HIGH COURT OF AUSTRALIA

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

CLIVE FREDERICK PALMER PLAINTIFF

AND

THE STATE OF WESTERN AUSTRALIA DEFENDANT

Palmer v Western Australia
[2021] HCA 31
Dates of Hearing: 15, 16, 17 & 18 June 2021
Date of Judgment: 13 October 2021
B52/2020

ORDER

The questions of law stated in the Special Case filed on 12 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(1), (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;

(i) Section 15;
(j) Section 16;
(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) Section 23;
(r) Section 24;
(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 plaintiff.*

Representation

C F Palmer appeared in person

J A Thomson SC, Solicitor-General for the State of Western Australia, and S J Free SC with 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 Christrup 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)

CATCHWORDS

Palmer 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 plaintiff controller and beneficial owner of Mineralogy Pty Ltd and director of both Mineralogy Pty Ltd and 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 Mineralogy Pty Ltd and International Minerals Pty Ltd 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 Mineralogy Pty Ltd and International Minerals Pty Ltd 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 plaintiff named in Pt 3 – Where plaintiff commenced proceedings in High Court's original jurisdiction seeking declarations that Amending Act wholly or partly invalid – Whether Amending Act singled out plaintiff for "disability" or "discrimination" in manner forbidden by s 117 of *Constitution* – Whether ss 9(1), 9(2) and 10(4)-(7) of State Act invalid on basis they amounted to exercise of adjudicative authority regarding controversy within scope of s 75(iv) of *Constitution* – Whether ss 9(1), 9(2) and 10(4)-(7) of State Act invalid on basis they constituted bill of pains and penalties – Whether Amending Act exceeded limitation on legislative power of Parliament of Western Australia arising from rule of law.

Words and phrases – "adjudicative authority", "bill of pains and penalties", "disability", "discrimination", "exercise of judicial power", "legislative power", "rule of law", "text and structure of the *Constitution*".

Constitution, Ch III, s 117.
Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002 (WA).
Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020 (WA).

1 KIEFEL CJ, GAGELER, KEANE, GORDON, STEWARD AND GLEESON JJ. These reasons for judgment are to be read together with the reasons for judgment in *Mineralogy Pty Ltd v Western Australia*[1], which can be referred to as the "principal proceeding". They adopt the same nomenclature.

2 The plaintiff, Mr Palmer, is an Australian citizen resident in Queensland. He is the controller and majority beneficial owner of Mineralogy Pty Ltd. He is a director of that company and of International Minerals Pty Ltd. He is the individual identified by name as a "relevant person" for the purposes of the indemnity provisions of the State Act.

3 In a proceeding commenced by writ of summons contemporaneously with the principal proceeding, the plaintiff seeks declaratory relief against the defendant in terms almost identical to that sought by the plaintiffs in the principal proceeding. By special case in the proceeding, the plaintiff and the defendant have agreed in stating questions of law for the opinion of the Full Court that are almost identical to those stated by the parties in the special case in the principal proceeding. The facts the plaintiff and the defendant have stated and the documents they have identified in the special case as necessary to enable a decision to be made on the questions they have stated do not differ in any material respect from the facts stated and documents identified in the special case in the principal proceeding.

4 For the reasons fully set out in the reasons for judgment in the principal proceeding, the facts and documents identified in the special case provide no basis on which to be satisfied of the necessity of answering any question beyond those 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. For the reasons also fully set out in those reasons for judgment, the manner of enactment of the Amending Act did not contravene s 6 of the *Australia Act* and s 9(1) and s 9(2) and s 10(4) to s 10(7) of the State Act are not incompatible with Ch III of the *Constitution* and have not been demonstrated to be incompatible with s 118 of the *Constitution*.

5 Left to consider are the additional bases on which the plaintiff, choosing to appear for himself on the hearing of the special case, argued for the invalidity of the Amending Act.

6 First, the plaintiff argued that the Amending Act singles him out for a "disability" or "discrimination" of a kind forbidden by s 117 of the *Constitution*.

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1 [2021] HCA 30.

