>J</i>

29.

Queensland, New South Wales, Victoria, South Australia and Tasmania has not been demonstrated to exist.

92       Noted in *Sweedman v Transport Accident Commission*<sup>66</sup> was that an "adequate constitutional criterion ... which would resolve inconsistency between the laws of two or more States ... awaits formulation on another occasion where the circumstances of the propounded incompatibility of the State laws suggest a criterion by which that incompatibility is to be recognised and resolved". This is not that occasion. The role, if any, of s 118 of the *Constitution* in resolving such a conflict must await consideration if and when that occasion arises.

### **Disposition**

93       The special case asks four questions. The first question asks whether the Amending Act is invalid or inoperative in its entirety. The answer is that it is not. The second question asks whether Pt 3 of the State Act or specified provisions of Pt 3 of the State Act are invalid or inoperative to any extent. The appropriate response is that s 9(1) and s 9(2) and s 10(4) to s 10(7) of the State Act are not invalid or inoperative to any extent and that the question is otherwise unnecessary to answer. The third question is contingent on an affirmative answer to the second, and therefore does not arise. The final question asks who should pay the costs of the special case. The answer is: the plaintiffs.

---

66   (2006) 226 CLR 362 at 407 [52].

EDELMAN J.

**Introduction**

94 The plaintiffs argued this special case, which was heard together with the related *Palmer v Western Australia* proceeding, in the original jurisdiction of this Court across four days. This special case involved a challenge by the plaintiffs, on numerous constitutional grounds, to the entirety of Pt 3 of the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA) ("the State Act") as introduced by the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA) ("the Amending Act") or, alternatively, to part or all of 21 sections inserted by the Amending Act into the State Act.

95 The core purpose of the Amending Act is to extinguish the plaintiffs' contractual rights arising from the Iron Ore Processing (Mineralogy Pty Ltd) Agreement ("the State Agreement"). Those contractual rights had been vindicated in arbitral awards in favour of the plaintiffs. In an endeavour to provide what the Solicitor-General for the State of Western Australia described as "cascading layers of protection", the Parliament of Western Australia enacted the Amending Act, which contains elaborate provisions purporting to extinguish the plaintiffs' contractual rights and to exclude almost any legal proceeding that might seek to enforce those rights. In the course of doing so, the Amending Act takes extreme measures, including purporting to: exclude natural justice<sup>67</sup>; deny freedom of information<sup>68</sup>; exclude any proceedings for discovery or inspection of any documents<sup>69</sup>; and require the plaintiffs to pay costs incurred and to compensate for various losses suffered by the State of Western Australia, notwithstanding that those costs incurred and losses suffered might derive from the State's own breach of contract as found by the arbitrator<sup>70</sup>.

96 I have had the benefit of reading in draft the joint reasons of the other members of this Court, which set out the background to this proceeding and the relevant provisions of the State Act, the Amending Act, and the State Agreement. On the issue of whether this Court should engage with many of the constitutional questions raised by the parties, I agree with the joint judgment that a restrained approach should be adopted. In circumstances in which the plaintiffs had standing to raise the broad range of issues concerning the entirety of the Amending Act and

---

67 State Act, ss 12(2), 20(2).

68 State Act, ss 13(1)-13(3), 21(1)-21(3).

69 State Act, ss 13(4), 18(6)-18(7), 21(4).

70 State Act, ss 14, 15, 22, 23.



in a context in which all parties to this proceeding (including all interveners) sought to have this dispute resolved on wider grounds, I explain below the additional reasons that I approach the adjudication of this special case on a restrained basis.

97 Putting to one side challenges concerning the rule of law and the alleged punitive nature of the Amending Act, which are considered in *Palmer v Western Australia*<sup>71</sup>, the only challenges by the plaintiffs which are appropriate to determine in this special case are: (i) the challenge to the validity of the Amending Act on the basis that it failed to comply with the manner and form requirement prescribed by the State Act; (ii) the challenge to ss 9(1), 9(2), and 10(4) to 10(7) of the State Act (which can be described, as the State of Western Australia did, as the "Declaratory Provisions") on the basis that the provisions are incompatible with Ch III of the *Constitution*; and (iii) the challenge to the Declaratory Provisions on the basis that they are contrary to s 118 of the *Constitution*. For the reasons below, each of those challenges fails. The decision to enact the Declaratory Provisions may reverberate with sovereign risk consequences. But those consequences are political, not legal.

### **The duties and powers of this Court to decide cases**

#### *General principles*

98 In *Attorney-General for NSW v Brewery Employees Union of NSW*<sup>72</sup>, Isaacs J said:

"the Court cannot be called on, or with propriety assume, to question the legality of what Parliament has enacted as the will of the nation unless such a determination is absolutely necessary".

His Honour was there speaking of the need for this Court to avoid adjudicating legal questions raised by a party who does not have a "legal cause of complaint"<sup>73</sup>. In other words, this Court will not adjudicate complaints by a party who has no standing. One circumstance in which a party will usually have no standing is where the answer to the question sought to be adjudicated will not affect the party's interests, in the sense of rights, privileges, powers, immunities, or correlative concepts.

---

71 [2021] HCA 31.

72 (1908) 6 CLR 469 at 553.

73 (1908) 6 CLR 469 at 554.

99 A similar principle applies where a party seeks to challenge provisions beyond those that affect their interests: to "roam at large" over the statute<sup>74</sup>. There is rarely a basis for a court to adjudicate upon the validity of provisions which do not affect the interests of that party. One exception is where the provisions which do not affect the party's interests are inseverably tied to those that do<sup>75</sup>. Like a lack of standing, this principle involves the constitutional boundaries of adjudicative authority in an action instigated by a party whose interests are unaffected, in whole or in part, by the resolution of the action.

100 A different question arises where a party with legal standing challenges provisions that affect that party's interests but it is possible for the court to resolve the dispute without deciding important constitutional issues. In that circumstance, the question is no longer one of the constitutional boundaries of adjudicative authority. Instead, the court must choose whether to exercise restraint in deciding the dispute. That choice requires evaluation of different factors. As an evaluative choice, it is unsurprising that, as this Court said in *Zhang v Commissioner of the Australian Federal Police*<sup>76</sup>, "different views have been expressed by different members of the Court as to the application of the practice [of adjudication] in particular cases".

101 One consideration that can weigh powerfully in favour of broader adjudication is whether a decision upon an otherwise undecided ground could have a significant effect upon the interests of a party. For instance, in *Jones v The Queen*<sup>77</sup>, Mason CJ, Brennan, Dawson and Toohey JJ said that the duty of a court of criminal appeal to exercise its jurisdiction precluded such a court from allowing an appeal and ordering a retrial on one ground where other grounds might have entitled the appellant to an acquittal. An example is an appeal from conviction that is brought before this Court upon two grounds where the first ground turns only upon the facts of the case but the second ground involves constitutional issues. If success on the first ground would lead to a retrial but success on the second ground would require an acquittal, then it should be a very rare case in which this Court would avoid adjudication of the constitutional ground.

102 There are other significant considerations favouring adjudication of constitutional issues even if the dispute can be resolved on narrower grounds.

---

74 *The Real Estate Institute of NSW v Blair* (1946) 73 CLR 213 at 227; *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 69 [156].

75 *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 258.

76 (2021) 95 ALJR 432 at 438 [23]; 389 ALR 363 at 369.

77 (1989) 166 CLR 409 at 411.

A second consideration is whether there is a division within the Court leaving a minority of Justices for whom "it is necessary to deal with a range of issues to dispose of the appeal"<sup>78</sup>. It would be desirable in those circumstances for the range of issues to be considered by the whole Court.

