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THE *MINERALOGY ACT* AND THE RULE OF LAW

> 'This is crucial that this bill is introduced and passed. And the academics and the other people can write about it afterwards, can analyse it afterwards, all they like for months to come.'[1]

Abstract

On 13 August 2020, the Parliament of Western Australia ('WA') enacted the *Mineralogy Act* to address damages claims arising from proposals for mining projects submitted by Clive Palmer, Mineralogy Pty Ltd and International Minerals Pty Ltd. The constitutionality of the *Mineralogy Act* was challenged in the High Court on various grounds in *Mineralogy* and *Palmer*. This article considers one of these grounds: that the *Mineralogy Act* was invalid for its failure to comply with the rule of law, understood as an implied constraint on State legislative competence arising under the *Commonwealth Constitution*. This submission was unsuccessful, as were the other grounds of challenge. However, the High Court's consideration of this issue and the legislative process leading to the enactment of the *Mineralogy Act* provide a useful backdrop to reflect upon the concept of the rule of law, the circumstances in which departures from the rule of law are justifiable, and the status of the rule of law in Australian constitutional law. The rule of law is rightly protected primarily through parliamentary as opposed to judicial processes, although the *Mineralogy Act* also reveals clear weaknesses in Australia's political constitution.

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1 'QUIGLEY — Palmer's $30 Billion Claim', *ABC Radio Perth — Breakfast* (ABC Radio Perth, 13 August 2020) 3–4 <https://libstream.Parliament.wa.gov.au/2020/8/Radio/222601.pdf>.

I Introduction

On 11 August 2020 at 4.55pm, standing orders were suspended in the WA Legislative Assembly to allow the Attorney-General, John Quigley, to introduce urgently and without notice the Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Bill 2020 ('Mineralogy Bill'), which purported to amend the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA) ('*Pre-Amendment Act*'). In a radio interview on 13 August 2020, the Attorney-General explained that the Mineralogy Bill had been prepared in secret over a period of six weeks.[2] Other than the Premier and the Attorney-General, and possibly one or two other Ministers, no member of Cabinet was aware of the Mineralogy Bill's existence until a Cabinet meeting at 4.15pm on 11 August 2020, approximately 45 minutes before the Mineralogy Bill was introduced to Parliament. Backbenchers knew nothing about the Mineralogy Bill until the Attorney-General rose to speak, and the Leader of the Opposition, Liza Harvey, was briefed only minutes beforehand.[3] The Mineralogy Bill passed the Legislative Assembly the following day and was passed by the Legislative Council on 13 August 2020. The Governor, Chris Dawson, assented to the Mineralogy Bill on the same day. Usually in WA, statutes commence four weeks after receiving royal assent, unless otherwise specified.[4] The Mineralogy Bill stipulated that it would commence on the day of its assent, meaning that the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA) ('*Mineralogy Act*') took effect on 13 August 2020.

As the Attorney-General explained in his second reading speech, the effect of the Mineralogy Bill was to address damages claims arising from proposals submitted by Clive Palmer, Mineralogy Pty Ltd and International Minerals Pty Ltd (the plaintiffs) pursuant to the terms of the *Pre-Amendment Act*. These proposals related to a project called the Balmoral South Iron Ore Project. The Attorney-General stated that the damages claim was in the order of $30 billion, an amount equivalent to the WA state budget or $12,000 per person in WA. The Mineralogy Bill was, as the Attorney-General acknowledged, 'unprecedented'.[5] The Mineralogy Bill would, *inter alia*: ensure that the Balmoral South proposals would have no further legal effect; terminate arbitration proceedings concerning those proposals; and invalidate existing arbitral awards. The clandestine preparation of the Mineralogy Bill and its urgent passage through Parliament were also extraordinary. In his radio interview on 13 August 2020, the Attorney-General explained that the Mineralogy Bill's introduction to the WA Legislative Assembly was timed to prevent Clive Palmer registering arbitral awards from 2014 and 2019: 'we kept it so tight and then brought it in at 5:00pm on Tuesday, after every court in the land was closed, and the doors were locked'. All of this was necessary, the Attorney-General said, to protect

2 Ibid 4.

3 Western Australia, *Parliamentary Debates*, Legislative Assembly, 12 August 2020, 4780 (Liza Mary Harvey).

4 *Interpretation Act 1984* (WA) s 20(2).

5 Western Australia, *Parliamentary Debates*, Legislative Assembly, 11 August 2020, 4599 (John Quigley, Attorney-General).

the state 'from the rapacious nature of Mr Palmer, Mineralogy and International Minerals'.[6]

The constitutionality of the *Mineralogy Act* was challenged in the High Court on various grounds in *Mineralogy Pty Ltd v Western Australia* ('*Mineralogy*')[7] and *Palmer v Western Australia* ('*Palmer*').[8] This article considers one of these grounds: that the *Mineralogy Act* was invalid for its failure to comply with the rule of law, understood to be an implied constraint on State legislative competence arising under the *Commonwealth Constitution*. This submission was unsuccessful, as were the other grounds of challenge. The constitutionality of the *Mineralogy Act* was upheld, the arbitration proceedings were terminated, and, at the time of writing, the plaintiffs were seeking damages from the Commonwealth by way of international arbitration proceedings.[9] However, the High Court's judgments in *Mineralogy* and *Palmer* and the legislative process leading to the enactment of the *Mineralogy Act* provide a useful backdrop to reflect upon the concept of the rule of law, the circumstances in which departures from the rule of law are justified, and the status of the rule of law in Australian constitutional law.

From the perspective of the High Court, as Dixon J states in *Australian Communist Party v Commonwealth* ('*Communist Party Case*'), the rule of law 'forms an assumption' of the *Constitution*.[10] To be sure, there are aspects of the rule of law that find practical expression in the *Constitution*. For example, ch III of the *Constitution* gives effect to the rule of law through s 75(v), which entrenches the federal judiciary's ability to engage in judicial review of Commonwealth executive action through constitutional writs.[11] But generally, the rule of law does not function as a standard of legal validity.[12] However, this does not mean that the rule of law is unimportant. Instead, the rule of law functions mainly as a political ideal that is upheld through Australia's political institutions. In other words, the rule of law is primarily an

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6 Western Australia, *Parliamentary Debates*, Legislative Assembly, 11 August 2020, 4598 (John Quigley, Attorney-General).

7 (2021) 274 CLR 219 ('*Mineralogy*').

8 (2021) 274 CLR 286 ('*Palmer*').

9 Paul Karp, 'Clive Palmer sues Australia for $41.3bn over alleged free trade rule breach', *The Guardian* (online, 11 July 2023) <www.theguardian.com/australia-news/2023/jul/10/clive-palmers-second-case-against-australia-is-413bn-claim-it-broke-trade-deal>.

10 (1951) 83 CLR 1, 193 (Dixon J) ('*Communist Party Case*').

11 Ch III of the *Constitution* also gives effect to the rule of law by vesting in an independent judiciary the ability to hold the Commonwealth Parliament to constitutional constraints in the enactment of legislation, and by denying to non-ch III courts the ability to engage in exclusively judicial tasks such as the adjudication of criminal guilt. For discussion, see Justice AS Bell, 'The Rule of Law and the Constitution: A Short Overview' (Web Page, 23 July 2021) <https://supremecourt.nsw.gov.au/documents/Publications/Speeches/2021-Speeches/Bell_20210723.pdf>.

12 Lisa Burton Crawford, *The Rule of Law and the Australian Constitution* (Federation Press, 2017) 2.

aspect of Australia's political constitution — the part associated with holding those who exercise political power to account through political processes — as opposed to its legal constitution — the part associated with holding those who exercise political power to account through judicial review.[13]

The rule of law is a notoriously contested idea, with a noted divide between 'thin' accounts, focused on formal attributes of the rule of law, and 'thick' accounts that seek to import various substantive rights into the concept.[14] Notwithstanding these complexities, this article contends that the *Mineralogy Act* constitutes a clear violation of the rule of law. This is because the *Mineralogy Act* undermines a fundamental value of the rule of law, which is that the law should be capable of guiding human conduct.[15] However, the rule of law is not an absolute. Prominent rule of law theorists acknowledge that the rule of law must be balanced against other values.[16] Unfortunately, there is much less guidance in the literature about the circumstances in which legislative departures from the rule of law are warranted. The article seeks to contribute to our understanding of the rule of law by developing an account of when the rule of law may be justifiably limited, drawing upon the legitimate aim and balancing stages of the structured proportionality test.[17] This article argues further that these issues are best addressed through parliamentary, as opposed to judicial, processes. In other words, there are good reasons for the rule of law to primarily form a part of Australia's political, as opposed to legal, constitution.

But for Parliament to perform its role in determining whether departures from the rule of law are justified, it is necessary for the legislative process to work effectively. This was not the case for the *Mineralogy Act*. The WA Parliament was unable to properly consider the rule of law implications of the Mineralogy Bill due to: (1) the urgency with which the Mineralogy Bill was pressed upon Parliament; (2) the limited information provided by the Government; (3) the extent to which the legislative process was distorted by the extreme unpopularity of Clive Palmer with the WA public; and (4) the overwhelming Parliamentary majority held by the WA Labor party.