Plainly, it does not. The prohibition in s 117 is against subjecting an Australian citizen resident in one State to a disability or discrimination in another State which would not be equally applicable to that Australian citizen if the Australian citizen were resident in that other State. Even if the Amending Act could be characterised as singling the plaintiff out for a disability or discrimination, that disability or discrimination could not be characterised as being of a kind forbidden by s 117 of the *Constitution*. Neither the legal operation nor the practical operation of the whole or any part of the Amending Act would be any different if the plaintiff were resident in Western Australia instead of being resident in Queensland.

7 Second, the plaintiff argued that the Amending Act amounts to an invalid attempt to exercise "adjudicative authority" to put an end to a justiciable controversy within the scope of s 75(iv) of the *Constitution* (between the defendant as a State and himself as a resident of another State) of a kind which, on the authority of *Burns v Corbett*[2], is capable of being exercised only by a court. The argument presupposes that the Amending Act amounts to an exercise of judicial power. For reasons fully set out in the reasons for judgment in the principal proceeding, s 9(1) and s 9(2) and s 10(4) to s 10(7) of the State Act as inserted by the Amending Act involve no exercise of judicial power. The argument that one or more of those provisions involves an exercise of judicial power is not advanced by the plaintiff's attempt to characterise the Amending Act as a "bill of pains and penalties" for the reason that none of the provisions is concerned either with criminal guilt or with punishment[3]. Whether any other provision of the State Act inserted by the Amending Act might involve an exercise of judicial power is not raised on the facts stated in the special case and is not appropriate to be addressed.

8 Third, the plaintiff argued that the Amending Act falls foul of the "'cardinal principle' of the rule of law ... 'that Government should be under law, that the law should apply to and be observed by Government and its agencies, those given power in the community, just as it applies to the ordinary citizen'"[4]. "The rule of

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2 (2018) 265 CLR 304 at 335 [43], 336-337 [45].

3 *Haskins v The Commonwealth* (2011) 244 CLR 22 at 37 [25]-[26].

4 *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441 at 463 [91]; 390 ALR 590 at 612, quoting Stephen, "The Rule of Law" (2003) 22(2) *Dialogue* 8 at 8.

law" is a useful shorthand description of a complex concept central to an appreciation of the form of government that inheres in the text and structure of the *Constitution*. Acknowledged repeatedly has been that the *Constitution* was framed on the "assumption" of the rule of law. Reference to the rule of law can help to elucidate the scope and operation of a conferral of judicial power[5], just as it can help to elucidate the scope and operation of an express or implied limitation on legislative or executive power[6]. Also acknowledged repeatedly[7], however, has been that the rule of law supports neither expansion of judicial power nor contraction of legislative or executive power beyond those limits that inhere in the text and structure of the *Constitution*. Of the rule of law, no less than of "representative democracy", it "is logically impermissible to treat [the term] as though it were contained in the Constitution, to attribute to the term a meaning or content derived from sources extrinsic to the Constitution and then to invalidate a law for inconsistency with the meaning or content so attributed"[8]. That is what the plaintiff has sought to do.

9 Finally, the plaintiff argued that the Amending Act is inconsistent with various Commonwealth laws. The facts in the special case provide no basis on which to be satisfied of the necessity of determining whether any such inconsistency exists[9].

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5 eg *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 492 [31]; *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 24 [40], 25-26 [44].

6 eg *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193; *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 24 [40], 25-26 [44].

7 eg *Minogue v Victoria* (2019) 268 CLR 1 at 19 [25]; *Gerner v Victoria* (2020) 95 ALJR 107 at 111 [14]; 385 ALR 394 at 398.

8 *McGinty v Western Australia* (1996) 186 CLR 140 at 169.

9 cf *Victoria v The Commonwealth* (1937) 58 CLR 618 at 631-632; *The Commonwealth v Queensland* (1987) 62 ALJR 1 at 1-2; *The Commonwealth v Western Australia* (1999) 196 CLR 392 at 478 [259]; *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 266 CLR 428 at 467-468 [90].

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

10 The questions stated in the special case will be answered in terms equivalent to the answers to the questions stated in the special case in the principal proceeding.