103 A third consideration concerns the role of this Court. Whilst the primary role of this Court is to resolve disputes between the parties, this Court does so by developing the law in a principled way that aims to guide both the public and lower courts. For instance, the premise of s 35A(a) of the *Judiciary Act 1903* (Cth) is that, in its appellate jurisdiction, this Court will not eschew questions of public importance, or issues upon which lower courts are divided, in favour of resolving disputes on the basis of narrower issues. The greater the magnitude of the issue involved, and the more pressing the matters that it raises, the more compelling will be the case for this Court to consider the issue rather than to leave it in the shadows to await future adjudication.

104 A fourth consideration is the sense of injustice to the parties that could be engendered by the feeling that this Court's decision has not matched the procedure in which they participated, particularly if the decisive ground in the Court's reasons is only peripheral to the submissions made by the parties<sup>79</sup>. This fourth consideration may have been the foundation for the submission made by the Solicitor-General of the Commonwealth in this case that "where a plaintiff with admitted standing puts in issue the constitutional validity of provisions that affected their rights ... there needed to be some reason we could advance persuasively to the Court why the point should not be decided".

105 On the other hand, there are sometimes powerful considerations that weigh against this Court deciding a constitutional issue where a matter can be resolved on some other, narrower basis. One circumstance is where the Court has insufficient facts or legal argument upon which to engage in a proper examination of a constitutional issue. An example is *Lambert v Weichelt*<sup>80</sup>, in which the Stipendiary Magistrate had dismissed an information against the defendant on the basis that any prohibition upon the alleged sale by the defendant by the *Prices Regulation Act 1948* (Vic) would be contrary to s 92 of the *Constitution*. This Court discharged the order nisi because there was not enough evidence to support a conviction. The lack of such evidence meant that there were insufficient facts from which to consider the effect on that legislation of s 92 of the *Constitution*.

---

78 *Kimberly-Clark Australia Pty Ltd v Arico Trading International Pty Ltd* (2001) 207 CLR 1 at 20 [34].

79 See *R (Osborn) v Parole Board* [2014] AC 1115 at 1149 [68], quoting Waldron, "How Law Protects Dignity" (2012) 71 *Cambridge Law Journal* 200 at 210.

80 (1954) 28 ALJ 282 at 283.

Similar issues may arise where the Court does not have adequate legal argument on the constitutional issue before it, although one response to such a circumstance has historically been for the Court to write to the parties inviting further written submissions and occasionally also to invite further oral submissions.

106 A second consideration weighing against adjudication of constitutional issues when the dispute could be resolved more narrowly is the converse of the second consideration favouring adjudication. It arises where a majority of the Justices on the Court have decided a case on a narrow ground and there is a path open for a minority of the Justices also to decide the case on that narrow ground. Just as it can be undesirable for a majority of Justices to avoid adjudication of a point that it is necessary for a minority of Justices to decide, so too it can be undesirable for a minority of Justices to express views on a point that is not necessary for their decision.

107 A third consideration weighing against adjudication of constitutional issues arises where there is a concern about a "risk of premature interpretation of statutes on the basis of inadequate appreciation of their practical operation"<sup>81</sup>. But rather than avoiding the constitutional issue altogether, this concern can be addressed by considering: (i) whether the challenged provision does not affect the rights of the party impugning it and whether it could be severed from other challenged provisions which do; (ii) whether the challenged provision could be read down to have a narrower meaning if necessary to ensure validity; or (iii) whether the challenged provision in its application to the facts of the case is constitutionally valid and is a provision that is "applied distributively"<sup>82</sup> so that it can be disapplied from any otherwise invalid application. In each of these circumstances, the ability of the Court to sever, read down, or disapply the provision means that a consideration of any circumstance in which it might be invalid can be left to when those circumstances actually arise<sup>83</sup>. This consideration, and the associated concern of premature interpretation, should not be overstated. Rules of law, no less of constitutional law, are almost always stated at a level of generality beyond the particular facts to which they apply. That is what makes rules of law general rules and prevents the law from disintegrating into a wilderness of single instances. The circumstance in which this consideration is likely to be most appropriate is where a legislative provision does not appear to be facially compliant with a

---

81 *Tajjour v New South Wales* (2014) 254 CLR 508 at 588 [174].

82 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 369.

83 *LibertyWorks Inc v The Commonwealth* (2021) 95 ALJR 490 at 511 [89]; 391 ALR 188 at 209-210. See *Acts Interpretation Act 1901* (Cth), s 15A.

constitutional restriction but there are insufficient facts to adjudicate upon the areas of potential invalidity beyond the circumstances of the case<sup>84</sup>.

*This case*

108 The core provisions of the State Act, as inserted by the Amending Act, are those that extinguish the plaintiffs' extant rights arising from either (i) the first or second Balmoral South proposal or (ii) the arbitrations or arbitration agreement. Those provisions, being the Declaratory Provisions, are (i) ss 9(1) and 9(2) and (ii) ss 10(4) to 10(7). At a minimum, it is necessary to adjudicate upon the validity of those provisions. The question becomes whether this Court should go further, as the plaintiffs urge.

109 The plaintiffs' primary submission was that this Court should adjudicate upon the validity of the whole of the Amending Act. Their alternative submission was that this Court should adjudicate upon any or all of the particular provisions that the plaintiffs challenged on various grounds. These provisions and grounds were set out in a schedule that the plaintiffs provided in response to this Court's request for precise identification of the grounds of invalidity with respect to each challenged provision: ss 8(3), 11(1)-11(4), 11(7), 12(1)-12(2), 12(4), 12(7), 13(4)-13(5), 13(8), 14(4), 14(7)(b), 15(2), 15(5)(b), 16(3), 17(4)-17(5), 18(1)-18(2), 18(5)-18(7), 19(1)-19(4), 19(7), 20(1)-20(2), 20(4), 20(7)-20(8), 21(4)-21(5), 21(7)-21(8), 22(4), 22(7)(b), 23(2), 23(5)(b), 24(3), 25(4)-25(5), 27, and 30-31.

110 The plaintiffs' schedule put their numerous particular challenges only as an alternative. As the plaintiffs explained in the preamble to their schedule, their "primary submission is that the validity of the [Amending] Act is to be considered *in toto*", and "one does not leave out of account that the specifically impugned provisions are part of one Act and operate together" and, in many cases, "particularly references to the application of the *Kable* principle, as well as the limitation concerning the rule of law ..., one is looking at the Act as a whole".

111 The plaintiffs made two submissions in support of their primary submission that this Court should approach its adjudicative task on the broader basis of the validity of the Amending Act as a whole. First, the plaintiffs relied upon factors favouring broader adjudication and submitted that it was appropriate for this Court to consider the validity of the entirety of the Amending Act or the numerous provisions that affected their rights. Secondly, the plaintiffs submitted that, at least in relation to their grounds of challenge based upon the rule of law and the institutional integrity of the Supreme Court of Western Australia, the provisions

---

84 *Palmer v Western Australia* (2021) 95 ALJR 229 at 275 [227]; 388 ALR 180 at 235.

of the Amending Act were inseverable and required examination of "the whole of the Act in question and all of the features which it present[s]"<sup>85</sup>.

112 As to the first submission, the extinguishment of the plaintiffs' rights by the Declaratory Provisions is the central feature of the Amending Act. The decision of this Court to focus upon the validity of those provisions, rather than on other possibly invalid provisions that affect the same rights of the plaintiffs, is not, as Latham CJ said in a related context<sup>86</sup>, a "selection among ... possibilities [which] would result in the content of the law depending upon the mere choice of the court". As I have reached the same conclusion as the other members of this Court that the Declaratory Provisions are valid, and in light of the speculative nature of the effect upon the plaintiffs' interests of some other provisions of the Amending Act described in the joint reasons, there is a strong case for restraint from adjudication upon the validity of those other provisions or upon the validity of the Act as a whole.