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13 On the distinction between political and legal constitutionalism, see, eg: Graham Gee and Grégoire CN Webber, 'What is a Political Constitution?' (2010) 30(2) *Oxford Journal of Legal Studies* 273; Yee-Fui Ng, 'Political Constitutionalism: Individual Responsibility and Collective Restraint' (2020) 48(4) *Federal Law Review* 455.

14 Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' [1997] (Autumn) *Public Law* 467.

15 Joseph Raz, 'The Rule of Law and Its Virtue' in Joseph Raz (ed), *The Authority of Law: Essays on Law and Morality* (Clarendon Press, 1979) 210; Lon Fuller, *The Morality of Law* (Yale University Press, 2nd ed, 1964) 95.

16 Raz (n 15); Fuller (n 15).

17 Structured proportionality was introduced to Australian constitutional law as a 'tool of analysis' for determining whether the implied freedom of political communication is breached in *McCloy v New South Wales* (2015) 257 CLR 178, 336 ('*McCloy*').

However, a peculiar feature of the circumstances surrounding the passage of the Mineralogy Bill was that the Government had some justification for restricting the information available to Parliament given that arbitration proceedings were extant at the time the Mineralogy Bill was before Parliament, and thus subject to the confidentiality requirements of the *Commercial Arbitration Act 2012* (Cth). The Government could also point to reasons for the urgent passage of the Mineralogy Bill relating to the need to forestall litigation that might derail the constitutionality of the *Mineralogy Act*. In these circumstances, members of Parliament felt compelled to take the Government at its word that departing from the rule of law was necessary to safeguard the fiscal position of the State, even though they were not able to conclude with complete confidence that this was the case. Indeed, it is still not possible to do so given that the *Mineralogy Act* excludes the application of the *Freedom of Information Act 1992* (WA).[18] In short, although this article develops a theory of when it is permissible for legislatures to depart from the rule of law, it is not possible to reach a clear conclusion about whether the *Mineralogy Act* constitutes a justified departure from the rule of law. The *Mineralogy Act* therefore stands as a highly bizarre, deeply unsatisfactory, and possibly singular episode that nonetheless holds broader lessons for the place of the rule of law in Australian constitutional law. The *Mineralogy Act* has also received surprisingly little scholarly attention, especially given the extent to which it reveals weaknesses in the protection for the rule of law under Australia's political constitution.[19]

The arguments in this article are developed as follows. First, the article explores the nature of State Agreements and the Balmoral South disputes, provides an overview of the key features of the *Mineralogy Act*, and explains the focus of the High Court proceedings in *Mineralogy* and *Palmer*. Second, the article discusses the concept of the rule of law and develops a theory of the circumstances in which legislative departures from the rule of law are justified. Third, the article explains how the rule of law featured in the High Court's decisions in *Mineralogy* and *Palmer*, thereby shedding light on the place of the rule of law under Australia's legal constitution. Fourth, the article turns to the political constitution, considers how parliaments should ideally operate where proposed legislation threatens to derogate from the rule of law, and against this background analyses the deliberations of the WA

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18 *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA) ss 13(1), (3) and 21(1)–(3) ('*Mineralogy Act*').

19 For discussion, see: Nick Seddon, 'The Palmer Act' *AUSPUBLAW* (Blog Post, 31 August 2021) <https://auspublaw.org/blog/2020/08/the-palmer-act/>; Natalie Brown, 'Clive Palmer Takes a Sovereign Risk Challenging the Authority of WA Parliament' *AUSPUBLAW* (Blog Post, 9 September 2020) <www.auspublaw.org/blog/2020/09/clive-palmer-takes-a-sovereign-risk-challenging-the-authority-of-wa-Parliament/>; John Southalan, 'High Court Dismisses Challenge to Western Australia's Mineralogy Legislation' (2021) 40(1) *Australian Resources and Energy Law Journal* 5; Albert Monichino and Gianluca Rossi, 'Ex parte Enforcement of Arbitral Awards and the Rule of Law: *Mineralogy v Western Australia*' (2021) 31(1) *Australasian Dispute Resolution Journal* 31; Anthony Gray, 'The Separation of Powers and the Mineralogy/Palmer Litigation' in Keith Thompson (ed), *Current Issues in Australian Constitutional Law* (Connor Court Publishing, 2022) 63–92.

Parliament on the Mineralogy Bill. The article concludes by reflecting upon the clear weaknesses in the safeguards for the rule of law in Australia's political constitution revealed by the *Mineralogy Act*.

II State Agreements and the Balmoral South Disputes

To understand the *Mineralogy Act*, we first need to understand the nature of State Agreements. As John Southalan explains, State Agreements are used for large mining operations in WA and other states.[20] A State Agreement originates in a contract between a resources company and the Government. The Government obtains Parliament's approval of the agreement through statute which attaches the State Agreement. The legal effect of Parliament's endorsement is to enforce any aspects of the State Agreement that would otherwise be contrary to existing law. The State Agreement's main function is then to act as a mechanism to regulate future developments by the company. This occurs through the company providing the Government with proposals that are broadly described in the State Agreement. The Government considers each proposal, and, when approved, these allow the developments to proceed. The *Government Agreements Act 1979* (WA) prescribes additional protections for State Agreements.

The Mineralogy State Agreement was concluded by the WA Premier and the plaintiffs in December 2001, then approved by the WA Parliament in 2002 in the *Pre-Amendment Act*.[21] Clause 6 of the Mineralogy State Agreement required that the plaintiffs submit to the relevant Minister proposals for one or more combinations of projects. The Minister could take one of three courses of action regarding these proposals. First, the Minister could approve the proposal without qualification or reservation. Second, the Minister could defer considering, or making a decision on, the proposal pending submission of a further proposal, or a proposal in respect of matters not covered by the initial proposal. Third, the Minister could require that there be an alteration of the proposal, or require compliance with conditions on the approval of the proposal that the Minister, for stated reasons, considered reasonable. It was not open to the Minister simply to reject the proposal. Clause 46 of the Mineralogy State Agreement dealt with arbitration, providing that disputes between the parties should be resolved through arbitration under the *Commercial Arbitration Act 2012* (WA).

In 2012, the plaintiffs submitted to the Minister a proposal for a mining, processing, and export development, referred to in the *Pre-Amendment Act* as the 'first Balmoral South proposal'.[22] The Minister considered that the first Balmoral South proposal was outside the terms of the Mineralogy Agreement, and did not approve it. In response, the plaintiffs sought arbitration pursuant to clause 46 of the Mineralogy

20 Southalan (n 19).

21 *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA) sch 1 ('*Pre-Amendment Act*').

22 Ibid s 7(1).

State Agreement. In 2013, while the arbitration was in progress, the plaintiffs submitted to the Minister further documents, referred to in the *Pre-Amendment Act* as the 'second Balmoral South proposal'.[23] In 2014, the arbitrator determined that that the first Balmoral South proposal was a proposal within the terms of the Mineralogy State Agreement, which the Government had not properly considered. Following this decision, the Government effectively gave a 'conditional approval' to the first Balmoral South proposal, specifying 46 conditions for the plaintiffs to address before proceeding.

In 2018, the plaintiffs referred to arbitration a procedural dispute about whether the 2014 arbitral award precluded them from pursuing a claim for damages for breach of the Mineralogy State Agreement relating to the initial failure of the Minister to deal with the first Balmoral South proposal. A procedural dispute was also referred to arbitration regarding whether the plaintiffs were entitled to pursue a claim for damages for breach of the Mineralogy State Agreement on the basis that the conditions imposed by the Government for approval of the first Balmoral South proposal were so unreasonable as to give rise to a further failure to deal with the proposal. In 2019, the arbitrator ruled that the plaintiffs were not precluded from pursuing either claim for damages.

The result was that, in July 2020, the plaintiffs referred the substantive claims for damages to arbitration. The arbitrator was scheduled to hear the damages claims in November 2020 and issue a decision by February 2021. Notwithstanding these developments, the WA Premier, Mark McGowan, and the Attorney-General, John Quigley, were, in March 2020, already engaged in discussion about the prospect of legislation as a means of dealing with the plaintiffs' damages claims.[24] By the end of July 2020, they were discussing the exact timing of the introduction of the Mineralogy Bill to Parliament.[25] The enactment of the *Mineralogy Act* on 13 August 2020 terminated the arbitration proceedings.

III The Mineralogy Act

Described by the WA Solicitor-General in the *Mineralogy* High Court litigation as providing 'cascading layers of protection' for the financial position of the State,[26] the *Mineralogy Act* is an extraordinary piece of legislation. Section 9 provides that the first and second Balmoral South proposals will have no further legal effect. Section 10 terminates the arbitration proceedings that were then in progress and states that the 2014 and 2019 arbitral awards in favour of the plaintiffs should be taken never to have had legal effect. Pursuant to an elaborate definition of 'disputed matter',[27] s 11 precludes any relevant liability on the part of the State and provides

23 Ibid.

24 *Palmer v McGowan (No 5)* (2022) 404 ALR 621, 630 [27] (Lee J).

