Termination of Clive Palmer's multi-billion dollar claim against Western Australia

Clare Langford reports on *Mineralogy Pty Ltd v Western Australia* [2021] HCA 30 and *Palmer v Western Australia* [2021] HCA 31

The High Court unanimously dismissed challenges by Clive Palmer, Mineralogy Pty Ltd (Mineralogy) and International Minerals Pty Ltd (International Minerals) to the validity of Western Australian legislation which terminated their multi-billion dollar claims against the State. In so doing, the High Court has highlighted the extent of the power of State parliaments to create, alter and extinguish legal rights and liabilities.

Background

The genesis of the dispute lay in the Iron Ore (Mineralogy Pty Ltd) Agreement (Agreement) between Mineralogy, International Minerals and the State of Western Australia, which came into effect in 2002 and which was varied in 2008.

Under the Agreement, Mineralogy would (by itself, or with one or more co-proponents such as International Minerals) submit to the responsible Minister proposals for the mining, concentration and processing of iron ore in the Pilbara. On receipt of a proposal, the Minister could do one of three things: accept the proposal, defer its consideration or impose conditions precedent on its approval. Significantly, the Minister could not reject a submitted proposal.

By the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA), the Agreement, replicated in a Schedule, was 'ratified', 'authorised' and expressed to 'operate and take effect' despite any other Act or law: ss 4, 6. Clause 32 of the Agreement notably allowed for variations by further written agreement of the parties. The Minister was required to lay any variation agreement before each house of Parliament. Unless the variation were disallowed by either house, it would take effect at a specified time.

In August 2012, the plaintiffs submitted a proposal in relation to a project at Balmoral South. Evidently the Western Australian government considered the proposal had problems and it refused to recognise the submitted documents as a proposal for the purposes of the Agreement. In May 2014, the Hon Michael McHugh AC QC determined, in an arbitral award, that the proposal was one made under the Agreement and that the Minister was obliged to deal with it as such.

In July 2014, the Premier purported to deal with the proposal by imposing 46 conditions precedent on its approval. These were not acceptable to the plaintiffs who, subsequently, claimed damages for loss suffered as a result of the initial failure to deal with the proposal and as a result of the conditions precedent which, the plaintiffs said, were so unreasonable as to amount to a further failure to deal with the proposal.

However, before those claims were commenced, in December 2018 there was a second arbitration between the parties. This concerned, first, whether the May 2014 arbitral award precluded the plaintiffs from pursuing a claim for damages for breach of the Agreement based on the initial failure of the Minister to deal with the Balmoral South proposal and, secondly, whether delay precluded the plaintiffs from being able to pursue the claim for damages on the additional basis that the conditions precedent imposed by the Premier were so unreasonable as to give rise to a further failure to deal with the proposal. In an award made in October 2019, both contentions were rejected; the result being that the plaintiffs were not precluded from pursuing either claim for damages. This paved the way for a third arbitration in respect of the substance of the claims.

The Western Australian government said that the claims totalled just under $30 billion and, if made out, would have 'dire financial consequences' for the State. The arbitration of the claims was listed for hearing over 15 days in November 2020.

However, in August 2020 the arbitration was cut short by the enactment of the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA) (Amending Act), which Edelman J described as a step that might 'reverberate with sovereign risk consequences' (*Mineralogy* at [97]). The Amending Act terminated the third arbitration and precluded future claims arising in relation to the same, or related, matters. The Amending Act also provided that: neither the 2012 proposal, nor a second Balmoral South proposal made in 2013, had any legal effect (s 9(1)); only proposals received after the commencement of the Amending Act were capable of being proposals for the purposes of the Agreement (s 9(2)); the 2014 and 2019 arbitral awards had no effect (ss 10(4), (6)); and the arbitration agreements, which supported those awards, were invalid to the extent that they provided the jurisdiction necessary to make them (ss 10(5), (7)), (these provisions collectively being the 'Declaratory Provisions').

The plaintiffs commenced proceedings in the original jurisdiction of the High Court seeking a declaration that the Amending Act was wholly or partially invalid.

The arguments before the Hugh Court

The Court (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ; Edelman J agreeing with the outcome, but writing separately) rejected the plaintiffs' contentions and held that the Amending Act was not invalid.

The plaintiffs' arguments for invalidity were as follows:

- The Amending Act was not enacted in the required 'manner and form', contrary to s 6 of the *Australia Act 1986* (Cth) (Australia Act): *Mineralogy* at [72]-[80], [117]-[154];
- The Amending Act went beyond the powers of the State Parliament because of limitations 'concerning the rule of law and deeply rooted common law rights': *Mineralogy* at [70]; *Palmer* at [8], [19]-[26];
- The Declaratory Provisions were contrary to the principle in *Kable v DPP* (1996) 189 CLR 51 and amounted to an exercise of judicial power by the State Parliament, contrary to Ch III of the *Constitution*; and
- Those provisions were also inconsistent with the arbitration laws of other States, to which they had to give way as a result of s 118, which required 'full faith and credit' to be given to State laws.

