THE POSSIBLE CONSITUTIONAL VALIDITY OF THE IRON ORE PROCESSING (MINERALOGY PTY. LTD.) AGREEMENT ACT 2020 (WA) DESPITE ITS IMPLIED ENCROACHMENT TOWARDS JUDICIARY POWERS

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ABSTRACT

This paper will look at the possible Constitutional validity of the *Iron Ore Processing (Mineralogy Pty. Ltd.) Agreement Amendment Act 2020* (WA) (The *Agreement Act* (WA)). It will be based on the principles of separation of powers and the rule of law considering the differences between judicial and non-judicial power and how the incompatibility doctrine stems from this dichotomy[i]. Prima facie, some sections of the *Agreement Act* (WA) come across as discriminatory where the Western Australian State Parliament encroaches on powers reserved exclusively to the judicature. These sections will be reviewed considering, taking the *Agreement Act* (WA) on its whole, may be interpreted as Western Australia not encroaching on Chapter III of the *Australian Constitution* but rather playing its part by making law in line with Western Australian public policy, a power specifically reserved for State legislature.[ii] Before this, Chapters III & V of the *Australian Constitution* will be looked at to assist in providing a specific point of reference as to where the judiciary and state legislative powers lie. Following these will be a comparative analysis of cases arguing both for and against the validity of an Act where separation of power encroachment serves as a focal point. The ratio decidendi and some orbiter dictum of these cases will provide a bigger picture of this debate and confirm the non-absoluteness of one correct argument.[iii] And finally, based on the findings, it will be opined that the Agreement Act is valid.

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SEPARATION OF POWERS, THE RULE OF LAW, AND THE INCOMPATIBILITY DOCTRINE

Although the concept has been in existence long before, Charles de Montesquieu was one scholar who helped popularise the principle of separation of powers in his book *The Spirit of the Laws* first published in 1748. Here, he explained the separation to be between the executive, the legislative, and the judiciary branches of government. Each branch held their own distinct duties and powers. These powers, he advised, were exclusive to a specific branch that should not be exercised by another lest it be construed to encroach on powers reserved for a separate branch. With respect to the judiciary power, he believed that:

> *There is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.*[iv]

This concept serves as an ideal and the three branches of government tries its best to adhere to it. Overlap of powers within the branches of government from time to time, however, does occur. Montesquieu himself seemed to have contradicted himself with the separation of power principle he helped coin. Iain Stewart, for example, observed shortly after Montesquieu expounded on his beliefs on the importance of separation of powers, that in essence 'he…cuts out the judicial power. He conceives it not as a professional or even permanent body but as a sort of occasional assembly.'[v]

Despite its apparent contradiction, the notion of separation of powers is used conventionally as a starting point for determining the validity or invalidity of an Act by the judiciary. Specifically, if the law enables the legislature to make decisions or directs the courts to decide a matter in a way that is not independent, it would most likely be invalid. It is likewise in the inverse, where 'an attempt to vest non-judicial functions in courts will be constitutionally invalid.[vi] This is because doing so would be an interference to the rule of law due to an incompatibility of delegated powers being used. Ultimately, this may be construed as an arbitrary exercise of power and the notion of equality under the law would be questioned.

In order to adhere to the rule of law through the practice of separation of powers within an Australian context, for example, the High Court decided in *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24 that s 10 of the *Criminal Assets Recovery Act 1900* (NSW) was 'invalid because it required the NSW Supreme Court to hear and determine an application for a restraining order by the NSW executive government on an ex parte basis without any effective mechanism for judicial review.'[vii] By the same token, there has been other case decisions determined through a more flexible approach where overlap of powers may have occurred in order to protect the powers of State Parliament; one being that of making laws and the power to amend it as required. A review of these will be discussed shortly. M J C Vile perhaps explained it best where he said that 'even if we accept the rule of law in the sense of a hierarchy of rules which can ultimately be tested against the final statutory or constitutional authority, we have to face the fact that this may become merely a matter of form.'[viii]

THE AUSTRALIAN CONSTITUTION ON THE SEPARATION OF POWERS BETWEEN THE JUDICATURE AND THE STATES AND HOW IT APPLIES TO THE AGREEMENT ACT

Chapter III of the *Australian Constitution* enumerates the exclusive power of the Judicature of Australia. This consists of sections 71 – 80. Section 71 'vest(s) judicial power in the High Court, other federal courts, and courts with federal jurisdiction'.[ix] Griffith CJ explained judicial power that he was