25 Ibid 630 [28] (Lee J).

26 *Mineralogy* (n 7) 257 [95] (Edelman J).

27 *Mineralogy Act* (n 18) s 7(1).

that no relevant proceedings can be brought against the State. Further to an equally elaborate definition of 'protected matter',[28] s 18 prevents the matter from giving rise to a cause of action or legal right or remedy against the State after commencement of the *Mineralogy Act*, and provides that the 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. The *Mineralogy Act* separately requires the plaintiffs to indemnify the State against any amount that might be recovered in respect of these matters.[29] In addition, non-enforcement provisions prevent a liability of the State connected with these matters from being charged to or paid out of the Consolidated Revenue Fund or enforced against any asset of the State.[30]

Apart from these protections, the *Mineralogy Act* excludes any relevant conduct of the State from judicial review,[31] other than for jurisdictional error,[32] and from the application of the rules of natural justice. The Act states 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'.[33] Persons are also precluded from seeking payment from the State for legal costs connected with the proceedings.[34] These provisions clearly have the potential to bear directly upon the judicial process. The Act similarly excludes the application of the *Freedom of Information Act 1992* (WA) from these matters.[35] A further noteworthy feature of the *Mineralogy Act* is the express provision made for the substantive provisions of Pt 3 to have distinct and severable operations in the event of invalidity: 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 the provision, that is not valid'.[36] A final remarkable feature of the *Mineralogy Act* is s 30, which empowers 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 these circumstances or to make any other provision necessary or convenient to address these circumstances. Section 31 goes on to provide that subsidiary legislation may operate retrospectively and have effect notwithstanding the State Agreement, *Mineralogy Act*, or any other Act or law. Section 30 was

28 Ibid s 7(1).

29 Ibid ss 14, 15, 22, 23.

30 Ibid ss 17, 25.

31 Ibid ss 12(1), (3), 20(1), (3).

32 Ibid s 26(6).

33 Ibid ss 12(4)–(7), 13(5)–(8), 20(4)–(7), 21(5)–(8).

34 Ibid ss 11(7), (8), 12(7), 13(8).

35 Ibid ss 13(1)–(3), 21(1)–(3).

36 Ibid s 8(5).

described by the Attorney-General in the WA Legislative Assembly as 'the Henry VIII clause of all Henry VIIIs'.[37]

IV The High Court's 'Prudential Approach' to Constitutional Adjudication

In September 2020, the plaintiffs filed writs in the High Court challenging the constitutionality of the *Mineralogy Act*, and *Mineralogy* and *Palmer* were heard in June 2021. Counsel for Mineralogy Pty Ltd made submissions in the *Mineralogy* proceedings and Clive Palmer appeared in person in the *Palmer* proceedings.

In *Mineralogy*, the High Court emphasised that it adopts a 'prudential approach' to constitutional adjudication. The prudential approach means that parties have no entitlement to expect an answer to a question of law unless 'there exists a state of facts which makes it necessary to decide [the] question in order to do justice in a given case and to determine the rights of the parties'.[38] It follows that parties will not be permitted to 'roam at large' over statutes, but will instead be 'confined to advancing those grounds of challenge which bear on the validity of the provision in its application to that party'.[39] Further, it is ordinarily inappropriate for the Court to be 'drawn into a consideration of a 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'.[40]

The result of the prudential approach is that, notwithstanding the elaborate provisions of the *Mineralogy Act*, the High Court was able to narrow its focus to those sections having a 'practical effect' on the rights of the plaintiffs. These were identified as ss 9(1) to 9(2) (invaliding the first and second Balmoral South proposals) and ss 10(4) to 10(7) (invalidating the arbitration awards). In other words, the High Court confined its inquiry to the provisions of the *Mineralogy Act* extinguishing the rights of the plaintiffs. The plaintiffs challenged these provisions on the basis that they are were inconsistent with ch III and s 118 of the *Constitution*. Additional grounds of challenge were that the *Mineralogy Act* as a whole was incompatible with s 6 of the *Australia Act 1986* (Cth) and exceeds limitations on the scope of the legislative power of the WA Parliament relating to the rule of law. This article does

37 Western Australia, *Parliamentary Debates*, Legislative Assembly, 12 August 2020, 4834 (John Quigley, Attorney-General). A Henry VIII clause enables delegated legislation to override legislation that has been passed by Parliament.

38 *Mineralogy* (n 7) 247–8 [56] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), quoting *Lambert v Weichelt* (1954) 28 ALJ 282, 283 (Dixon J). For discussion of the prudential approach, see Tristan Taylor, 'The High Court's Prudential Approach: When Is it Necessary to Resolve a Constitutional Question?' (2024) 47(1) *UNSW Law Journal* 211.

39 *Knight v Victoria* (2017) 261 CLR 306, 324–5 [33].

40 Ibid 324–5 [33] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

not provide a comprehensive overview of the High Court's judgments in *Mineralogy* and *Palmer*.[41] Instead, the focus is on the interaction between the *Mineralogy Act* and the rule of law.

V The Rule of Law

Before considering *Mineralogy* and *Palmer*, it is necessary to explore the concept of the rule of law in greater depth. As Tom Bingham notes,[42] credit for coining the phrase 'the rule of law' is normally given to Professor AV Dicey who used the term in his book, *Introduction to the Study of the Law of the Constitution*.[43] However, the idea has numerous antecedents, including in the work of Aristotle.[44] The rule of law has since emerged as a key principle of liberal constitutionalism, but it does not follow that the meaning of the rule of law is settled or clear. Instead, the meaning of the rule of law is notoriously elusive, with some authors suggesting that concept is 'essentially contested'[45] or even meaningless.[46] As Jeremy Waldron notes, there is 'contestation about the content and requirements of the Rule of Law ideal, *and* there is contestation about its point'.[47]

In the literature on the rule of law, there is a well-established distinction between 'thin' and 'thick', or 'formal' and 'substantive' conceptions of the rule of law. For Paul Craig, thin or formal conceptions of the rule of law address: (1) the manner in which the law was promulgated; (2) the clarity of the ensuing norm; and (3) the temporal dimension of the enacted norm.

However, formal conceptions of the rule of law do not pass judgement upon the content of the law. They are 'not concerned with whether the law was, in that sense, a good law or a bad law, provided that the formal precepts of the rule of law were themselves met'.[48] Prominent thin accounts of the rule of law are provided by Joseph Raz[49] and Lon Fuller.[50] In contrast, thick or substantive conceptions of the rule of

41 For a general discussion of *Mineralogy* and *Palmer*, see Southalan (n 19).

42 Tom Bingham, *The Rule of Law* (Allen Lane, 2010) 3.

43 AV Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan & Co, 8th ed, 1927).

44 Aristotle, *The Politics* (c 350 BC), tr Stephen Everson (Cambridge University Press, 1988).

45 Jeremy Waldron, 'Is the Rule of Law an Essentially Contested Concept (In Florida)?' (2002) 21(2) *Law and Philosophy* 137.

46 Judith Shklar, 'Political Theory and the Rule of Law' in Allan C Hutchinson and Patrick J Monahan (eds), *The Rule of Law: Ideal or Ideology* (Carswell, Toronto, 1987) 1.

47 Waldron (n 45) 159 (emphasis in original).

48 Craig (n 14) 467.

49 Raz (n 15).

50 Fuller (n 15).

law accept the formal attributes of the rule of law but also seek to derive substantive rights from the concept. An example is the work of TRS Allan, who argues that the rule of law embraces substantive moral principles and it is the role of the judiciary to apply these principles to restrain legislative and executive power.[51] As Lisa Burton Crawford notes, the distinction between thin and thick accounts of the rule of law is therefore not the only axis of disagreement.[52] Where Allan regards the rule of law as a criterion of legal validity, for Raz, the rule of law is a 'political ideal which a legal system may lack or may possess to a greater or lesser extent'.[53]

For the purposes of this article, it is not necessary to explore substantive conceptions of the rule of law. As argued below, the *Mineralogy Act* plainly violates a formal conception of the rule of law. This dispenses with the need to delve into more contentious, substantive accounts of the rule of law to establish the incompatibility of the *Mineralogy Act* with the rule of law. Further, it is typically formal conceptions of the rule of law that are invoked in Australian constitutional law. The focus is therefore on formal theories of the rule of law, especially those developed by Raz and Fuller.

For Raz, the basic idea of the rule of law is that 'law must be capable of guiding the behaviour of its subjects'.[54] From this idea, Raz derives a series of principles: (1) all laws should be prospective, open, and clear; (2) laws should be relatively stable; (3) the making of particular laws should be guided by open, stable, clear and general rules; (4) the independence of the judiciary must be guaranteed; (5) the principles of natural justice must be observed; (6) the courts should have review powers over the implementation of the other principles; (7) the courts should be easily accessible; and (8) the discretion of the crime-preventing agencies should not be allowed to pervert the law.[55]

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51 TRS Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Oxford University Press, 2001).