11 EDELMAN J. As explained in the joint reasons for decision of the other members of this Court in this proceeding, most of the issues in this proceeding can be resolved on the same basis as the issues in *Mineralogy Pty Ltd v Western Australia*[10]. These reasons, which should be read together with my reasons in *Mineralogy v Western Australia*, deal only with issues that are not resolved in *Mineralogy v Western Australia*. Five issues remain in this proceeding: (i) whether the Amending Act is inoperative pursuant to s 109 of the *Constitution* due to inconsistency with Commonwealth laws; (ii) whether the Declaratory Provisions contravene implied restrictions on legislative power deriving from s 75(iv) of the *Constitution* by purporting to exercise adjudicative authority in a matter between a State and a resident of another State; (iii) whether the Declaratory Provisions are a bill of pains and penalties; (iv) whether the Declaratory Provisions discriminate against a resident of another State and therefore contravene s 117 of the *Constitution*; or (v) whether the Declaratory Provisions are contrary to the rule of law or contravene a constitutional limit upon "extreme" laws.

12 As to the first issue, whether the Amending Act is inconsistent with Commonwealth laws, I agree with the joint reasons that the facts in the special case are inadequate for a consideration of whether any inconsistency exists.

13 As to the second and third issues, the premise of Mr Palmer's submissions is that the Amending Act involves the impermissible exercise of judicial power or is a punitive Act in the nature of a bill of pains and penalties amounting to a legislative intrusion upon the exclusive sphere of judicial power[11]. For the reasons that I give in *Mineralogy v Western Australia*[12], the enactment of the Declaratory Provisions is not an exercise of judicial power. It remains to consider whether the Declaratory Provisions are punitive and in the nature of a bill of pains and penalties. If so, it would be necessary to consider whether, as State law, they are invalid for that reason.

14 The essence of a bill of pains and penalties, like a bill of attainder, as a law that offends against the separation of powers at Commonwealth level, is that it "proscribes legislative punishment of specified persons – not of whichever persons might be judicially determined to fit within properly general proscriptions duly

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10 [2021] HCA 30.

11 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 536, 650, 685-686, 721; *Haskins v The Commonwealth* (2011) 244 CLR 22 at 37 [25].

12 [2021] HCA 30 at [155]-[159].

enacted in advance"[13]. An "expanded notion"[14] of such bills extends to legislative punishment for some acts or characteristics independent of the criminal activity "which it is the purpose of the law to prohibit or prevent"[15]. However described, the essential features of bills of pains and penalties or bills of attainder are that they constitute legislative punishment for specified conduct or characteristics of a person or group of persons.

15 The submission by the State of Western Australia that the purpose of the Amending Act was "to protect Western Australians from the crippling effects that an adverse determination in the arbitral proceedings ... would have on the economy" is insufficient to preclude the Declaratory Provisions from being characterised as punitive. Nor is the civil nature of the Declaratory Provisions sufficient to preclude their characterisation as punitive. Just as a deprivation of a person's liberty by detention can be both punitive and protective, even if it is not imprisonment for a criminal offence committed by the detainee[16], so too can the deprivation of a person's property be both penal and protective even if it is not a fine for a criminal offence committed by the owner[17]. These established propositions mean that punishment as a constitutional concept cannot be confined to its core meaning concerning traditional notions of criminal punishment where

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13 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 536, quoting Tribe, *American Constitutional Law*, 2nd ed (1988), §10-4 at 643. See also (1991) 172 CLR 501 at 612, 646, 685, 719.

14 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 648.

15 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 647. See also at 719.

16 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27; *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 218 [207], 219 [210]; 388 ALR 1 at 62, 63.

17 See *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 423-424 [37]. See also *Cheatley v The Queen* (1972) 127 CLR 291 at 310; *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 279-280, 289-290, quoting *Goldsmith-Grant Co v United States* (1921) 254 US 505 at 510-511 and *Calero-Toledo v Pearson Yacht Leasing Co* (1974) 416 US 663 at 686-688.

proportionate retribution is imposed for a criminal offence[18]. It can extend to other instances of sanction "for breach of provisions which prescribe a rule of conduct"[19].