113 The second submission – that the provisions of the Amending Act are inseverable, requiring examination of the whole Act – cannot be accepted because the Amending Act expressly permits any provision that is invalid in its application to be disappplied to that extent<sup>87</sup> and, failing that, to be severed<sup>88</sup>. In the plaintiffs' third further amended statement of claim and notice of a constitutional matter, they alleged that these disapplication and severance provisions are invalid for three reasons. First, it was said that there would be "one version of the [A]mending Act to be applied in matters in federal jurisdiction, and another version in matters in State jurisdiction". Such bifurcation, the plaintiffs pleaded, is beyond the legislative power of the Parliament of Western Australia. Secondly, the plaintiffs alleged that the provisions are likely to result in a version of the Amending Act that the Parliament of Western Australia could never have intended to enact. Thirdly, the plaintiffs pleaded that the provisions "place[] the judiciary into the position of a legislative body".

114 In relation to the severance provision in s 8(5), there would be a powerful argument that s 8(5) would be invalid, at least in so far as it purported to permit severance, particularly by a court exercising federal jurisdiction, if "the Statute

---

85 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 91 [129].

86 *Pidoto v Victoria* (1943) 68 CLR 87 at 110.

87 State Act, s 8(4): "does not apply to a matter or thing to the extent (if any) that is necessary" to avoid invalidity.

88 State Act, s 8(5): "regarded as divisible from, and capable of operating independently of, the provision, or the part of a provision, that is not valid".

with the invalid portions omitted would be substantially a different law as to the subject matter dealt with by what remains from what it would be with the omitted portions forming part of it"<sup>89</sup>. To permit severance in such circumstances would be "in effect making a new law"<sup>90</sup> and would cross the divide between adjudicating and legislating<sup>91</sup>. One circumstance in which this divide will have been crossed is where the objective purpose of the legislation changes after the provisions are severed. If the removal of some provisions would change the objective purpose of the legislation then the judiciary would be creating a new law by severing the provisions to the extent of invalidity. Parliament could not, by the device of a severance provision, confer such legislative power upon a court, at least when the court is exercising federal jurisdiction.

115 In relation to whether any other invalid provisions of the State Act can be severed from the Declaratory Provisions, the plaintiffs' three arguments concerning the invalidity of s 8(5) ultimately all reduce to the point of whether the severance would create a new law. The plaintiffs' arguments should not be accepted. The plaintiffs referred to some provisions that were said to be inseverable but did not explain how those provisions were so interdependent with the Declaratory Provisions, or how the removal of those provisions would so change the purpose of the Amending Act, that severance would create a substantially new law. The severance from the Declaratory Provisions of any or all of the other provisions of the Amending Act would not create a new law. This can be illustrated by reference to provisions to which the parties referred in submissions on this issue, being: (i) those described by the State of Western Australia as the "No Liability Provisions", including ss 11(1) and 11(2), which exclude and extinguish any liability of the State for matters connected with the subject matter of the Declaratory Provisions; and (ii) those described as the "Admissibility and Discovery Provisions", ss 18(5) to 18(7), which purport to make documents and oral testimony connected with a protected matter inadmissible against the State

---

89 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co* (1910) 11 CLR 1 at 27. See also *Bell Group NV (In liq) v Western Australia* (2016) 260 CLR 500 at 527 [71]; *Clubb v Edwards* (2019) 267 CLR 171 at 314-316 [418]-[420].

90 *Owners of SS Kalibia v Wilson* (1910) 11 CLR 689 at 699.

91 *Owners of SS Kalibia v Wilson* (1910) 11 CLR 689 at 709, 715; *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319 at 386; *Pidoto v Victoria* (1943) 68 CLR 87 at 111; *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 372; *Clubb v Edwards* (2019) 267 CLR 171 at 315 [419].

and to prevent any person being compelled to discover such documents or to give such testimony.

116 The association between the Declaratory Provisions and the No Liability Provisions and Admissibility and Discovery Provisions might be close, especially in proceedings in relation to the subject matter of the Declaratory Provisions. Nevertheless, for two reasons, the severance of the No Liability Provisions and the Admissibility and Discovery Provisions would not substantially alter the nature of the Amending Act. First, although the purpose of the Amending Act is not expressly stated in the Act itself, the structure of the Amending Act, which the Solicitor-General for Western Australia described as providing "cascading layers of protection", reveals the purpose of extinguishing the plaintiffs' rights for the reason that, as the Attorney-General said when introducing the legislation, the "government is not prepared to risk the financial consequences to the state of an adverse arbitral award"<sup>92</sup>. Secondly, in fulfilling the purpose of avoiding State liability, the Act relies upon different protections related to the basic distinction between an underlying right and the process of enforcing that right. The Declaratory Provisions concern the former. The other provisions concern the latter. The Declaratory Provisions are severable.

### **The manner and form required for the Amending Act**

117 The plaintiffs submitted that the Amending Act was of no force or effect because it failed to comply with the requirements of s 6 of the *Australia Act 1986* (Cth)<sup>93</sup>. It was not suggested that there was any other valid source of power by which a State Parliament might bind itself to a manner and form requirement, or affect its own composition, in a manner applicable to the enactment of a later

---

<sup>92</sup> Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 11 August 2020 at 4598.

<sup>93</sup> And, to the extent necessary, the *Australia Act 1986* (UK).



law<sup>94</sup>. There was also no dispute that s 6 was binding upon the Parliament of Western Australia<sup>95</sup>. Section 6 relevantly provides:

"... a law made after the commencement of this Act by the Parliament of a State respecting the constitution, powers or procedure of the Parliament of the State shall be of no force or effect unless it is made in such manner and form as may from time to time be required by a law made by that Parliament, whether made before or after the commencement of this Act".

118 The starting point is to consider whether the State Act was a "law made by [the] Parliament [of Western Australia]" that required a later law purporting to amend the State Act to follow a prescribed "manner and form". The positions of the parties reflected two different approaches to the characterisation of the State Act with different effects upon the alleged manner and form provision in cl 32 of the State Agreement.

119 The first approach, taken by the State of Western Australia and the interveners, and supported by intermediate appellate court authority, is that the clauses of the State Agreement have a contractual character, and that the State Act did not imbue any of those provisions with any other character.

120 The second approach, taken by the plaintiffs, is that the State Act imbued at least some of the provisions of the State Agreement with a further character, being that of statute law. The plaintiffs pointed to s 3(a) of the *Government Agreements Act 1979* (WA) and ss 4(3) and 6(3) of the State Act. Section 3 of the *Government Agreements Act* requires that Government agreements (including the State Agreement) "operate and take effect ... notwithstanding any other Act or law" and that "any purported modification of any other Act or law" in a provision of a Government agreement "shall operate and take effect so as to modify that other Act or law" for the purposes of the Government agreement. Sections 4(3) and 6(3) of the State Act provide that, without limiting or otherwise affecting the operation

---

94 Compare *Bribery Commissioner v Ranasinghe* [1965] AC 172 at 197, discussed in *Victoria v The Commonwealth and Connor* (1975) 134 CLR 81 at 163-164; *Western Australia v Wilsmore* (1982) 149 CLR 79 at 96. See also *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394 at 419-420, 429-430; Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (1999) at 14-15; Lee, "'Manner and Form': An Imbroglio in Victoria" (1992) 15 *University of New South Wales Law Journal* 516 at 526-536.

95 cf Johnston, "Method or Madness: Constitutional Perturbations and *Marquet's Case*" (2004) 7 *Constitutional Law and Policy Review* 25 at 33.

of the *Government Agreements Act*, the State Agreement and its variations "operate[] and take[] effect despite any other Act or law".

*The first approach and the first character of cl 32*

121 As an agreement between eight parties, including the Premier acting for and on behalf of the State of Western Australia, the State Agreement has a character as a private agreement, in the sense that it involves private undertakings made by parties only to each other. The State of Western Australia focused upon this private character of the State Agreement. Western Australia submitted that if "the State Agreement is statute law, it is difficult to see how the plaintiffs could ever say that they had a claim for contractual damages arising from breach of contract". Western Australia also submitted that any enforcement of the State Agreement by a third party would be "a matter of contract[] law"<sup>96</sup>.