> *of the opinion that the words 'judicial power' as used in s 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision is called upon to take action.*[x]

Sections 75 and 76, following from what constitutes the judiciary, enumerates the specific functions, or original jurisdiction, that the Court can hear. Although these original jurisdictions reserved for the High Court do not have specific mention of determining the validity or invalidity of Statutes enacted by State Parliaments, the High Court has 'the power to define jurisdiction (including) defining the extent to which the jurisdiction of any federal court shall

be exclusive of that which belongs to or is invested in the courts of the States (and) investing any court of a State with federal jurisdiction.'[xi] In other words,

> *The precise element of judicial power which is sought to be protected from legislative interference, and in relation to which limitations on legislative power are sought to be defined, is the conclusive adjudication of controversies between parties in litigation – particularly in situations where the government is party – resulting in an authoritative and binding declaration of their respective rights and duties according to existing law.*[xii]

Dr. Anthony Gray, for example, found that 'it is not desirable to have States experimenting with departures from fundamental legal principles such as the presumption of innocence, the right to silence, or the onus or standard of proof.'[xiii] So, if powers exclusively reserved for the judiciary are those instances where the Courts determine or adjudicate controversies between parties in a litigation using fundamental legal principles through due process, what if the issue at hand is an actual law created by a State Parliament, such as the *Agreement Act* (WA)? Dixon CJ, McTiernan, Fullagar and Kitto JJ, for example, observed in the *Boilermakers Case* that 'Chapter III does not allow powers which are foreign to the judicial power to be attached to the courts created by or under that chapter for the exercise of the judicial power of the Commonwealth.'[xiv] At first instance, it may seem that the *Agreement Act* (WA), being a law created by the Parliament of Western Australia, would be a power 'foreign' to judicial power. This is because the Australian Constitution also states that

> *Every law in force in a Colony which has become or becomes a State, and relating to any matter within the powers of the Parliament of the Commonwealth, shall, subject to this Constitution, continue in force in the State; and, until provision is made in that behalf by the Parliament of the Commonwealth, the Parliament of the State shall have such powers of alteration and of repeal in respect of any such law as the Parliament of the Colony had until the Colony became a Sate.*[xv]

Chapter V of the *Australian Constitution* enumerates the exclusive power of the Australian States. This consists of sections 106 – 120. Section 118, for example, states that 'full faith and credit shall be given, throughout the Commonwealth to the laws, the public Acts and records,

and the judicial proceedings of every state.' This has been reiterated by Kirby J where he said in *Attorney-General (WA) v Marquet*:

> *No common law principle…could stand against the clear grant of law-making power to a representative legislature of Australia, as provided in, and under, the Imperial legislation establishing the legislature and as confirmed in the colonial and State Acts that make up the State Constitutions as well as by the federal Constitution itself.*[xvi]

These observations, however, does not mean that States are able to make any law that it sees fit.

First, in the event that there is an inconsistency between a State Law and a Commonwealth Law, the latter will prevail to the extent of the inconsistency.[xvii] In the *Work Choices Case*, for example, a case regarding the validity of the *Workplace Relations Amendment (Work Choices) Act* 2005 (Cth), the High Court has confirmed the power of the federal Parliament to legislate on industrial relations matters'.[xviii] Essentially, New South Wales argued against the *Work Choices* Act because the legislation went beyond the powers enumerated under s 51(xx) head of power of the *Australian Constitution* which includes 'foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.' Meaning, New South Wales believed that 's51(xx) only permits laws with respect to external rather than internal relationships of constitutional corporations. WorkChoices, as a law with respect to the relationship between a corporation and it's employees, was properly classified as internal and therefore invalid.'[xix] The High Court disagreed. The Court interpreted s51(xx) to have a broad power. Specifically, Gaudron J found that s51(xx) 'extends to laws prescribing the industrial rights and obligations of corporations and their employees and the means by which they are to conduct their industrial relations.'[xx]

And Second, in the *BLF Case*, Street CJ quoted *Dr Bonham's Case* (1610):

> *…in many cases, the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or is impossible to be performed, the common law will control it and adjudge such Act to be void.*[xxi]

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It should be noted, however, that in order for this or 'for s109 to apply, there must be a valid State law and a valid Commonwealth law.'[xxii] The next section of this paper may determine the existence or non-existence thereof in terms of the *Agreement Act* (WA).