52 Crawford (n 12) 14.

53 Raz (n 15) 211.

54 Ibid 210. In *Thoughtfulness and the Rule of Law* (Harvard University Press, 2023), Jeremy Waldron questions the centrality of predictability values to the rule of law. In particular, Waldron discusses three aspects of legal practice that incorporate elements of 'thoughtfulness' as opposed to predictability: the use of standards as opposed to rules; the rules of legal procedure; and *stare decisis*. However, Waldron does not wish to displace predictability values altogether from the rule of law. Further, the aspects of legal practice that he discusses are not raised by the *Mineralogy Act*, which concerned the enactment of legislation that derogated from various rule of law principles, especially — it will be argued — the value of legal predictability for the plaintiffs. For these reasons, while Waldron's discussion enriches our understanding of the rule of law, there does not appear to be any inconsistency between his theory and the approach taken in this article, which maintains a focus on legal predictability as essential to the rule of law for the purposes of analysing the *Mineralogy Act*.

55 Raz (n 15) 214–18.

In developing a formal account of the rule of law, Raz emphasises that the rule of law is not a 'complete social philosophy'.[56] The rule of law is one virtue that a legal system may possess and should not be confused with democracy, justice, equality, human rights and so on. Conformity to the rule of law is also a matter of degree. Complete conformity to the rule of law is impossible, but it is broadly agreed that legal systems should generally comply with the rule of law. Importantly, Raz acknowledges that since the rule of law is just one of the virtues that the law should possess, it has no more than prima facie force. The rule of law must be balanced against the competing claims of other values. A lesser degree of conformity with the rule of law may facilitate the realisation of other goals. The evil of different violations of the rule of law is not always the same. Therefore, 'one should be wary of disqualifying the legal pursuit of major social goals in the name of the rule of law'.[57]

There are some overlaps between Raz's account of the rule of law and Fuller's theory of the inner morality of law developed in *The Morality of Law*.[58] It is well-known that Fuller develops his theory through an allegory involving eight ways in which the fictional King Rex fails to make law. These eight failures to make law correspond to eight standards of legal excellence: (1) generality; (2) promulgation; (3) non-retroactivity; (4) clarity; (5) non-contradiction; (6) possibility of compliance; (7) constancy; and (8) congruence between the declared rule and official action.

Similarly to Raz's account of the rule of law, Fuller regards the purpose of law as 'subjecting human conduct to the governance of rules'.[59] The standards of legal excellence ensure that the law is capable of guiding human behaviour. Fuller likewise acknowledges that a legal utopia in which the standards of legal excellence are perfectly realised is not possible. There may also sometimes be trade-offs between the standards of legal excellence.[60] For Fuller, the 'inner' morality of law is therefore a 'morality of aspiration' that appeals to the 'pride of the craftsman'.[61]

Notwithstanding these overlaps, there are also some key differences between Raz's and Fuller's theories. Fuller regards some level of compliance with the standards of legal excellence as necessary for the existence of law and on this basis concludes that law is an innately moral concept. In contrast, Raz does not accept that every legal system necessarily has some moral value.[62] Relevantly for this article, there are also differences between Raz and Fuller about the circumstances in which departures from the rule of law are justified. Raz simply notes that general conformity to the

56 Ibid 211.

57 Ibid 229.

58 Fuller (n 15).

59 Ibid 96.

60 Ibid 41, 45.

61 Ibid 43.

62 Raz (n 15) 223.

rule of law should be 'cherished',[63] and that the rule of law should be 'balanced'[64] against competing values. Fuller similarly invokes the idea of balance: 'not too much, not too little'.[65] However, Fuller's view of the purposes that may justify departures from the rule of law is more constrained than Raz's account. Kristen Rundle argues that at the basis of Fuller's theory is a conception of the person as a responsible agent. The lawgiver and legal subject enter into a relationship of reciprocity. Derogations from the inner morality of law are permissible if they 'serve the particular quality of lawgiver-legal subject relationship that a condition of legality constitutes and maintains'.[66] Fuller argues, for example, that retroactive laws may be justified to address irregularities arising from failures to meet other desiderata of legality.[67]

For reasons explored below, Fuller's emphasis on the purpose for which the legislature seeks to depart from the rule of law is deeply illuminating. However, Fuller's account of the purposes that are legitimate in this context is arguably excessively constrained, at least if Fuller is understood as arguing that these purposes are confined to notions of reciprocity inherent in the idea of legality. Consider, for example, the challenge for the rule of law posed by the growth of administrative discretion in the modern state. It is sometimes argued that administrative discretion threatens to undermine the rule of law by introducing elements of arbitrariness into administrative decision-making and jeopardising legal certainty.[68] On the other hand, it is also possible to defend administrative discretion on the basis that it is necessary to achieve greater flexibility and better substantive outcomes.[69] These are not objectives related to the promotion of legality, or a situation where a particular desideratum is compromised in order to promote another aspect of the rule of law. Rather, the argument is that it is necessary to compromise the rule of law in pursuit of non-legal objectives.[70]

VI The Permissibility of Departures from the Rule of Law

Faced with these difficulties, some theorists conclude that it is not possible to formulate a general theory about the circumstances in which departures from the rule of law are justified. John Finnis, for example, argues that there is no 'key' or

63 Ibid 222.

64 Ibid 228.

65 Fuller (n 15) 18.

66 Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (Bloomsbury Publishing, 2012) 98.

67 Fuller (n 15) 54.

68 See, eg, Robert Goodin, *Reasons for Welfare* (Princeton University Press, 1988) 184–229.

69 See, eg, Joseph Heath, *The Machinery of Government: Public Administration and the Liberal State* (Oxford University Press, 2020) 274–6.

70 There may also be an argument that administrative discretion is conducive to greater overall compliance with the law. See, eg, Heath (n 69) 276.

'guide' and ultimately what is required is an exercise in 'practical reasonableness'.[71] In a similar vein, John Tasioulas suggests that the extent to which less than maximal compliance with the rule of law is permitted 'will naturally differ from one society to another, depending on their individual circumstances'.[72]

In contrast, this article argues that it is possible to stipulate some general principles to structure our reflections on the rule of law, even if these are stated at a relatively high level of abstraction. The starting point for this argument is the doctrine of structured proportionality, which has gained prominence in Australian constitutional law in recent years as a 'tool of analysis'[73] for determining whether limitations on the implied freedom of political communication[74] and the guarantee of free interstate trade, commerce and intercourse in s 92 of the *Constitution* are justified.[75] In broad terms, structured proportionality requires the court to consider: (1) whether there is a burden on the right or freedom; (2) whether the purpose of the law is legitimate; and (3) whether the law is proportionate to the legitimate objective. The third stage is understood as entailing a further three steps. In the Australian context, these are articulated by the High Court as follows: (i) the law should be suitable (rationally connected to the purpose of the provision); (ii) necessary (there should not be an obvious and compelling alternative reasonably practicable means of achieving the same purpose that has a less restrictive effect on the right or freedom); and (iii) adequate in its balance[76] (which involves a value judgement, consistent with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction that it imposes on the freedom).[77]

As it stands, it would be infeasible to transplant the structured proportionality test wholesale to analysis of whether particular departures from the rule are permitted. First, structured proportionality is not well-adapted to the internal complexity of the rule of law. Structured proportionality developed in the context of the enforcement of constitutional rights and freedoms, where the question is whether a right or

71 John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2nd ed, 2011) 275.

72 John Tasioulas, 'The Rule of Law' in John Tasioulas (ed), *The Cambridge Companion to the Philosophy of Law* (Cambridge University Press, 2020) 117, 128.

73 *McCloy* (n 17) 211 [58] (French CJ, Kiefel, Bell and Keane JJ).

74 Ibid 193–6 [2]-[5] (French CJ, Kiefel, Bell and Keane JJ).

75 *Palmer v Western Australia* (2021) 272 CLR 505, 43 [140] (Gageler J).

76 *McCloy* (n 17) 194–5 [2] (French CJ, Kiefel, Bell and Keane JJ).

77 Ibid 195 [2] (French CJ, Kiefel, Bell and Keane JJ). There is extensive literature on structured proportionality. For a comparative perspective see, eg: Alex Stone Stewart and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 72; Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012). In Australian constitutional law see, eg: Adrienne Stone, 'Proportionality and Its Alternatives' (2020) 48(1) *Federal Law Review* 123; Shipra Chordia, *Proportionality in Australian Constitutional Law* (Federation Press, 2020).

freedom may justifiably be limited with respect to a legislative objective external to the right or freedom. In contrast, as Tasioulas notes, the rule of law has a more complex structure given that it necessitates trade-offs 'among its … desiderata when they conflict … and also trade-offs of those desiderata against other considerations, such as democracy or justice'.[78] The internal complexity of the rule of law necessitates a more flexible mode of analysis than structured proportionality.