122 In its character only as a private agreement, these submissions are correct. It is therefore correct that the enforceability of cl 32, in its character as a provision of a contract, is a matter of contract law only. In that character, cl 32 is plainly not a "law made by [the] Parliament" within s 6 of the *Australia Act*: the Parliament of Western Australia is not a party to the State Agreement.

123 The first approach to the characterisation of the State Agreement is that the provisions have *only* this contractual effect. The State of Western Australia, supported by the Attorneys-General of the Commonwealth, the State of Victoria, the State of Queensland, the Northern Territory, and the State of New South Wales, submitted that the provisions of the State Agreement operated merely to "clear[] any legislative obstacle out of the path of the [State Agreement] taking effect". On this interpretation, although the State Agreement is part of the State Act<sup>97</sup>, it is only part of the State Act for the limited purpose of ensuring that the provisions of the State Agreement remain enforceable as a matter of contract law.

124 Some authorising legislation is plainly intended to adopt this first approach of having only contractual effect. An example is s 3 of the *War Service Land Settlement Agreements Act 1945* (Cth), considered in *P J Magennis Pty Ltd v The Commonwealth*<sup>98</sup>, which had provided that the execution of agreements between the Commonwealth and the States substantially in the form contained in the schedules "is hereby authorized". This provision went no further than to secure

---

<sup>96</sup> See also *Property Law Act 1969* (WA), s 11.

<sup>97</sup> *Interpretation Act 1984* (WA), s 31(2).

<sup>98</sup> (1949) 80 CLR 382.

parliamentary approval for the transaction. As Dixon J said<sup>99</sup>, although dissenting as to the result of the case, s 3 "certainly [did] not convert the terms of the agreement into the provisions of a law". The same reasoning will usually apply to a statutory provision that does no more than approve or ratify an agreement<sup>100</sup>. The obligations remain purely contractual and subject to the rules of contractual interpretation. The legislative effect is only the removal of any common law or statutory obstacles to enforceability of the agreement, such as a lack of power of a contracting party or the illegality of any of the contractual provisions<sup>101</sup>.

*The second approach and the second character of cl 32*

125 The second approach was taken by the plaintiffs. They submitted that the State Act or the *Government Agreements Act*, or both, gave provisions of the State Agreement a separate character as having statutory force in addition to contractual force. Underlying the plaintiffs' submission was the valid assumption that, by conferring a separate statutory character upon some or all of the provisions, the State Act or the *Government Agreements Act* did not deprive the provisions of their contractual force (with obstacles to contractual enforcement removed) and thus did not deprive the parties of their contractual rights<sup>102</sup>.

126 Some legislation plainly takes this second approach, conferring upon provisions of a Government agreement not merely contractual force with statutory obstacles to their contractual force removed but also statutory force. In *Caledonian Railway Co v Greenock and Wemyss Bay Railway Co*<sup>103</sup>, the House of Lords considered legislation, one provision of which their Lordships described in the following terms:

"The said agreement shall be, and the same is hereby sanctioned and confirmed, and shall be as valid and obligatory upon the company and the *Caledonian Railway Company* respectively, as if those companies had been authorized by this Act to enter into the said agreement, and as if the same had been duly executed by them after the passing of this Act.

---

99 (1949) 80 CLR 382 at 410.

100 See *Placer Development Ltd v The Commonwealth* (1969) 121 CLR 353 at 357, 368; *Sankey v Whitlam* (1978) 142 CLR 1 at 31, 76-77.

101 *Davis & Sons v Taff Vale Railway Co* [1895] AC 542 at 552-553.

102 cf *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560 at 623 [159].

103 (1874) LR 2 Sc and Div 347 at 349.

And it shall be lawful for the company (that is, the *Greenock and Wemyss Bay Railway Company*) and the *Caledonian Railway Company* respectively, and they are hereby required, to implement and fulfil all the provisions and stipulations in the said agreement contained."

The Lord Chancellor, with whom the other Lords agreed, said of the first paragraph of the provision that it did "no more than give statutory validity to the agreement" (the first approach) but that it was "clear beyond the possibility of argument" that, with the agreement being scheduled to the Act and the requirements of the second paragraph, the agreement became "as obligatory and binding on the two companies as if those provisions had been repeated in the form of statutory sections"<sup>104</sup> (the second approach).

127 In some Australian legislation, it is clear beyond rational argument that Parliament intended that some or all of the provisions of a Government agreement have the force of statute law in addition to their contractual force (the second approach). Examples are statutes which provide that the provisions of a scheduled agreement shall "have the force of law as though the Agreement were an enactment of this Act"<sup>105</sup>. As will be seen, Parliament might also give the force of law to only some of the contractual provisions, namely those contractual provisions that purport to modify other laws.

#### *The background to the Government Agreements Act*

128 The difference between the two approaches to statutory provisions that implement or give effect to Government agreements was squarely confronted by this Court in *Sankey v Whitlam*<sup>106</sup>. That case concerned a financial agreement between the Commonwealth and the States, first made in 1927 and scheduled to the *Financial Agreement Act 1928* (Cth), and "approved" by s 2 of that Act<sup>107</sup>. Subsequently, the agreement was "validated"<sup>108</sup> following an amendment to the *Constitution* that had inserted s 105A, which concerns agreements made between

---

**104** (1874) LR 2 Sc and Div 347 at 349.

**105** See *Commonwealth Aluminium Corporation Ltd v Attorney-General* [1976] Qd R 231 at 234. See also *West Lakes Ltd v South Australia* (1980) 25 SASR 389 at 402; *Brown v Western Australia* (2012) 208 FCR 505 at 531 [128].

**106** (1978) 142 CLR 1.

**107** And subsequently by various statutes including the *Financial Agreement Act 1944* (Cth).

**108** *Financial Agreement Validation Act 1929* (Cth).

the Commonwealth and the States with respect to the public debts of the States. Section 105A(5) provides that "[e]very such agreement and any such variation thereof shall be binding upon the Commonwealth and the States parties thereto notwithstanding anything contained in this Constitution or the Constitution of the several States or in any law of the Parliament of the Commonwealth or of any State". One issue in *Sankey v Whitlam* was whether the legislative "approval" of the Financial Agreement or the operation of s 105A(5) had the effect that the Financial Agreement was a "law of the Commonwealth" for the purposes of s 86(1)(c) of the *Crimes Act 1914* (Cth).

129 Aickin J observed that although the distinction between the two approaches was "a fine one and not perhaps wholly satisfactory" it was nevertheless a distinction which was well established by judicial decisions<sup>109</sup>. The members of this Court who considered the issue all held that the Financial Agreement had not become a law of the Commonwealth by legislation or by s 105A of the *Constitution*<sup>110</sup>. As to the latter, Gibbs A-CJ and Mason J both relied upon the terms of s 105A as making it clear that s 2 did no more than approve the Financial Agreement<sup>111</sup>: the provision in s 105A(3) for the Commonwealth Parliament to "make laws for the carrying out by the parties" of such an agreement suggested, in the words of Mason J, "that the imposition of a statutory obligation to perform the Agreement was a matter left for Parliament to determine"; and the provision in s 105A(4) that any such agreement may be varied or rescinded by the parties meant that "[l]ike every contract it continues to be capable of variation or rescission by the parties"<sup>112</sup>.

130 The year after the decision in *Sankey v Whitlam*, a similar interpretation issue arose in the Full Court of the Supreme Court of Western Australia in *Margetts v Campbell-Foulkes*<sup>113</sup>. The Full Court considered an appeal by members of an environmental group who, by standing in front of a bulldozer, had obstructed a company from building an alumina refinery. They were convicted of an offence under s 67(4) of the *Police Act 1892* (WA), which, among other things, prohibited any person from preventing or obstructing an activity which another person was lawfully entitled to do "pursuant to any law of the State or of the Commonwealth" which granted a "licence, permit or authorisation". One issue was whether an

---

109 (1978) 142 CLR 1 at 106. See also at 89 (Mason J).

110 (1978) 142 CLR 1 at 30-32, 77-78, 90-91, 106.