16 Although the Declaratory Provisions are directed to extinguishing the rights of a small number of persons, on their proper characterisation they are not a penalty or sanction for breach of provisions which prescribe a rule of conduct. The character of the Declaratory Provisions instead bears much closer resemblance to provisions concerned with general acquisition of property than with provisions concerned with sanctioning any particular conduct. The Declaratory Provisions are also very distant from the traditional notions of criminal punishment that lie at the core of the conception of punishment. They cannot be characterised for constitutional purposes as punitive.

17 As to the fourth issue, s 117 of the *Constitution* provides for an individual immunity from a law which, as either its object or its effect, subjects a subject of the Queen, resident in any State, to any disability or discrimination in any other State where the disability or discrimination "would not be equally applicable to him if he were a subject of the Queen resident in such other State". Section 117 will apply to a law which has as one of its very objects such different treatment of persons because they are out-of-State residents[20]. But where that different treatment is merely the *effect* of the law then, as Brennan J said in *Street v Queensland Bar Association*[21], "if there is a rational and proportionate connexion between the condition and some objective other than the subjecting of protected persons to different treatment because they are out-of-State residents, s 117 does not apply".

18 Mr Palmer's submissions in relation to s 117 fail for the simple reason that neither the object nor the effect of the Declaratory Provisions is the different treatment of Mr Palmer because he is not resident in Western Australia: the Declaratory Provisions are not, in their object or effect, "conditioned by

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18 See also *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 215 [196]; 388 ALR 1 at 58.

19 *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 437-438 [80]. See also *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 278.

20 *Street v Queensland Bar Association* (1989) 168 CLR 461 at 510-511, 548, 566.

21 (1989) 168 CLR 461 at 511. See also at 492 (Mason CJ), 529 (Deane J), 573 (Gaudron J); *Sweedman v Transport Accident Commission* (2006) 226 CLR 362 at 409-410 [66].

residence"[22]. In the words of s 117, there is no basis to conclude that the Declaratory Provisions "would not be equally applicable to him if he were a subject of the Queen resident in [Western Australia]".

19 The fifth issue reflects "increasingly fashionable"[23] submissions in this Court proposing novel constitutional implications said to derive from the rule of law or novel constitutional implications that laws must conform to some unspecified content of the rule of law[24]. The submission, put variously by the plaintiffs in *Mineralogy v Western Australia* and Mr Palmer in this proceeding, was that: (i) the rule of law is an assumption upon which the *Constitution* depends for its efficacy[25]; (ii) one of the three core aspects of the rule of law is that "all should be able freely to assert, and by the processes of law to vindicate, rights under the law"; and (iii) the Amending Act sets out to destroy the ability of Mr Palmer and the plaintiffs in *Mineralogy v Western Australia* to vindicate their rights under the law. Mr Palmer also submitted that the "extreme" nature of the Amending Act meant that it was not a "law of a State", thus violating an alleged constitutional presupposition that Parliament could only pass legislation which fit the character of laws valid under the *Constitution*. But he did not identify any further aspect of the Declaratory Provisions that satisfied this alleged character as so extreme as to be unconstitutional other than those aspects of the rule of law upon which he relied.

20 The first part of this submission misunderstands the nature of constitutional assumptions. Although Dixon J said that "the rule of law forms an assumption" upon which the *Constitution* is based, his Honour was contrasting that assumption with "traditional conceptions" to which the *Constitution* "gives effect"[26]. His Honour had previously explained the need not to confuse "the unexpressed assumptions upon which the framers of the instrument supposedly proceeded with

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22 *Sweedman v Transport Accident Commission* (2006) 226 CLR 362 at 408 [60].

23 Burton Crawford, *The Rule of Law and the Australian Constitution* (2017) at 202.

24 See *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319 at 346 [54], 347 [58]; *New South Wales v Kable* (2013) 252 CLR 118 at 121; *Director of Public Prosecutions (Cth) v Keating* (2013) 248 CLR 459 at 466; *Plaintiff S195/2016 v Minister for Immigration and Border Protection* (2017) 261 CLR 622 at 626; *Minogue v Victoria* (2019) 268 CLR 1 at 5-6.

25 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 351 [30].