Second, structured proportionality assumes that rights are 'optimisation requirements' meaning that they should be 'realised to the greatest extent possible given their legal and factual possibilities'.[79] The optimising nature of rights is especially evident in the necessity limb of the structured proportionality test, which asks whether there is an alternative means of achieving the legislative objective that is less restrictive of the right or freedom. In contrast, the rule of law does not share the optimising character of constitutional rights. Both Raz and Fuller emphasise that complete conformity to the rule of law is impossible and it is not feasible for the various desiderata of the rule of law to be realised to their maximum extent.[80]

Third, the normative status of the rule of law is more variable than constitutional rights. While some departures from the rule of law are tantamount to rights violations, others may be 'violations of imperfect duties directed at fostering and preserving common goods to which no-one can claim to have an individual right'.[81] The normatively chequered character of the rule of law necessitates a more flexible mode of analysis than structured proportionality for determining whether departures from the rule of law are justified.

Notwithstanding these qualifications, there are two elements of the structured proportionality test that are helpful in evaluating the permissibility of legislative departures from the rule of law. First, as Fuller notes, there are advantages to considering the purpose for which the legislature is seeking to depart from the rule of law.[82] The insight provided by structured proportionality is that not every purpose can justify a limitation of a constitutional right or freedom.[83] The purpose must be compatible with the democratic values of the state which can be sourced, expressly and impliedly, in the *Constitution*.[84] Likewise, not every legislative purpose should justify a departure from the rule of law. In the Australian context, the purpose must be compatible with the *Constitution*'s commitment to representative and responsible

78 Tasioulas (n 72) 128.

79 Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press, 2002) 47. For a helpful discussion of Alexy's work, see Mattias Kumm, 'Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice' (2004) 2(3) *International Journal of Constitutional Law* 574.

80 Raz (n 15) 229; Fuller (n 15) 122.

81 Tasioulas (n 69) 129.

82 Fuller (n 15) 87.

83 Barak (n 77) 245.

84 Ibid 251.

government. In other words, it should not be permissible for legislatures to depart from the rule of law for purposes that are destructive of Australian democracy. A bedrock commitment to representative government is integral to the legal and political dimensions of Australia's constitutional settlement.

Second, like the final balancing stage of structured proportionality, it is helpful to consider whether there is an adequate balance between the importance of the legislative purpose and the extent of the restriction or burden being placed on a particular aspect of the rule of law. This requires the decision-maker to weigh the benefits gained by the public against the proposed harm to the rule of law. There must be an 'adequate congruence' between the advantages to the public of the law and the projected damage to the rule of law.[85] The balancing stage of structured proportionality aligns with the references to balancing in Raz's theory of the rule of law.[86] Balancing receives even greater emphasis in Fuller's work who argues that it is not a 'trite' notion but rather an inevitable consequence of the pursuit by human beings of a 'plurality of ends'.[87] For Fuller, balancing is not the 'easy way', involving a minimum of commitment, but rather the 'hard way'.[88] It is a problem that we invariably encounter as we 'traverse the long road that leads from the abyss of total failure to the heights of human excellence'.[89]

Both the legitimate aim and balancing stages are value-oriented analyses that require normative weight to be ascribed to the legislative purpose and the rule of law. Both are also sufficiently flexible to accommodate the structural and normative complexities of the rule of law. Neither inquiry entails, for example, that an optimising character should be attached to the rule of law. In contrast, the necessity stage of structured proportionality presupposes the optimising character of constitutional rights and would be unhelpful in considering the permissibility of departures from the rule of law. Inclusion of the suitability stage of structured proportionality would also threaten to over-formalise the type of flexible analysis that the rule of law and legislative reasoning require. In any event, suitability is already likely implicit in consideration of whether there is an adequate balance between the importance of the legislative aim and the limitation of the rule of law.[90]

The legitimate aim and balancing stages also share a focus upon the balancing of competing imperatives. Julian Rivers observes that the legitimate aim stage of structured proportionality represents a 'crude balancing exercise between rights

85 Barak (n 77) 340.

86 Raz (n 15) 228.

87 Fuller (n 15) 18.

88 Ibid 19.

89 Ibid 45–6.

90 Suitability plays only a limited role in the enforcement of constitutional rights. Dieter Grimm describes the suitability stage as eliminating a 'small number of runaway cases'. See 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57(2) *University of Toronto Law Journal* 383, 389.

and public interests at the highest level of generality'.[91] This is because balancing is implicit in consideration of whether a legislative purpose has sufficient normative weight to justify the limitation of a constitutional right, or, in our analysis, the rule of law. In contrast, the balancing stage of structured proportionality involves a closer examination of whether the 'degree of attainment of the legitimate aim balances the limitation of interests necessarily caused by the act in question'.[92]

A common objection to balancing by the judiciary is that it requires incommensurable values to be weighed against one another, in the sense that there is no given scale of measurement for determining whether the benefits of achieving the legislative aim outweigh the costs to the competing norm. Critics argue that this entails a departure from the rule of law, in favour of arbitrary rule by judges.[93] There are various responses to this objection in the literature on the justiciability of balancing. Aharon Barak, for example, argues that the relevant dimension of comparison should be 'the social importance of the benefit gained by the limiting law and the social importance of preventing harm to the limited constitutional right at the point of conflict'.[94] As for how social importance is determined, it is derived 'from different political and economic ideologies, from the unique history of each country, from the structure of the political system, and from different social values'.[95]

Even assuming that it is possible to reach a judicial consensus upon social importance as the relevant standard of comparison, Barak's argument underscores that balancing is an inherently open-ended and unstructured inquiry that draws upon multiple values, sources and considerations. This is not to say that the judiciary should never engage in balancing; some forms of balancing are unavoidable.[96] Nor is this an argument against structured proportionality, which incorporates elements of balancing within an overall, staged analysis. Rather, the contention is that to the extent that departures from the rule of law should be considered primarily with reference to balancing — whether this involves consideration of legitimate aims or adequacy of balance — this is an inherently political task that is better suited to the legislature than the judiciary. In other words, the rule of law is overall better situated

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91 Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65(1) *Cambridge Law Journal* 174, 196.

92 Ibid 200.

93 See, eg: Timothy Endicott, 'Proportionality and Incommensurability' in Grant Huscroft, Bradley Miller and Grégoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2016) 311; Jochen von Bernstoff, 'Proportionality Without Balancing: Why Judicial Ad Hoc Balancing Is Unnecessary and Potentially Detrimental to the Realisation of Individual and Collective Self-Determination' in Liora Lazarus, Christopher McCrudden and Nigel Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing, 2014) 63.

94 Barak (n 77) 349.

95 Ibid.

96 For example, awarding damages in tort law: see Endicott (n 87) 323.

within the political constitution rather than the legal constitution and generally should not function as a justiciable standard.[97]

Before returning to the *Mineralogy Act*, it is necessary to consider two potential objections to the analysis developed in this section. On the one hand, it might be argued that the argument goes insufficiently far in recommending that legislatures rely upon particular elements of the structured proportionality test to determine the permissibility of proposed legislative departures from the rule of law. More specifically, it might be suggested that in addition to the legitimate aim and balancing stages legislatures should apply a necessity test, which would assist in identifying alternatives to the proposed legislation that are less burdensome of the rule of law while also promoting the legislative objective. In this regard, it might be observed that the necessity stage of the structured proportionality test is capable of being applied with varying levels of intensity.[98] The flexible nature of the necessity test would allow legislative decision-makers to accommodate the normatively chequered nature of the rule of law in their deliberations.

However, it should be emphasised the focus of this article is on legislative as opposed to judicial reasoning. In contrast to judicial reasoning, commentators stress the inherently open-ended, all-things-considered nature of legislative reasoning. Richard Ekins for example, notes that the 'legislature responds directly to the complexity of the common good in that its deliberation is open to whatever is relevant to the good of the community, including moral argument, empirical findings, and the interests of various members of the community'.[99] It follows that recommendations for how legislatures should reason should not over-formalise the process. Applying the necessity stage of structured proportionality with different levels of intensity involves finely grained and technical distinctions between whether the proposed alternative measures are, for example, equally effective, obvious and compelling, and so on.[100] While lawyers thrive upon drawing and applying these types of distinctions, it is difficult to imagine a legislature imposing these constraints upon their reasoning. There is also a risk, as Ekins also notes, that an over-formalised reliance upon proportionality in legislative reasoning may 'reduce or obscure much that is important'.[101] The stages of the structured proportionality test recommended by this article — the legitimate aim and balancing stages — are the least structured and most open-ended and apply only a very loose framework to legislative deliberations.