111 (1978) 142 CLR 1 at 29, 90.

112 (1978) 142 CLR 1 at 90.

113 Unreported, Supreme Court of Western Australia, 29 November 1979.

agreement between a company and the State of Western Australia, which had been "ratified" by State legislation<sup>114</sup>, was a "law of the State". The Full Court allowed the appeal on the ground that the company's activity had not been "authorised" by a letter which approved the work, where approval was a condition precedent to the obligation to perform work under the agreement. Hence, the Court did not need to decide whether the agreement was a law of the State. Nevertheless, Wickham J, with whom Jones and Smith JJ agreed, described the question as to whether the ratified agreement was a law of the State as "debatable"<sup>115</sup>. Jones J also observed that the point had been "debated before us at length"<sup>116</sup>.

131 Counsel for the successful appellant in that case, Messrs French and Johnston, subsequently observed in an academic article<sup>117</sup> that the "State Government then seems to have demonstrated its anxiety about the status of special development agreements ratified by Acts in that almost immediately after the handing down of [*Margetts*] it introduced and had passed by Parliament the [*Government Agreements Act 1979 (WA)*]" . They described the evident effect of the *Government Agreements Act* as being that "for Western Australian purposes, the agreements concerning major mining developments which are ratified by legislation will have the force of law".

132 When introducing the *Government Agreements Bill 1979 (WA)* into the Parliament of Western Australia, the Minister for Industrial Development said that the consequence of the decision in *Margetts* was that, "in a number of our State agreements in which there are provisions whereby Parliament has simply ratified or approved an agreement, the terms of those agreements may not have the force of law. This could have serious significance."<sup>118</sup> The concern appears to have been that a provision of a Government agreement that purported directly to modify a statutory provision could not have effect unless the contractual provision also had statutory force. There is a difference between removing a statutory obstacle to a contractual agreement and giving a contractual term legal effect so that it can

---

114 *Alumina Refinery (Wagerup) Agreement and Acts Amendment Act 1978 (WA)*, s 3.

115 Unreported, Supreme Court of Western Australia, 29 November 1979 at 6.

116 Unreported, Supreme Court of Western Australia, 29 November 1979 at 2.

117 Johnston and French, "Environmental Law in a Commonwealth-States Context: The First Decade" (1980) 2(2) *Australian Mining and Petroleum Law Journal* 77 at 87.

118 Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 4 December 1979 at 5705.

modify existing legislation. Under the first approach described above<sup>119</sup> the "ratified" contractual provisions of a Government agreement would have no statutory force and could not effect any modification. The Minister gave examples of serious consequences that were apprehended: provisions consolidating mining tenements; provisions making different rates payable to local authorities than otherwise required by legislation; and provisions expressly varying or overriding the operation of various State laws. The overarching purpose of the *Government Agreements Act* was to give statutory effect, where it was needed, to the provisions of Government agreements. As the purpose of s 3 of the *Government Agreements Act* was described in the Legislative Council, it was "simply closing a loophole" to "put ... beyond legal doubt" that a Government agreement would become the law of the State<sup>120</sup>.

### *The Government Agreements Act*

133 The *Government Agreements Act* defines a "Government agreement" in s 2 in terms which include "an agreement scheduled to ... an Act the administration of which is for the time being ... approved by the Governor to be placed under the control of, the Minister". Section 3 of the *Government Agreements Act* relevantly provides that, "[f]or the removal of doubt":

- "(a) each provision of a Government agreement shall operate and take effect, and shall be deemed to have operated and taken effect from its inception, according to its terms notwithstanding any other Act or law; and
- (b) any purported modification of any other Act or law contained, or provided for, in such a provision shall operate and take effect so as to modify that other Act or law for the purposes of the Government agreement, and shall be deemed to have so operated and taken effect from its inception, according to its terms notwithstanding any other Act or law."

134 The ordinary meaning of the words of s 3 reflects the second approach<sup>121</sup>. First, s 3(a) removes any common law or statutory obstacles to the contractual operation of the provisions of a Government agreement. Secondly, and in addition, s 3(b) gives effect to a provision of a Government agreement as a statutory provision, "notwithstanding any *other* Act or law", to the extent that the provision

---

119 See above at [121]-[124].

120 Western Australia, Legislative Council, *Parliamentary Debates* (Hansard), 6 December 1979 at 5906.

121 See above at [125]-[127].

*modifies* another Act or law. That could only be possible if the provision of the Government agreement had the force of statutory law.

135 Section 4(2) of the *Government Agreements Act* created an offence specifically related to Government agreements including where a person, without lawful authority, prevents, obstructs, or hinders any activity which is being carried on pursuant to a Government agreement. One assumption that permeated some of the parliamentary debate with respect to the introduction of s 4 was that the provision was not necessary to resolve the doubts expressed in *Margetts* about whether provisions of a Government agreement had the force of law. The reason it was thought that s 4 was not necessary was that s 3 of the *Government Agreements Act*<sup>122</sup> made provisions of the Government agreement a "law of the State" sufficient for the prosecution in *Margetts* to "have been sustained" under s 67 of the *Police Act*. It was therefore argued that it was unnecessary to create a new offence in s 4 with increased penalties of a \$5,000 fine or 12 months' imprisonment<sup>123</sup>. This assumption is dubious. It may be that the relevant provisions of the Government agreement considered in *Margetts* did not purport to modify any existing law and hence possibly did not obtain the independent force of law. But, in any event, s 4 created an independent offence which removed any such issue and provided for penalties which were "severe" and which would "reflect the seriousness with which the Government views these deliberate acts of obstruction"<sup>124</sup>.

136 For these reasons, the context, purpose, and ordinary meaning of the words of s 3 of the *Government Agreements Act* all support the second approach. The contrary conclusion, however, was reached in *Re Michael; Ex parte WMC Resources Ltd*<sup>125</sup>. In that case, Parker J, with whom Templeman and Miller JJ agreed<sup>126</sup>, carefully considered the various judgments in *Sankey v Whitlam* before concluding that the legislative ratification of the agreement in *Re Michael* did not give statutory force to any of its terms, leaving the agreement "binding on the

---

122 Sections 1 and 2 are concerned with the citation of the Act and interpretation.

123 Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 5 December 1979 at 5842.

124 Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 4 December 1979 at 5706.

125 (2003) 27 WAR 574.

126 (2003) 27 WAR 574 at 592 [73], [74].



parties to the contract and not on others"<sup>127</sup>. His Honour then asserted that s 3 of the *Government Agreements Act* operated in the same way<sup>128</sup>. Perhaps due to a lack of submissions on the point, neither in *Re Michael* nor in the cases which followed it<sup>129</sup> did the courts closely consider the context, purpose, or ordinary meaning of the words of s 3. In so far as those authorities recognise that Government agreements to which s 3 applies continue to have contractual effect, they are correct. In so far as they conclude that such Government agreements can have no other character, and hence no force or effect as statutory provisions to modify other laws, they should be overruled.

### *The State Act*

137 On 30 June 2003, the Governor notified for public information the approval of the administration of the State Act, placed under the control of the Minister for State Development<sup>130</sup>. Section 3 of the *Government Agreements Act* removed common law or statutory obstacles to the contractual effect of the State Agreement and gave statutory force to the provisions of the State Agreement that modified other laws. The operation of s 3, however, did not mean that there was no remaining need for the provisions of the State Act in relation to the terms and variations of the State Agreement which: "ratif[y]" the State Agreement<sup>131</sup>; authorise the implementation of the State Agreement<sup>132</sup>; and provide that, without limiting or otherwise affecting the application of the *Government Agreements Act*, the State Agreement "operates and takes effect despite any other Act or law"<sup>133</sup>. These statutory provisions resolved any issues that might arise concerning conflict between the provisions of the State Agreement and statutes that have been enacted subsequent to the *Government Agreements Act* in 1979.