26 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193.

the expressed meaning of the power"[27]. That previous explanation by Dixon J may not have been entirely accurate, because an understanding of expressed meaning will often take into account unexpressed assumptions or presuppositions. But the important distinction being made was between, on the one hand, assumptions about the expected application of the *Constitution* which have no effect on the essential meaning of the *Constitution* – for instance, "that the Senate would protect the States"[28] – and, on the other hand, those conceptions that shape the express or implied meaning of the *Constitution* because the conceptions are "part of the fabric on which the written words of the Constitution are superimposed" and which "cannot be ignored" in constitutional interpretation[29].

21 In order to ascertain whether some aspect said to be part of the "rule of law" is a conception which shapes the express or implied meaning of the *Constitution* or whether it is no more than an assumption about the expected application of the *Constitution* it is necessary (i) to identify precisely the aspect of the highly contested and abstract notion of the rule of law that is relied upon, and (ii) to identify why that aspect is necessary for the meaning or effective operation of the *Constitution* or its provisions. The identification of these matters may ultimately reveal that assertions that the aspect relied upon is part of the "rule of law" are, in this respect, no more than magniloquence.

22 There are laws permitted by the *Constitution* which exhibit features, at least individually, that are contrary even to aspects of common, "thin" notions of the rule of law. This point can be illustrated by reference to the eight desiderata or elements in Lon Fuller's classic exposition on the rule of law[30], an exposition adopted in large part by numerous others[31]. One aspect said to be part of this notion of the rule of law is that laws should not change too frequently. But, as Fuller accepted, this aspect "seems least suited to formalization in a constitutional

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27 *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29 at 81.

28 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 135.

29 *The Commonwealth v Kreglinger & Fernau Ltd and Bardsley* (1926) 37 CLR 393 at 413.

30 Fuller, *The Morality of Law*, rev ed (1969), ch 2.

31 Finnis, *Natural Law and Natural Rights* (1980) at 270-271; Gardner, *Law as a Leap of Faith* (2012) at 195; Raz, *The Authority of Law*, 2nd ed (2009) at 214-219; Raz, "The Law's Own Virtue" (2019) 39 *Oxford Journal of Legal Studies* 1 at 3; Waldron, "The Concept and the Rule of Law" (2008) 43 *Georgia Law Review* 1 at 6-7.

restriction"[32]. Legislation is not invalid if it creates criteria subject to constant change by applying a body of general law which "picks up the case law as it stands from time to time"[33]. Another aspect of a thin notion of the rule of law, described as "one of the most essential ingredients", is that laws must be clear[34]. But this Court has held that the *Constitution* does not prohibit vague or unclear laws[35]. Another aspect, the absence of which Fuller described as "truly a monstrosity"[36], is that laws, and particularly criminal laws, should not be retroactive[37]. But this Court has held that there is no constitutional proscription even against retroactive criminal laws[38]. Another aspect is that laws should be general. But this Court has upheld laws that are specific to corporations, individuals, or small groups of people[39].

23 There are, however, a limited number of constitutional implications that have been recognised by this Court as associated with aspects of the rule of law in older, Diceyan terms. Dicey's first principle of his notion of the rule of law, that no person "is punishable ... except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land"[40], conforms, with some exceptions, to the constitutional implication that "the involuntary detention

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32 Fuller, *The Morality of Law*, rev ed (1969) at 79.

33 *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 259 [86], citing *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539 at 549 [23].

34 Fuller, *The Morality of Law*, rev ed (1969) at 63.

35 *King Gee Clothing Co Pty Ltd v The Commonwealth* (1945) 71 CLR 184 at 195; *R v Holmes; Ex parte Altona Petrochemical Co Ltd* (1972) 126 CLR 529 at 562; *Brown v Tasmania* (2017) 261 CLR 328 at 373 [149], 470-471 [448]-[453], 487-488 [507]-[508].

36 Fuller, *The Morality of Law*, rev ed (1969) at 53.

37 See also *PGA v The Queen* (2012) 245 CLR 355 at 444 [245].

38 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501.

39 *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth* (1986) 161 CLR 88; *Knight v Victoria* (2017) 261 CLR 306; *Minogue v Victoria* (2019) 268 CLR 1.