The Court also rejected separate arguments made by Mr Palmer, appearing

in person, to the effect that the legislation was impermissibly 'extreme'; inconsistent with Commonwealth laws; amounted to a 'bill of pains and penalties'; impermissibly determined a dispute between the State and a non-State resident; and discriminated against him as a non-State resident: *Palmer* at [6]-[7], [9], [11]-[18].

Manner and form

Pursuant to s 6 of the Australia Act, 'a law made… by the Parliament of a State respecting the constitution, powers or procedure of the Parliament of the State shall be of no force or effect unless it is made in such manner and form as may from time to time be required under a law made by that Parliament'.

The argument that the Amending Act violated s 6 rested on three propositions: *first*, that it was a law 'respecting the constitution, powers or procedure' of the Western Australian Parliament; *secondly*, that cl 32 of the Agreement, the variation clause, was a 'law' made by that Parliament; and, *thirdly*, that cl 32 prescribed a 'manner and form' requirement: *Mineralogy* at [75]. It was common ground that the process in cl 32 had not been followed in the enactment of the Amending Act.

Whatever the result of the first two controversies, Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ were satisfied that cl 32 did not purport to regulate the 'manner and form' of lawmaking by the Western Australian Parliament. In the joint judgment, their Honours reasoned that cl 32 imposed a measure of ministerial accountability in relation to decisions to vary a significant state agreement. It did not, for that reason, purport to affect the legislative process. Instead, it governed the conduct of the parties to the Agreement: *Mineralogy* at [76]-[78].

In contrast, Edelman J determined that cl 32 had statutory as well as contractual effect and, further, that it purported to impose a restraint on Parliament: *Mineralogy* at [144], [146]. However, cl 32 was inapplicable on its terms: it governed only variations by agreement, and did not purport to preclude 'unilateral' amending legislation: *Mineralogy* at [147]-[154].

The rule of law and common law rights

The Court rejected this ground on the basis that no operative limitation on legislative power arises from the rule of law, with the Court noting that the plaintiffs had not identified with any precision what aspect was said to be infringed and that '[n]o deeply rooted common law right was identified': *Mineralogy* at [70]; *Palmer* at [8], [19]-[26].

The integrity of State courts

The Court held there was no purported exercise of judicial power. Nor was there any interference with the exercise of judicial power by courts. The Declaratory Provisions only affected substantive rights and liabilities. They deprived certain acts of legal effect, with the Court referring to *Duncan v Independent Commission against Corruption* (2015) 256 CLR 83 where it was said 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. Also of no relevance were the, arguably, extreme consequences of the law and the alleged motivations of members of Parliament in introducing and supporting the legislation: *Mineralogy* at [81]-[87], [155]-[159].

Full faith and credit

The plaintiffs argued that the Declaratory Provisions, which denied legal effect to the 2014 and 2019 arbitral awards, were inconsistent with the arbitration legislation in force in other States, which recognised their legal effect. Further, the plaintiffs argued, the Western Australian legislation had to give way in the face of that inconsistency because of s 118 of the Constitution.

The Court held that while an 'adequate constitutional criterion' for dealing with inconsistencies between State laws was yet to be identified, the Court was satisfied that there was, in fact, no inconsistency: under the uniform arbitration laws, the courts had a discretion to refuse to recognise or enforce an award where the arbitration agreement was invalid under its governing law: *Mineralogy* at [89]-[92], [160]-[165].

Use of special cases

The two decisions answered various questions set out in a special case in each proceeding. In *Mineralogy* at [51]-[61], Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ reiterated the principles relevant to special cases, with the Court stating that the special cases in the proceedings had 'been framed by the parties with insufficient attention to those principles': *Mineralogy* at [61]. Their Honours noted, in particular, that parties have no entitlement to expect an answer to a question of law they have agreed in stating in a special case, unless the Court can be satisfied, by reference to the facts and documents they have agreed in the special case, that 'there exists a state of facts which makes it necessary to decide [the] question in order to do justice in the given case and to determine the rights of the parties': *Mineralogy* at [56]. Their Honours held in the present proceedings that there were several issues which were inappropriate to determine for this reason: *Mineralogy* at [10], [62]-[69]; see also Edelman J at [97]-[116] (considering *inter alia* the severability of the Declaratory Provisions); *Palmer* at [7], [9]. This included the question as to whether any other provision of the Amending Act might involve an exercise of judicial power: *Palmer* at [7]. BN