138 It is a matter of statutory interpretation as to whether Parliament intended to take the first approach, merely removing common law or statutory obstacles to the operation of a Government agreement, or the second approach, which goes

---

127 (2003) 27 WAR 574 at 581 [26].

128 (2003) 27 WAR 574 at 581 [29].

129 See *Commissioner of State Revenue v OZ Minerals Ltd* (2013) 46 WAR 156 at 189-190 [179], 204 [275]; *Western Australia v Graham* (2016) 242 FCR 231 at 240 [41]. Compare *West Lakes Ltd v South Australia* (1980) 25 SASR 389 at 398.

130 *Western Australian Government Gazette*, No 112, 30 June 2003 at 2639, 2647.

131 State Act, ss 4(1), 6(1).

132 State Act, ss 4(2), 6(2).

133 State Act, ss 4(3), 6(3).

further by also making some or all of the provisions of a Government agreement binding as statute law. Like all statutory interpretation, there is rarely any magic in the use of particular words. Words must be read and interpreted in their context and in light of Parliament's purpose.

139 A literal reading of the provisions of the State Act suggests that the intention of Parliament was merely to remove any common law or statutory obstacles in the path of any provision of the State Agreement. The ordinary meaning of "ratified", "authorised", and "operates and takes effect despite any other Act or law" suggests that the intention was merely to remove common law or statutory obstacles. But two important matters of context support a wider intention consistent with the second approach.

140 First, the opening words of ss 4(3) and 6(3) of the State Act – "[w]ithout limiting or otherwise affecting the application of the *Government Agreements Act 1979*" – reveal an intention that the State Act have a cognate operation with the *Government Agreements Act* by giving statutory effect to contractual provisions that expressly or impliedly purport to modify State laws.

141 Secondly, there are numerous provisions of the State Agreement that cannot "operate[] and take[] effect" merely by removal of statutory obstacles: those provisions modify other laws and require the force of statute law to take effect according to their terms. The intention of Parliament to give effect to those contractual provisions which expressly or impliedly modify other laws must include an intention to give those contractual provisions the force of law.

142 Numerous examples can be given of provisions in the State Agreement which expressly or impliedly modify other laws and as to which it would be a verbal nonsense to speak of the State Act as merely removing inconsistent State laws to give contractual effect to the provisions. One example is cl 10(8), which provides that reg 28A of the *Mining Regulations 1981* (WA) "shall be deemed modified" in various respects. Another example is cll 9(2) and 9(5), which purport to "modify" the *Mining Act 1978* (WA). Another example is cl 20(6), which purports to "modify" the *Land Administration Act 1997* (WA). Another example is cl 20(7), which purports to "modify" the *Aboriginal Heritage Act 1972* (WA). And, as explained below, another example is cl 32, which, in its express terms, purports to modify the law concerning the manner and form in which an amendment to the State Agreement, made by agreement, can be given statutory force by Parliament.

### **The manner and form requirement imposed by cl 32**

#### *The nature of the manner and form requirement in cl 32*

143 Clause 32 of the State Agreement provides as follows:

- "(1) The parties to this Agreement may from time to time by agreement in writing add to substitute for cancel or vary all or any of the provisions of this Agreement or of any lease licence easement or other title granted under or pursuant to this Agreement for the purpose of more efficiently or satisfactorily implementing or facilitating any of the objects of this Agreement.
- (2) The Minister shall cause any agreement made pursuant to subclause (1) in respect of any addition substitution cancellation or variation of the provisions of this Agreement to be laid on the Table of each House of Parliament within 12 sitting days next following its execution.
- (3) Either House may, within 12 sitting days of that House after the agreement has been laid before it pass a resolution disallowing the agreement, but if after the last day on which the agreement might have been disallowed neither House has passed such a resolution the agreement shall have effect from and after that last day."

144 Since some provisions of the State Agreement have the force of statute law as well as contractual force, the reference in cl 32(3) to when an agreed variation "shall have effect" must be to when the agreed variation takes effect not merely in its character as a contractual provision but also in its character as having the force of law. For instance, cl 32(3) could not have been intended only to concern the manner in which contractual force is given to an agreed amendment to cl 10(8), which provides that reg 28A of the *Mining Regulations* "shall be deemed modified". By altering the manner in which a provision can "have effect" as a statute, cl 32 itself is a provision that must have the force of statute law.

145 Since cl 32 has the force of statute law in addition to its contractual effect, the next question is whether, in its character as having the force of statute law, cl 32 imposes a manner and form requirement upon the Parliament of Western Australia before any law can be passed which amends the State Agreement. If so, in its character as having the force of law, cl 32 would modify existing statute law and would impose a constraint upon Parliament. It was not suggested that cl 32 imposed a constraint upon the parties by containing an implication that the State of Western Australia, as a party to the State Agreement, could not by its Executive

take steps to permit the introduction of legislation that would unilaterally amend the agreement<sup>134</sup>.

146 The terms of cl 32 in its statutory character plainly purport to impose a constraint upon Parliament. Where the parties have agreed under cl 32(1) to make any change<sup>135</sup> to the State Agreement then, in their character as enactments of Parliament, cll 32(2) and 32(3): (i) require the Minister to put those changes before Parliament within 12 sitting days next following execution of those changes; and (ii) preclude statutory effect being given to the changes until the expiry of 12 sitting days from when the change has been laid before each House without the change being disallowed. This purports to be a legislative requirement controlling any statutory amendment to the State Agreement in its character as an enactment of Parliament, following an agreed change by the parties to the State Agreement under cl 32.

*An extension by implication of the manner and form requirement?*

147 Since the Amending Act was not the consequence of an agreement between the parties, the constraints purportedly imposed by cl 32 do not expressly apply to the Amending Act. The plaintiffs therefore submitted that, whilst cl 32 did not say so "in terms", an implication from the words of cl 32, in its character as a statutory provision, was that the State Agreement could *only* be amended by the procedure in cl 32. Mr Palmer submitted in the related proceeding that cl 32 required that Parliament would not "unilaterally" act without following the procedure of cl 32. The plaintiffs' submission, therefore, was that an implication in cl 32, based upon an assumption underlying that manner and form provision, was that Parliament would only amend the State Act following the agreement of the parties.

148 The plaintiffs' submission derives some support from the decision of Hoare J, in dissent, in *Commonwealth Aluminium Corporation Ltd v Attorney-General*<sup>136</sup>. The plaintiff company relied on ss 3 and 4 of the *Commonwealth Aluminium Corporation Pty Limited Agreement Act 1957* (Qld), which gave effect to a Government agreement. Section 3 provided that the provisions of the agreement "shall have the force of law as though the Agreement were an enactment of this Act". Section 4 provided that the agreement shall be varied exclusively by a procedure involving agreement between the parties and that any "purported alteration of the Agreement not made and approved in such

---

134 See *West Lakes Ltd v South Australia* (1980) 25 SASR 389; *Port of Portland Pty Ltd v Victoria* (2009) 27 VR 366.

135 "[A]dd to substitute for cancel or vary all or any of the provisions".

136 [1976] Qd R 231.

manner shall be void and of no legal effect whatsoever". Different approaches were taken by each of the judges of the Full Court of the Supreme Court of Queensland. Wanstall SPJ held that the provision was not concerned with prescribing the manner and form of legislation but instead was an invalid abdication of legislative power<sup>137</sup>. Dunn J, in reasoning which has been described as "questionable as it reduces to insignificance, if not ignores altogether, the provisions ... that expressly stated that the agreement there was to have the force of law"<sup>138</sup>, held that the agreement was an instance of the first approach, merely removing common law or statutory obstacles to contractual enforcement and not giving the force of law to the provisions themselves<sup>139</sup>. In dissent, Hoare J held<sup>140</sup>:

"To treat the section as only applying to an act of the executive government, it seems to me, involves ignoring the provisions of s 3 which has in effect converted the agreement into an Act of Parliament. In my opinion, it follows that s 4 purports to provide that the provisions of the 1957 Act may only be varied in the manner provided by s 4 of that Act."