On the other hand, from a different perspective, it might be argued that any importation of legal concepts such as structured proportionality to the legislative process is problematic. Of course, there are instances where legislatures are required to engage

97 Crawford (n 12) 14.

98 Stone (n 77) 137.

99 Richard Ekins, *The Nature of Legislative Intent* (Oxford University Press, 2012) 125.

100 Stone (n 77) 137.

101 Richard Ekins, 'Legislating Proportionately' in Grant Huscroft, Bradley W Miller and Grégoire Webber (eds), *Proportionality and the Rule of Law* (Cambridge University Press, 2014) 343, 369.

in legal reasoning. Gabrielle Appleby and Adam Webster explain that the Commonwealth Parliament has a primary role in constitutional interpretation in instances where courts show deference to Parliament, and where a non-justiciable constitutional question is involved.[102] Similarly, pursuant to the 'New Commonwealth Model of Constitutionalism',[103] many jurisdictions have introduced parliamentary rights review mechanisms such as joint standing committees on human rights.[104] Even Australia, which lacks a federal bill of rights, has at a Commonwealth level established a Parliamentary Joint Committee on Human Rights which examines bills and legislation for compatibility with Australia's international human rights treaty commitments.[105] These developments would seem to require legislatures to engage in legal reasoning, including through the application of structured proportionality.

However, these observations do not reach the heart of the objection to legislatures relying upon elements of structured proportionality to determine the permissibility of departures from the rule of law. Even where legislatures are required to interpret legal materials, commentators emphasise that they should not 'mimic the legalistic processes of the courts'.[106] Mark Tushnet has cautioned against legislatures failing to develop their own constitutional norms and instead slavishly following the norms that courts articulate, thereby allowing judicial decisions to displace legislative consideration of arguably more important issues.[107] Further, the rule of law in Australia is primarily an assumption of the *Constitution* that functions as a political value as opposed to a standard of legal validity. This casts further doubt upon the appropriateness of legislatures importing elements of legal analysis to their consideration of whether departures from the rule of law are justified.

The difficulty is that even commentators such as Ekins who are sceptical of legislatures adopting elements of legal reasoning emphasise that adherence to the 'ideal of the rule of law is central to legislating well and the rule of law serves as a powerful rational constraint on legislative reasoning'.[108] While there is an extensive literature on the nature of the rule of law as a political ideal, there is much less consideration

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102 Gabrielle Appleby and Adam Webster, 'Parliament's Role in Constitutional Interpretation' (2013) 37(2) *Melbourne University Law Review* 255, 265.

103 Stephen Gardbaum, 'The New Commonwealth Model of Constitutionalism' (2001) 49(4) *The American Journal of Comparative Law* 707.

104 For discussion, see: Janet L Hiebert, 'Parliamentary Bills of Rights: An Alternative Model?' (2006) 69(1) *Modern Law Review* 7; Aileen Kavanagh, *The Collaborative Constitution* (Cambridge University Press, 2023) 150–69.

105 The Parliamentary Joint Committee on Human Rights was established by the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). For discussion, see George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2015) 41(2) *Monash University Law Review* 469.

106 Appleby and Webster (n 103) 270.

107 Mark Tushnet, 'Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty' (1995) 94 *Michigan Law Review* 245, 247.

108 Ekins (n 101) 132.

of the circumstances in which departures from the rule of law are permissible. The result is that legislators have little guidance about how to proceed when confronted with proposed legislation that threatens to derogate from the rule of law. This article has drawn upon the concept of structured proportionality to provide a framework for legislative consideration of this issue. In doing so, it has selected those aspects of structured proportionality that are the most suited for political determination and the least likely to impose upon the legislature the 'crabbed and formalistic constitutionalism' that often characterises judicial interpretation.[109] In doing so, this article has sought to chart a middle path between criticisms that the proposed approach goes insufficiently far in incorporating structured proportionality, and objections to the adoption of any elements of structured proportionality in this context.

With this background in mind, we can now return to the *Mineralogy Act*. In terms of the theories developed by Raz and Fuller, it is difficult to see the *Mineralogy Act* as anything other than a violation of the rule of law. At one level, this is because the *Mineralogy Act* violates various desiderata of the rule of law formulated by both theorists. The *Mineralogy Act* is, for example, ad hominem and retrospective. The clandestine preparation of the *Mineralogy Act* and its urgent passage through Parliament undermined the requirements that laws should be relatively stable and constant. The provisions of the *Mineralogy Act* excluding judicial review threaten to undermine judicial independence. But even more fundamentally, the essence of both theories is that the law should be capable of guiding human conduct. Raz, for example, endorses the following statement by FA Hayek:

> [The rule of law means that] government in all its actions is bound by rules fixed and announced beforehand — rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge.[110]

In contrast, the entire point of the *Mineralogy Act* was to wrong-foot the plaintiffs to ensure that they would not be able to plan their affairs with reference to the law. The Attorney-General was clear in his radio interview on 13 August 2020 that the secretive preparation of the Mineralogy Bill, and the timing of the introduction to the Mineralogy Bill to Parliament, were intended to ensure that the plaintiffs would not be able to rely upon their pre-existing legal rights.

It is therefore unsurprising that the rule of law featured prominently in debates surrounding the *Mineralogy Act*. There are multiple references to the rule of law in parliamentary debates in the Legislative Assembly on 11 and 12 August 2020[111] and

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109 Cornelia TL Pillard, 'The Unfulfilled Promise of the *Constitution* in Executive Hands' (2005) 103 *Michigan Law Review* 676, 678.

110 Raz (n 15) 210, quoting FA Hayek, *The Road to Serfdom* (London, 1944) 54.

111 See, eg, Western Australia, *Parliamentary Debates,* Legislative Assembly, 12 August 2020, 4800 (Peter Argyris Katsambanis).

the Legislative Council on 13 August 2020.[112] On 19 August 2020, the Law Society of Western Australia issued a statement implicitly invoking a Fullerian conception of the rule of law:

> Citizens acquiesce to be governed by the State on the basis the State will govern according to the rule of law. The rule of law comprises a series of concepts, but most fundamentally: all people, whatever their status, are subject to the ordinary law of the land. Departure from that principle has the capacity to affect the foundation of our democracy.[113]

However, as we have also seen, the rule of law is not an absolute. Departures from the rule of law are permissible where these are in furtherance of a legitimate aim and there is an adequate balance between the importance of this aim and the extent of the restriction on the particular aspect of the rule of law that is burdened. The next part of this article explores the role that the rule of law played in the legal constitutionalist proceedings in the High Court in *Mineralogy* and *Palmer* before turning to the political constitutionalist deliberations of the WA Parliament. The High Court's approach to Ch III provides important context for the WA Parliament's deliberations, especially the urgency with which the *Mineralogy Act* was enacted.

VII The Rule of Law in the Legal Constitution: The High Court's Decisions in *Mineralogy* and *Palmer*

In the *Communist Party Case*, Dixon J stated that the rule of law 'forms an assumption' of the *Constitution* as opposed to a justiciable standard.[114] It is therefore unsurprising that the rule of law was not given great prominence in the plaintiffs' submissions or the High Court's judgments in *Mineralogy* and *Palmer*. However, there are aspects of the *Constitution* that give effect to the underlying assumption of the rule of law. One of these aspects is ch III of the *Constitution*. In *APLA Ltd v Legal Services Commissioner (NSW)*, Gleeson CJ and Heydon J said:

> The rule of law is one of the assumptions upon which the Constitution is based. It is an assumption upon which the *Constitution* depends for its efficacy. Chapter III of the *Constitution*, which confers and denies judicial power, in accordance with its express terms and necessary implications, gives practical effect to that assumption.[115]

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112 See, eg, Western Australia, *Parliamentary Debates*, Legislative Council, 13 August 2020, 4881 (Rick Mazza).

113 Law Society of Western Australia, 'Media Statement on the Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act' (Media Statement, 19 August 2020).

114 *Communist Party Case* (n 10) 193 (Dixon J).

115 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 351 (Gleeson CJ and Heydon J).

Theorists such as Raz also identify judicial independence as a key element of the rule of law.[116]

In *Mineralogy*, the plaintiffs' argument that ss 9(1) to 9(2) (invalidating the first and second Balmoral South proposals) and ss 10(4) to 10(7) (invalidating the arbitration awards) of the *Mineralogy Act* breached ch III had two strands. First, they submitted that the provisions impaired 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. For this submission, they relied upon the doctrine in *Kable v Director of Public Prosecutions*.[117] The plaintiffs argued further — or in the alternative — that the provisions constituted an exercise of judicial power by the Parliament of Western Australia. They contended that an exercise of judicial power by the Parliament of a State is precluded by the integrated judicial system established by ch III of the *Constitution*.