40 Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (1885) at 172.

of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt"[41]. The existence of that constitutional implication was recognised as necessary from the separation of powers in the text and structure of the *Constitution*[42].

24 On the other hand, this Court has rejected a broad implication of legal equality derived from Dicey's second principle, that every person is "subject to the ordinary law of the realm"[43] and which "excludes the idea of any exemption of officials or others from the duty of obedience to the law"[44]. Although that second principle was initially said by Deane and Toohey JJ to support a constitutional implication of legal equality[45], a majority of this Court later rejected the existence of such an implication as contrary to the text and structure of the *Constitution*[46]. Dicey's second principle might, however, be said to support two more limited implications. The first more limited implication, recognised in *Plaintiff S157/2002 v The Commonwealth*[47], is that s 75(v) of the *Constitution* does not merely confer authority upon this Court but, consistently with the "rule of law", makes aspects of this Court's authority "irremovable"[48]. This implication arises from the necessity that "if executive power is subject to legal limits, then the courts must be able to properly enforce those limits, in circumstances where they are given jurisdiction to do so"[49]. The second more limited implication which Dicey's second principle

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41 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27.

42 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 26-29.

43 Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (1885) at 177-178.

44 Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (1885) at 215.

45 *Leeth v The Commonwealth* (1992) 174 CLR 455 at 485-488.

46 *Kruger v The Commonwealth* (1997) 190 CLR 1 at 44-45, 63-68, 142, 153-155.

47 (2003) 211 CLR 476 at 513 [103]. See also *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1.

48 (2003) 211 CLR 476 at 513 [103].

49 Burton Crawford, "Expanding the Entrenched Minimum Provision of Judicial Review? Graham v Minister for Immigration and Border Protection" (2017) 28

might be said to support is that which was first enunciated in *Marbury v Madison*[50], that power should reside in the courts rather than the Parliament to invalidate laws which exceed the limits of legislative power. That principle, which Fullagar J described as "axiomatic"[51], is an implication derived from the fabric of the *Constitution* as "necessary to vindicate the constitutional allocation of and restrictions on federal and State powers"[52].

25 Without specificity concerning the aspect of the particular version of the rule of law upon which reliance is placed, references to the "rule of law" are of little assistance in elucidating the content of any constitutional expression or implication. Mr Palmer and the plaintiffs in *Mineralogy v Western Australia* pointed only to one specific aspect of the rule of law that was said to give rise to a constitutional implication. Quoting from Sir Victor Windeyer[53], who was in turn referring to Dicey's third principle of his notion of the rule of law[54], Mr Palmer and the plaintiffs in *Mineralogy v Western Australia* sought to establish an implication that "all should be able freely to assert, and by the processes of law to vindicate, rights under the law".

26 It is unnecessary to determine whether a constitutional implication could be made in the terms that Mr Palmer and the plaintiffs in *Mineralogy v Western Australia* submitted, or to determine whether such an implication could exist at the level of both Commonwealth and State courts. Any implication of an ability to assert freely, and to vindicate, rights under the law, however precisely expressed, could not extend to protection of rights from extinguishment. The framers of the *Constitution* made a conscious choice to permit the Commonwealth Parliament to

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Public Law Review 282 at 286. See also *Smethurst v Commissioner of the Australian Federal Police* (2020) 94 ALJR 502 at 555 [230]; 376 ALR 575 at 634.

50 (1803) 5 US 137.

51 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 262.

52 *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 230. See also *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 381 [89].

53 Windeyer, "'A birthright and inheritance': The Establishment of the Rule of Law in Australia", in Debelle (ed), *Victor Windeyer's Legacy: Legal and Military Papers* (2019) 80 at 99.

54 Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (1885) at 208, 216. Compare *Wainohu v New South Wales* (2011) 243 CLR 181 at 208-209 [44].

pass laws which, provided they are expressed with sufficient clarity[55], extinguish vested rights, subject to the just terms requirements of s 51(xxxi). The Declaratory Provisions are not inconsistent with any constitutional implication based upon any aspect of the rule of law.

27 I would answer the questions stated in the special case in the same manner as the other members of this Court.

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55 *Official Report of the National Australasian Convention Debates* (Adelaide), 19 April 1897 at 848.