149 It is unnecessary to consider the proper interpretation of the particular legislation in *Commonwealth Aluminium Corporation Ltd v Attorney-General*. The State Act in that case was in different language with a different context and background. On the terms of the legislation in the present case, the plaintiffs' submission cannot be accepted for four reasons.

150 First, no assumption underlies cl 32 that Parliament would not unilaterally amend any provisions of the State Agreement having the force of statute law. The plaintiffs accepted that changes to the State Agreement in its contractual character might arise as a consequence of an order made in an arbitration under cl 42(1) of the State Agreement rather than as a result of an agreed variation. Assuming this to be correct, it means that cl 32 is not the exclusive procedure for making amendments to the provisions of the State Agreement in their contractual character. Likewise, it could not have been intended to be the exclusive means of making changes to the provisions of the State Agreement in their statutory character.

---

137 [1976] Qd R 231 at 236. See also *West Lakes Ltd v South Australia* (1980) 25 SASR 389 at 398.

138 Nonggorr, "The Legal Effect and Consequences of Conferring Legislative Status on Contracts" (1993) 17 *University of Queensland Law Journal* 169 at 174.

139 [1976] Qd R 231 at 259.

140 [1976] Qd R 231 at 248.

151 Secondly, and in any event, such an assumption about what Parliament *would* do is not an implication constraining what Parliament *could* do. Much clearer words would be required to evince an intention of Parliament in passing either the *Government Agreements Act* or the State Act that changes to the State Agreement would effectively require a reconstitution of the Parliament of Western Australia, with a precondition to legislation being an agreement between the State and external parties.

152 Thirdly, if any such assumption were an implication it would not, in any event, involve a condition concerned with the manner and form of Parliament's exercise of existing power to legislate. Instead, it would be an implied restructure of parliamentary power within a limited sphere. Such restructures of parliamentary power have been contrasted with manner and form provisions. In *West Lakes Ltd v South Australia*<sup>141</sup>, King CJ addressed a submission that ratifying legislation, the *West Lakes Development Act 1969* (SA), contained a general implication that the Parliament of South Australia could only legislate to vary the agreement following the agreement of the parties. Like Wanstall SPJ in *Commonwealth Aluminium Corporation Ltd v Attorney-General*<sup>142</sup>, King CJ held that such an implication would amount to a renunciation pro tanto of the lawmaking power rather than a manner and form provision<sup>143</sup>. As Professor Twomey has written<sup>144</sup>:

"In most cases, the requirement that an external body approve a measure before legislation can be enacted is not a 'manner and form' requirement, because it is a provision which purports to remove power from the legislature, rather than deal with the manner and form in which legislation is enacted."

153 Fourthly, whether the implication that the plaintiffs sought to justify is properly understood as one which involves an abdication of legislative power or a reconstitution of the Parliament of Western Australia for limited purposes, either effect might require compliance with manner and form requirements, including a referendum<sup>145</sup>, before the implication could be valid. The legislation giving statutory force to cl 32 did not satisfy those manner and form requirements.

---

141 (1980) 25 SASR 389.

142 [1976] Qd R 231 at 236.

143 *West Lakes Ltd v South Australia* (1980) 25 SASR 389 at 398.

144 Twomey, *The Constitution of New South Wales* (2004) at 286.

145 Compare *Constitution Act 1889* (WA), ss 73(2)(e)-73(2)(g), read with s 2.

154 In conclusion, since cl 32 imposed no manner and form requirement upon Parliament in unilaterally enacting the Amending Act, it is unnecessary to consider any of the further submissions of Western Australia concerning whether cl 32 could bind Parliament, including whether the Amending Act is a law respecting the "constitution, powers or procedure" of the Parliament of Western Australia.

### Consistency with Ch III of the *Constitution*

155 The plaintiffs' submissions concerning Ch III of the *Constitution* were twofold. The first of the plaintiffs' submissions was that the provisions of the Amending Act were contrary to Ch III of the *Constitution*, relying upon the principle in *Kable v Director of Public Prosecutions (NSW)*<sup>146</sup>. That principle has been synthesised as one of invalidity of State legislation "which purports to confer upon [a State Supreme Court] a power or function which substantially impairs the court's institutional integrity, and which is therefore incompatible with that court's role as a repository of federal jurisdiction"<sup>147</sup>. Such power or function must be assessed by both its legal and practical operation.

156 The plaintiffs' second submission was related. The major premise of the second submission was that the Amending Act is properly characterised as an exercise of judicial power. The minor premise was that Ch III of the *Constitution* precludes the Parliament of Western Australia from exercising judicial power.

157 These submissions require characterisation of the nature of, and identification of the scope of the operation of, the Declaratory Provisions. There are features of the Declaratory Provisions that, in combination, provide significant support for the plaintiffs' submissions that those provisions amount to a direction to the courts or an exercise of judicial power. First, there is the ad hominem nature of the provisions. Secondly, and in circumstances in which "trial[s] of actions for breach of contract ... are inalienable exercises of judicial power"<sup>148</sup>, the provisions are expressed as declarations of law about the effect or application of contractual provisions: neither of the Balmoral South proposals "has, nor can have, any contractual or other legal effect under the [State] Agreement or otherwise" (s 9(1)); neither proposals nor documents submitted under the State Agreement before commencement of the Amending Act can be proposals for the purposes of the State

---

146 (1996) 189 CLR 51.

147 *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 424 [40]. See also *Kuczborski v Queensland* (2014) 254 CLR 51 at 98 [139]; *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 245-246 [55].

148 *Bachrach (HA) Pty Ltd v Queensland* (1998) 195 CLR 547 at 562 [15]. See also *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 175.

Agreement (s 9(2)); the arbitral awards made on 20 May 2014 and 11 October 2019 are of no effect and are taken to be of no effect (ss 10(4), 10(6)); and the arbitration agreement under which the 20 May 2014 and 11 October 2019 arbitral awards were made is "taken never to have been valid" (ss 10(5), 10(7)).

158 The State of Western Australia and the Attorney-General of the Commonwealth relied upon the decision of this Court in *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth*<sup>149</sup>. In that case, the Australian Conciliation and Arbitration Commission had made a declaration which empowered the Minister to cancel the registration of the Federation. While the Federation's application to quash that declaration was pending in this Court, the Commonwealth Parliament passed legislation to cancel the registration of the Federation. This Court held that the legislation was valid because it did not "deal with any aspect of the judicial process"<sup>150</sup>. The judicial process had concerned the legality of the declaration by the Commission. The legislation might have had the effect that the ultimate purpose for the proceeding became redundant but it did not, in any way, affect the conclusion or the process of considering the legality of the Commission's declaration. By contrast, this Court referred with approval<sup>151</sup> to *Liyanage v The Queen*<sup>152</sup>, in which the Privy Council held invalid legislation that attempted to circumscribe the judicial process, including on sentencing. As the Privy Council explained<sup>153</sup>:

"Quite bluntly, [the aim of the legislation] was to ensure that the judges in dealing with these particular persons on these particular charges were deprived of their normal discretion as respects appropriate sentences."

159 If the Declaratory Provisions had been enacted whilst litigation was pending in the courts concerning the same parties and the same subject matter then there may have been force, even at the level of State courts<sup>154</sup>, in the plaintiffs' submission to the effect that the legislation would have undermined the assignment

---

149 (1986) 161 CLR 88.

150 (1986) 161 CLR 88 at 96.

151 (1986) 161 CLR 88 at 96.

152 [1967] 1 AC 259.

153 [1967] 1 AC 259 at 290.

154 *South Australia v Totani* (2010) 242 CLR 1 at 45-48 [66]-[69].



of judicial power to judges<sup>155</sup>. This point was powerfully made in dissent by Roberts CJ (Sotomayor J agreeing) in *Bank Markazi v Peterson*<sup>156</sup>:

"No less than if it had passed a law saying 'respondents win,' Congress has decided this case by enacting a bespoke statute tailored to this case that resolves the parties' specific legal disputes to guarantee respondents victory."