The joint judgment held that the provisions went no further than to ascribe new legal consequences to past events and thereby to alter substantive legal rights. In this regard, the joint judgment relied on *Duncan v Independent Commission Against Corruption* to the effect 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'.[118] They added that '[m]uch 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'.[119] Further, the institutional integrity of a court cannot be undermined by a mere alteration of substantive legal rights even if the alteration is extreme or drastic.[120] In other words, there may have been alteration of substantive rights but there was no interference with judicial independence or exercise of judicial power by the legislature. For this reason, there was no need to consider whether the integrated judicial system established by ch III of the *Constitution* precluded an exercise of judicial power by a State legislature.[121]

Writing separately on ch III, Edelman J cited *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* as authority for the proposition that legislation may alter or extinguish substantive rights, even regarding pending litigation.[122] However, Edelman J also cited *Liyanage v The Queen*[123] in which the Privy Council invalidated legislation on the basis that it

116 Raz (n 15) 216.

117 (1996) 189 CLR 51.

118 (2015) 256 CLR 83, 98 [26] (French CJ, Kiefel, Bell and Keane JJ).

119 *Mineralogy* (n 6) 255 [85] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

120 Ibid [86].

121 Ibid [87].

122 (1986) 161 CLR 88 ('*Australian Building Construction Federation*').

123 [1967] 1 AC 259 ('*Liyanage*'), cited in *Mineralogy* (n 6) 280–1 [158] (Edelman J).

usurped the judicial function. The Privy Council explained that 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'.[124] For Edelman J, the crucial distinction between these precedents appeared to be that the legislation in the former case did not 'deal with any aspect of the judicial process'.[125]

Despite finding no conflict between the *Mineralogy Act* and ch III, Edelman J indicated somewhat cryptically that had there been pending or extant litigation there might have been force to the plaintiffs' submissions that the *Mineralogy Act* constituted an exercise of judicial power.[126] This observation may be due to those aspects of the *Mineralogy Act* that do not simply extinguish rights but bear more directly upon the judicial process by, for example, precluding discovery,[127] judicial review other than for jurisdictional error,[128] and payment from the State for legal costs connected with the proceedings.[129] Due to its prudential approach to constitutional adjudication, the High Court did not consider these provisions and confined its focus to those parts of the *Mineralogy Act* extinguishing legal rights. Had there been pending or extant litigation, the sections of the *Mineralogy Act* relevant to the judicial process may have been engaged and the High Court might have broadened its focus. But in the absence of pending or extant litigation, the ch III argument could not gain any traction. This point is returned to below, in the discussion of the deliberations of the WA Parliament.

Apart from the ch III submissions, the plaintiffs advanced the following, more speculative argument: the rule of law is an 'assumption' upon which the *Constitution* depends for its efficacy; the States cannot pass laws that flout that assumption; and the rule of law requires that persons have access to impartial courts to vindicate their legal rights. This submission drew upon Kirby J's obiter remarks in *Durham Holdings Pty Ltd v New South Wales* that: the states derive their 'constitutional status' from the *Constitution*; State laws must be of a kind envisaged by the *Constitution*; and certain 'extreme' laws might fall outside that 'constitutional presupposition'.[130] In other words, the *Constitution* impliedly limits the law-making powers of the states with reference to the rule of law, and the *Mineralogy Act* constituted a sufficiently flagrant violation of the rule of law to fall outside the legislative competence of the WA Parliament.

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124 *Liyanage* (n 124) 290 (Lord Pearce).

125 *Australian Building Construction Federation* (n 124), 96 (Gibbs CJ, Mason, Brennan, Deane and Dawson JJ), cited in *Mineralogy* (n 6) 280–1 [158]–[159] (Edelman J).

126 *Mineralogy* (n 6) 281 [159] (Edelman J).

127 *Mineralogy Act* (n 17) ss 12(4)–(7), 13(5)–(8), 20(4)–(7), 21(5)–(8).

128 Ibid s 26(6).

129 Ibid ss 11(7), (8), 12(7), 13(8).

130 (2001) 205 CLR 399, 431 (Kirby J).

The joint judgment in *Palmer* dealt with this submission in a single paragraph. They describe the rule of law as 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*'.[131] Reference to the rule of law can help to elucidate constitutional conferrals of judicial, legislative and executive power. However, the rule of law does not support conceptions of judicial, legislative and executive power that extend beyond those limits inherent in the text and structure of the *Constitution*. It is not permissible to treat the rule of law 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 or attributed'.[132] This formulation reiterates the High Court's well-established emphasis upon the text and structure of the *Constitution* and its related aversion to free-standing principles in constitutional interpretation.[133]

Justice Edelman also wrote separately in *Palmer* and addressed the plaintiffs' rule of law submissions in greater depth. In the process, Edelman J provided helpful guidance about the extent to which parties can make submissions drawing upon the rule of law in constitutional litigation. For Edelman J, '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'.[134] Justice Edelman noted that there are a limited number of constitutional implications that have been recognised by the High Court as associated with aspects of the rule of law. For instance, Dicey's principle 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'[135] is reflected in the constitutional implication that 'the involuntary detention 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'.[136]

For their part, the plaintiffs sought to establish a constitutional implication derived from the rule of law that persons should have access to impartial courts to vindicate their legal rights. Justice Edelman found that it was unnecessary to determine whether this implication is entailed by the text and structure of the *Constitution* given that such an implication would not extend to the protection of legal rights from extinguishment. Accordingly, the provisions of the *Mineralogy Act* extinguishing

131 *Palmer* (n 8) [8] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

132 *McGinty v Western Australia* (1996) 186 CLR 140, 169 ('*McGinty*'), quoted in *Palmer* (n 8) [8] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

133 See, eg, *McGinty* (n 133) 232 (McHugh J).

134 *Palmer* (n 8) [21] (Edelman J).

135 Dicey (n 43) 172.

136 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ).

the rights of the plaintiffs were 'not inconsistent with any constitutional implication based upon any aspect of the rule of law'.[137]

VIII The Rule of Law in the Political Constitution: The Deliberations of the WA Parliament

The extent to which the *Mineralogy Act* constitutes a justified departure from the rule of law was therefore only tangentially explored by the High Court. However, as argued, it is doubtful that the judiciary is the most appropriate forum for these deliberations. The type of open-ended and unstructured balancing exercises involved in determining whether the legislature is departing from the rule of law for a legitimate aim, and whether there is an adequate balance between the importance of the legislative aim and the extent of the restriction on the particular aspect of the rule of law that is burdened, are inquiries that are better suited to the parliamentary process. But for the legislature to properly perform this role, it is essential that there is: (1) sufficient time; and (2) sufficient information for proper scrutiny and debate regarding bills that threaten to derogate from the rule of law.

It should be clear that neither of these criteria were met in the legislative process surrounding the enactment of the *Mineralogy Act*. On the issue of whether the Parliament was provided by the Government with sufficient information, the explanation provided by the Attorney-General for the Mineralogy Bill was the 'dire financial consequences for the state of Western Australia and Western Australians'[138] if the plaintiffs were to succeed in their damages claim. It seems to have been accepted by most members of Parliament that fiscal considerations are potentially a legitimate aim warranting a departure from the rule of law, at least where the envisaged costs to the State are sufficiently far-reaching. For instance, the Leader of the Opposition, Liza Harvey, said that 'net debt in this state is $36 billion. No opposition would stand in the way of a government protecting its taxpayers from net debt increasing to $66 billion on the back of litigation by any individual. That is why we are supporting this legislation'.[139]

However, the only information provided by the Attorney-General in support of his claim that the State faced ruinous financial repercussions if the Mineralogy Bill was not passed was a one-page schedule tabled in the Legislative Assembly.[140] Members of the Legislative Assembly expressed frustration that they were not able to verify the extent of the plaintiffs' damages claim. The Leader of the Opposition stated that

137 *Palmer* (n 8) [26] (Edelman J).

138 Western Australia, *Parliamentary Debates*, Legislative Assembly, 11 August 2020, 4597 (John Quigley, Attorney-General).

139 Western Australia, *Parliamentary Debates*, Legislative Assembly, 12 August 2020, 4780 (Lisa Mary Harvey).

140 Comparative Table of Approximate Damages (Including Interest) Claimed <www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/4013558a2cb77093b33c6e3a482585c2004d3a22/$file/3558.pdf>.

they were forced to take 'the Premier at his word that $30 billion of taxpayers' funds are at stake'.[141] In response, the Attorney-General noted that pending the enactment of the *Mineralogy Act* the arbitration proceedings remained extant and thus subject to the confidentiality requirements of the *Commercial Arbitration Act 2012* (Cth). This meant that it was not legally possible to provide further information regarding the damages claim. To be sure, the Attorney-General conceded that he had 'in a way' utilised parliamentary privilege to breach the *Commercial Arbitration Act 2012* (Cth) by tabling the schedule of damages.[142] However, he was reluctant to countenance a more far-reaching breach of the *Commercial Arbitration Act 2012* (Cth) without the consent of the plaintiffs, observing that 'in fairness to [Mr Palmer] … he has his rights under the act'.[143]