But the effect of (i) the absence of any extant legal proceedings to which the Amending Act was directed at resolving, and (ii) the purpose of the Amending Act being to provide cascading layers of protection for the financial position of the State of Western Australia rather than to resolve a judicial dispute<sup>157</sup>, is that the Declaratory Provisions bear the character of provisions which extinguish rights of the plaintiffs. With that single character, it is "well settled" that any effect of a law causing extinguishment or lesser alteration of rights, even on pending litigation, does not invalidate the law<sup>158</sup>. As for the ad hominem nature of the law, this is not conclusive that the function is judicial<sup>159</sup>. It can be a factor that suggests a judicial process but in this context the ad hominem aspect of the law served only the legislative function of focusing upon the particular rights to be extinguished. Finally, as explained in *Palmer v Western Australia*<sup>160</sup>, the Declaratory Provisions are not relevantly punitive.

---

**155** *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350 at 370 [66].

**156** (2016) 578 US 212 at 237.

**157** See *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (2001) 203 CLR 645 at 658 [31]; *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 at 566 [75].

**158** *Duncan v Independent Commission Against Corruption* (2015) 256 CLR 83 at 98 [26]. See also *Nelungaloo Pty Ltd v The Commonwealth* (1948) 75 CLR 495 at 503-504, 579-580; *R v Humby; Ex parte Rooney* (1973) 129 CLR 231 at 250; *Bachrach (HA) Pty Ltd v Queensland* (1998) 195 CLR 547 at 560 [8]-[9], 563-564 [18]-[22].

**159** *Liyanage v The Queen* [1967] 1 AC 259 at 289; *Leeth v The Commonwealth* (1992) 174 CLR 455 at 469-470; *Nicholas v The Queen* (1998) 193 CLR 173 at 192 [28], 212 [83], 250 [197(4)], 261-264 [205]-[208].

**160** [2021] HCA 31 at [14]-[16].

## Section 118 of the *Constitution*

160 The plaintiffs submitted that the Declaratory Provisions were invalid because a law of Western Australia could not deprive the 20 May 2014 and 11 October 2019 arbitral awards of legal effect when that effect had been recognised in other States. The plaintiffs relied upon: (i) s 35 of the *Commercial Arbitration Acts*<sup>161</sup> as recognising an arbitral award as uniformly binding "irrespective of the State or Territory in which it was made"; (ii) the views expressed by French CJ and Gageler J in *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia*<sup>162</sup> that an arbitral award is binding under s 35 of the *Commercial Arbitration Acts* from the date that it is made; and (iii) s 118 of the *Constitution* as requiring full faith and credit to be given to the laws of every State, which, it was said, prevented a law of Western Australia from depriving an arbitral award of the legal effect that it has by the laws of other States.

161 The premise of the plaintiffs' submission was that there was an inconsistency between, on the one hand, the Declaratory Provisions and, on the other hand, the binding effect of an arbitral award in States other than Western Australia by virtue of s 35 of the *Commercial Arbitration Acts*. The fatal flaw in the plaintiffs' submission is that the operation of s 36 of the *Commercial Arbitration Acts* denies any inconsistency in this case.

162 Both the recognition and enforcement limbs of s 35 of the *Commercial Arbitration Acts* are expressed to be "subject to the provisions of ... section 36". Section 36 provides that recognition or enforcement of an arbitral award "may be refused" in various circumstances, including on proof that the arbitration agreement "is not valid under the law to which the parties have subjected it or, failing any indication in it, under the law of the State or Territory where the award was made"<sup>163</sup>. Even on the assumption that the effect of s 35 is that an arbitral award is binding at the time that it is made, subject to defeasance by s 36, the satisfaction of three criteria contained in s 36(1)(a)(i) will have the effect that s 36 removes any inconsistency that would otherwise have arisen by the arbitral awards being enforceable in other States but not in Western Australia as a consequence of the Declaratory Provisions. The first criterion is that the relevant law of the arbitration agreement is the law of Western Australia as either the law to which the parties have subjected it or the law of the State where the award was made. The second criterion is that the arbitral awards are not valid under the law of Western

---

161 *Commercial Arbitration Act 2010* (NSW); *Commercial Arbitration Act 2011* (Vic); *Commercial Arbitration Act 2011* (SA); *Commercial Arbitration Act 2011* (Tas); *Commercial Arbitration Act 2012* (WA); *Commercial Arbitration Act 2013* (Qld).

162 (2013) 251 CLR 533 at 552 [23], 555 [31].

163 *Commercial Arbitration Acts*, s 36(1)(a)(i).

Australia at the time that they would be recognised or enforced. The third criterion is that the court would exercise its discretion to refuse the recognition or enforcement of the arbitral awards.

163 As to the first criterion, the State Agreement provides in cl 46 that the agreement "shall be interpreted according to the law for the time being in force in the State of Western Australia". It was submitted by the Solicitor-General of the Commonwealth, without dispute, that this was a choice of law provision for the arbitration agreement in cl 42 and that this choice of law extended to questions of validity as well as interpretation. Hence, it was argued, there was no dispute that the parties made a choice to subject their arbitration agreement to the law of Western Australia. In the absence of any reason why the choice of law in the State Agreement should not be applied in the usual way as a choice of law also for the arbitration agreement<sup>164</sup>, and in circumstances in which, within the terms of s 36, "the award was made" at Perth, Western Australia, it is appropriate to proceed upon that assumption.

164 As to the second criterion, the expression in s 36 of the question of validity in the present tense – "is not valid under the law to which the parties have subjected it" – emphasises that validity falls to be determined at the time that the arbitral awards are sought to be recognised or enforced and not at the time that the awards are made. Since the Declaratory Provisions are not otherwise invalid, their effect is that, at all times, the arbitral awards have not been valid under the law of Western Australia.

165 As to the third criterion, although s 36 involves a discretionary power it is only in very limited circumstances that a court would exercise the discretion in s 36 not to refuse to recognise or enforce an arbitral award where conditions such as the invalidity of the arbitration agreement are established. The limited scope of the discretion was discussed by Lord Collins of Mapesbury JSC in *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan*<sup>165</sup> in the course of considering the discretion contained in s 103(2)(b) of the *Arbitration Act 1996* (UK), which enacts Art V(1)(a) of the New York

---

**164** See *Enka Insaat ve Sanayi AS v OOO "Insurance Company Chubb"* [2020] 1 WLR 4117 at 4132 [43]-[45] and especially at 4189-4190 [233]-[234]; [2021] 2 All ER 1 at 16-17, 72-73; Briggs, *Private International Law in English Courts* (2014) at 1005-1006 [14.37]-[14.38]. See also Davies et al, *Nygh's Conflict of Laws in Australia*, 10th ed (2020) at 942 [39.2].

**165** [2011] 1 AC 763.

Convention<sup>166</sup> and provides, in similar terms to s 36 of the *Commercial Arbitration Acts*, that recognition or enforcement "of the award may be refused" if the arbitration agreement was not valid under the relevant law. His Lordship said that the discretion enabled the court to consider circumstances "which might on some recognisable legal principle affect the prima facie right to have an award set aside"<sup>167</sup>. The plaintiffs did not rely upon any such legal principle independently of their grounds for challenging the validity of the Declaratory Provisions. The consequence, therefore, is that if they are valid then the Declaratory Provisions preclude any State from recognising or enforcing the arbitral awards of 20 May 2014 and 11 October 2019. There is no inconsistency between the Declaratory Provisions and the effect of an arbitral award in States other than Western Australia.

### Conclusion

166           The questions in the special case should be answered as proposed in the joint judgment.

---

**166** Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. See also Paulsson, "*May or Must* Under the New York Convention: An Exercise in Syntax and Linguistics" (1998) 14 *Arbitration International* 227.

**167** [2011] 1 AC 763 at 843 [127].