This position seems to have been reluctantly accepted by some members of the Legislative Assembly. For example, the Deputy Leader of the Opposition, WR Marmion stated that 'I absolutely understand that we cannot have all the information'.[144] It is also understandable that the Attorney-General did not wish to divulge commercially sensitive information. But the net result was that the WA Parliament was unable to properly appraise whether the *Mineralogy Act* had a legitimate aim, or whether there was an adequate balance between the importance of this aim and the projected damage to the rule of law. A further troubling aspect of the *Mineralogy Act* is that it excludes the application of the *Freedom of Information Act 1992* (WA),[145] meaning that even though the arbitration proceedings are now terminated the circumstances surrounding the *Mineralogy Act* remain obscure. The Attorney-General argued that this was necessary to prevent Clive Palmer using 'the freedom of information process as a tool to gather information and documents to pursue the state'.[146] This explanation also appears to have been cautiously accepted by the Opposition. The Deputy Leader of the Opposition stated, 'I understand that Clive Palmer should not get anything and this adequately covers that under freedom of information'.[147]

Apart from the paucity of information provided by the Government, there was also insufficient time for Parliament to properly scrutinise the Mineralogy Bill. Even if the Parliament had been able to verify the extent of the damages claim, the urgency with which the Mineralogy Bill was passed meant that they would not have been able to properly consider whether there was an adequate balance between the purpose of the Mineralogy Bill and its ramifications for the rule of law. Speaking in the Legislative Assembly, the Leader of the Opposition proposed

141 Western Australia, *Parliamentary Debates*, Legislative Assembly, 12 August 2020, 4780 (Lisa Mary Harvey).

142 Ibid 4833 (John Quigley, Attorney-General).

143 Ibid.

144 Ibid 4797 (William Richard Marmion).

145 *Mineralogy Act* (n 18) ss 13(1)–(3) and 21(1)–(3).

146 Western Australia, *Parliamentary Debates*, Legislative Assembly, 12 August 2020, 4829 (John Quigley, Attorney-General).

147 Ibid 4829 (William Richard Marmion).

a 'short, sharp and bipartisan Legislative Council select committee to review the State's course of action in the best interests of accountability and oversight, without compromising the State's position'.[148] This was a compelling proposal. Indeed, the political protection for the rule of law would be greatly enhanced by bipartisan select committees that consider the permissibility of proposed legislative departures from the rule of law. However, this idea was roundly rejected by the Premier, Mark McGowan: 'absolutely not. We will not agree to any such measure whatsoever.'[149] The Attorney-General also insisted on the urgent passage of the Mineralogy Bill. He explained that subsequent to the introduction of the Mineralogy Bill to the Legislative Assembly, Clive Palmer had registered the 2014 and 2019 arbitration awards with the New South Wales Supreme Court. This made it 'all the more urgent to get this bill through and assented to, with no inquiries and no committees'.[150]

The fact that Clive Palmer succeeded in registering the 2014 and 2019 arbitration awards subsequent to the introduction of the Mineralogy Bill but prior to the enactment of the *Mineralogy Act* raised the question of whether the *Mineralogy Act* would be effective in defeating the damages claim. In response, the Attorney-General pointed to s 7 of the Mineralogy Bill which defined 'introduction time' as meaning 'the beginning of the day on which the Bill for the amending Act is introduced into the Legislative Assembly'.[151] He explained that the relevant provisions of the *Mineralogy Act* would be effective from the 'introduction time' thereby defeating the plaintiffs' damages claim even though their arbitration awards had been registered prior to the enactment of the *Mineralogy Act*. In the words of the Attorney-General: '[t]oo late, mate! Not checkmate; too late mate — by a day'.[152]

This gave rise to a further question, astutely raised by the Honourable Nick Goiran in the Legislative Council:

> 'If the introduction time is a core element of the bill, and that is why the Attorney-General is boasting that he has outfoxed Mr Palmer, why is the bill urgent, Leader of the House? If the introduction time is important to the functioning of the bill, why does it matter at what time the bill receives assent, and why does it matter at what time the Legislative Council concludes its consideration of this bill?'[153]

The Leader of the House and the Legislative Council, the Honourable Sue Ellery, answered that enactment of the *Mineralogy Act* would add an additional layer of protection for the fiscal position of the State: '[i]t is about layering protections and the thickest layer we can have, if I can describe it in that way, is to have the act in

148 Ibid 4783 (Lisa Mary Harvey).

149 Ibid 4783 (Mark McGowan).

150 Ibid 4821 (John Quigley, Attorney-General).

151 Ibid.

152 Ibid 4822.

153 Western Australia, *Parliamentary Debates*, Legislative Council, 13 August 2020, 4918 (Nick Gorian).

place.'[154] She added that they were also 'seeking to eliminate the possibility of a chapter III constitutional challenge.'[155]

The reference to a potential ch III challenge returns us to the High Court's decision in *Mineralogy*. There, in response to the plaintiffs' submissions that provisions of the *Mineralogy Act* breached ch III, the joint judgment found that the effect of the *Mineralogy Act* was simply to alter substantive legal rights. Justice Edelman agreed but added that had there been pending or extant litigation there might have been some force to the plaintiffs' submissions that the *Mineralogy Act* constituted an exercise of judicial power. In these circumstances, those aspects of the *Mineralogy Act* bearing upon the judicial process, but not considered by the High Court in *Mineralogy* and *Palmer* due to its prudential approach to constitutional adjudication, would have been engaged. In other words, the legal position of the State might have been more precarious had there been extant litigation seeking to vindicate the plaintiffs' rights when *Mineralogy* and *Palmer* reached the High Court. The result is that there is some force to the Government's view that the Mineralogy Bill needed to be urgently passed to nip any potential litigation in the bud.

Perhaps surprisingly, the Government was therefore able to provide reasons for providing the Parliament with: (1) insufficient time; and (2) insufficient information to properly scrutinise and debate the Mineralogy Bill, notwithstanding that these conditions should ideally be met where proposed legislation threatens to derogate from the rule of law. It follows that Parliament was unable to determine with confidence whether the *Mineralogy Act* constitutes a justified departure from the rule of law, and indeed it is still not possible to do so given that the *Mineralogy Act* excludes the application of the *Freedom of Information Act 1992* (WA).[156]

However, it is also clear that the Government did not come under serious pressure to utilise parliamentary privilege to provide further information regarding the plaintiffs' damages claims, or provide sufficient time to closely scrutinise the Mineralogy Bill by convening a bipartisan select committee in the Legislative Council. This is partly because the Labor Government's overwhelming majority in the Legislative Assembly — where as a result of their landslide victory in the 2021 State election Labor held 53 out of 59 seats — and Legislative Council — where Labor enjoyed a majority of 22 out of 36 seats — helped assure the frictionless progress of the Mineralogy Bill. It is also no doubt relevant that Clive Palmer is a wildly unpopular figure with the WA public, owing in part to his unsuccessful constitutional challenge to WA's 'hard' border arrangement during the COVID-19 pandemic.[157] The *West Australian* newspaper has, on its front page, variously depicted Clive Palmer as a

154 Ibid 4927 (Sue Ellery).

155 Ibid.

156 *Minerology Act* (n 17) ss 13(1)–(3), 21(1)–(3).

157 *Palmer v Western Australia* (2021) 272 CLR 505.

chicken, a cane toad and a cockroach.[158] While the opposition were clearly uncomfortable with the Mineralogy Bill, they were also anxious to distance themselves from Clive Palmer. In the Legislative Assembly, the Leader of the Opposition took care to emphasise that she 'would like to get it on the record that we do not support the actions of Clive Palmer, which is why we are not opposing this legislation.'[159]

IX Conclusion

In one sense, the *Mineralogy Act* represents a bizarre and possibly singular episode in Australian constitutional law that might not have been possible outside a highly unusual configuration of circumstances. At the time, the Government insisted that the *Mineralogy Act* is a one-off measure that does not have broader ramifications for the integrity of State Agreements or the State's adherence to the rule of law. Notwithstanding its unusual character, the *Mineralogy Act* is a useful case-study to reflect upon the concept of the rule of law, the circumstances in which legislative departures from the rule of law are justified, and the protections for the rule of law under the *Constitution*. In this regard, the article argues that there are good reasons for the rule of law to be primarily safeguarded under the political as opposed to legal constitution. However, the *Mineralogy Act* also points to clear weaknesses for the protection of the rule of law under the political constitution. While Clive Palmer is not a vulnerable or disadvantaged individual, the most disquieting long-term lesson to be drawn from the *Mineralogy Act* may be that there is ample political space for Australian governments to derogate from the rule of law where they command clear parliamentary majorities and proposed legislation is directed at sufficiently reviled groups or individuals. This issue is especially acute at state and territory level, where legislatures are subject to fewer constitutional constraints than the Commonwealth Parliament.

158 See, eg, 'The West Australian Turns Clive Palmer into a Cane Toad on Front Page', *PerthNow* (online, 13 August 2020) <www.perthnow.com.au/business/media/the-west-australian-turns-clive-palmer-into-a-cane-toad-on-front-page-ng-b881637651z>.

159 Western Australia, *Parliamentary Debates*, Legislative Assembly, 12 August 2020, 4793 (Liza Mary Harvey).