THE ACT: STATE PARLIAMENTARY ENCROACHMENT ON JUDICIARY POWER OR A RESERVED POWER?

The *Agreement Act* (WA) is also referred to the *Palmer Act* by some legal scholars because it is believed that 'it is about the Western Australian government's legislative attempt to shut down Mr. Clive Palmer's arbitration claims to an estimated [AUD]30 billion.'[xxiii] The royal assent of the *Agreement Act* (WA) on 18 August 2020 has since brought about much public criticism of it. For example, one media release stated that 'the new law is unprecedented and extreme. Its terms, particularly those which limit the public's access to information, require close scrutiny and further justification.'[xxiv] Could there, however, be a justification?

The *Agreement Act* (WA) was created by the Western Australian Parliament to essentially terminate two arbitrational disputes that occurred between them and Mineralogy Pty. Ltd. prior to its assent on 18 August 2020. The two disputes included first, a rejection by former WA Premier Colin Barnett on a proposal by Meralogy Pty. Ltd. to develop the 'Balmoral South Iron Ore Project (BSIOP)'.[xxv] And second, although Premier Barnett did provide conditions before allowing BSIOP to proceed, it included 46 conditions that Mineralogy Pty. Ltd. thought were unreasonable.[xxvi] The language of some of the sections of the *Agreement Act* (WA) shows the Parliament's seemingly unwavering attitude towards not giving Mineralogy Pty. Ltd. the opportunity to proceed with their arguments further. To be discussed as examples herewith will be sections 10 – 12 and 18 – 20 of the *Agreement Act* (WA).

Sections 10 – 12 of the *Agreement Act* (WA) form part of 'disputed matters.'[xxvii] Section 10 advises that any 'relevant arbitrations and awards' that have occurred prior to assent of the *Agreement Act* (WA) is terminated.[xxviii] Section 11 advises that the 'State (is) to have no liability connected with disputed matters.'[xxix] And section 12 advises that there is to be 'no appeal or review in respect of disputed matters.'[xxx] The disputed matters alluded to in the *Agreement Act* (WA) involve arbitrations that occurred between Mineralogy Pty. Ltd. and

Western Australia. This means that there has actually been no dispute that has occurred in the Courts as defined in Chapter III of the Australian Constitution where the traditional due process of the Judicature has occurred. Specifically, as Charles M. Hough explained by referencing *Murray v Hoboken Land Co.*, it 'generally implies and includes actor reus judex (plaintiff, respondent, judicature), regular allegations, opportunity to answer and a trial according to some settled course of judicial proceedings.'[xxxi] Arbitrations, on the other hand, are 'a process in which an arbitrator adjudicates an issue or issues in dispute between parties…that parties can pursue in place of judicial proceedings.'[xxxii] What these two definitions imply are that judiciary powers and the arbitration process are symbiotically exclusive. Justice Steven Rares explained this relationship quoting Stephen J where he 'described the…powers of the Court as procedural tools for the trial of issues or of whole cases that were distinct from conventional arbitration.'[xxxiii] This leads to the next area of discussion, that of confidentiality between parties in arbitration and the non-disclosure of all matters of the arbitration to the courts. It is established that even in cases where State law is determined invalid, 'the legislative abolition of rules of evidence in curial proceedings is very unlikely to be invalid. Rules of evidence can be… radically modified by statute both for interlocutory hearings and for trials.'[xxxiv]

Sections 18 – 20 of the *Agreement Act* (WA) form part of 'protected matters.'[xxxv] Section 18 advises that 'protected matters (are) not to have certain effects and related provisions.'[xxxvi] Section 19 advises that the 'State (is) to have no liability connected with protected matters.'[xxxvii] And Section 20 advises that there is to be 'no appeal or review or criminal liability in respect of protected matters.'[xxxviii] Chapter III of the *Constitution* specifically reserves some powers to other entities that is not within their jurisdiction to provide decisions on by only enumerating what is reserved for the judicature. For example, the *Constitution* provides Judicature power to be those that have 'original jurisdiction of the High Court'.[xxxix] Although the *Constitution* also has additional original jurisdiction reserved for the Judicature, if interpreted narrowly it does not specify State Parliament Acts or arbitration matters.[xl] In this instance, it can be implied that the Agreement Act was assented to by the WA State Parliament for the best interests of Western Australia through its existence as an independent State and a holder of a State Constitution that includes therewith the power:

> *to make laws for the peace, order, and good Government of the Colony of Western Australia and its Dependencies: and such council and Assembly shall, subject to the*

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> *provisions of this Act, have all the powers and functions of the now subsisting Legislative Council.*[xli]

Disputed and protected matters in an arbitration can therefore be construed as separated from the traditional due process of law within the confines of Chapter III's judicature powers as earlier mentioned in reference to Dixon CJ, McTiernan, Fullagar and Kitto JJ observation in the *Boilermaker's case*.[xlii] This, then, goes back to the concept of separation of powers and it is arguable, based on this premise, that the *Agreement Act* (WA) is reserved for powers reserved to Chapter V of the *Constitution*, being State powers.

In further support of the assenting of the *Agreement Act* (WA) being reserved to Chapter V State Powers, the subject matter of the dispute between Mineralogy Pty. Ltd. and Western Australia has been on the former developing natural minerals and seeking approval from the latter (for example, iron ore) in land that may not be part of Commonwealth land but rather, private land that would essentially be under the control of the Western Australian Government. This is verified through the *Mining Act 1978* (WA).[xliii] Further, the *Mining Act 1978* (WA) also grants the WA Governor the authority to have 'the exercise of the power to make regulations (to)…

> *prescribe how, by whom, and at what rate, or differentiating rates, royalties shall be paid in respect of minerals or any class of minerals, obtained from land that is subject of a mining lease or other mining tenement granted under this Act, or that is the subject of an application for the grant of a mining lease or other mining tenement under this Act.*[xliv]

This, in turn, supports Chapter V powers of the States.[xlv] The Commonwealth Courts, however, may still try cases with disputes involving State jurisdiction if it is regarding questions of law. This is because there is an integrated court structure in Australia that, being federal in nature, essentially draws down the strict separation rule. Hence, Chapter III of the *Constitution* may somewhat overlap State power as will be shown in the next section via discussions of cases involving these issues.[xlvi]

CASES IN ARGUMENT FOR AND AGAINST THE AGREEMENT ACT'S CONSTITUTIONAL VALIDITY UTILISING DISCUSSIONS IN PARTS II - IV

It has been established in the *Boilermaker's Case* that there is a strict separation of judicial and non-judicial functions.[xlvii] If this strict separation was to be used in the determination of the validity or the invalidity of the *Agreement Act* (WA), then it could be opined that it is valid because of the reservation it has for Western Australia. However, following this decision, there has been developments in later cases that has broadened the powers of the judicature to establish an overlap, although within a different context. In *Hilton v Wells*, it was determined that a Judge could serve as an assigned individual to issue warrants to allow telephone tapping by the Federal Police to investigate allegations against bribery and corruption allowing early release of Prisoners.[xlviii] The ratio here was that the Judge was selected to issue warrants as an individual qualified to do so, and not as a judge of a Court as per Chapter III of the *Constitution*. Specifically, Gibbs CJ, Wilson, and Dawson JJ in *Hilton v Wells* said that 'it is clear that if the judge is a member of the Supreme Court of a State,…the power is not conferred on the Supreme Court of the State…but upon the judge as a designated person.'[xlix] Following this, the Act in question, the *Telecommunications (Interception) Act 1979* (Cth), was amended to include sections that specifically assigned an 'eligible' judge to be able to issue warrants, not within the capacity of adjudicating in a Court under Chapter III Judicature powers.[l] If such is the case, then although Chapter III may have the 'power to define jurisdiction', it may do so while still adhering to the doctrine of separation of powers if the Western Australian Parliament would re-amend the *Agreement Act* (WA) permitting such an occurrence in accordance to the 'saving of State laws' as per Chapter V of the *Constitution*.[li]

This separation rule applies to all branches of government, Federal or State. Thus, it is also subject to the States as was shown in the *Kable* case where a State Parliament was not able to encroach with Chapter III judicature powers.[lii] Here, the New South Wales Parliament enacted the *Community Protection Act 1994* (NSW) where it was determined that 'the Court may order that a specified person be detained in prison for a specified period if it is satisfied, on reasonable grounds.[liii] Gaudron J observed in *Kable* that a State does not have the power to determine the guilt or non-guilt of an accused.[liv] This power is expressly reserved for the judicature as per due process of law. She also determined that 'if Chapter III requires that State courts not

exercise particular powers, the Parliaments of the States cannot confer those powers upon them.'[lv] McHugh J then added to this by saying that:

> *Whatever else the Parliament of New South Wales may be able to do in respect of the preventative detention of individuals who are perceived to be dangerous, it cannot, consistently with Ch III of the Constitution, invoke the authority of the Supreme Court to make the orders against the appellant by the methods which the Act authorises.*[lvi]

These *Kable* dictums, applied to the *Agreement Act* (WA), may show that there has been no breach by the Western Australian Government on enacting it. Specifically, none of the provisions within the *Agreement Act* (WA) specify any orders on how a Chapter III court should proceed. Although the *Agreement Act* (WA) as discussed earlier may be questioned, this would be in relation to arbitrations that did not result in mutual agreement. It was not a specific order for the courts to determine or finalise a matter. Mineralogy Pty. Ltd. provided a proposal to Western Australia to mine iron ore and other mineral deposits. Western Australia, being the rightful owners of those deposits, has the final say of determining whether or not they approve of a proposal from a privately owned company. In essence, what occurred was simply a negotiation stage between two parties where no contractual binding agreement was actually made.

Connected to the issue with land ownership and powers that lie within is the *Bachrach* case.[lvii] Here, there was a dispute between 'the owner of land used as a shopping centre (who) appealed to the…court against a decision by the local authority to approve the re-zoning of other land in the same shire to permit shopping centre development.' [lviii] It was held that the *Local Government (Morayfield Shopping Centre Zoning) Act 1996* (QLD) was valid and the appeal was dismissed. The court determined that 'the Council is empowered to rezone land, with or without conditions, and make amendments to the planning scheme.'[lix] Specifically, the defence counsel for Queensland, J C Sheahan QC said that 'regulation of land use for town planning… is a legitimate field of legislative activity.'[lx] He then continued by saying that 'even if the *Morayfield Act* did involve an intrusion into the judicial process that would not render it invalid, since States are not bound to a constitutional separation of legislative and judicial powers.'[lxi] This is because the zoning area with which the Queensland Government admitted a rezoning to was Council land and, therefore Queensland land. The land owned by the plaintiff was not

in contention. Such is the case with the *Agreement Act* (WA) which Mineralogy Pty. Ltd. wanted to develop mining sites on. Namely, on Western Australian land to which Western Australia, as owners, would have the right to agree or not agree to the proposal. And, therefore, would have the right to create a law pertaining to it. This is supported by section 118 of the *Constitution*, which states that 'full faith and credit shall be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State.'

The full faith of State powers, however, are not without its limits. A State, for example, does not have the authority to declare an association or collective group of people congregating as criminal where no due process has occurred to legally validate the illegality. In *Totani*, this principle was cemented by the reason of their decision to dismiss an appeal by South Australia who argued that the *Serious and Organised Crime (Control) Act 2008* (SA) was valid. One subject of contention regarding its validity was Section 14, which stated that the court may, at any time, revoke a declaration under this Part in relation to an organisation on application.' White J disagreed with this section saying that

> *the Magistrates Court should, absent particular circumstances such as urgency or evasion of service, conduct a hearing of a s 14 application only when it is satisfied that the defendant has been given proper notice. It should act only on cogent evidence, having full regard to the significance of the order which it is asked to make.*[lxii]

Another was directly related to the *Kable* principle discussed earlier on separation of powers which was breached by the South Australian government. Specifically, Bleby J held that

> *It is the unacceptable grafting of non-judicial powers onto the judicial process in such a way that the outcome is controlled to a significant and unacceptable extent, by an arm of the Executive Government, which destroys the court's integrity as a repository of federal jurisdiction.*[lxiii]

On a similar footing in *Wainohu*, albeit this time to authority to make judgements without due process of law, it was determined that the *Crimes (Criminal Organisations Control) Act 2009* (NSW) was invalid.[lxiv] Section 9(1) of the Act, for example, provides that a judgement may be made by a judge against a person or persons who he or she feels satisfied that they are:

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> *members of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity, and the organisation represents a risk to public safety and order.*[lxv]

French CJ and Kiefel J found 'the result (of this) is that the Act imposes no duty upon the eligible judge to provide reasons or grounds when deciding applications to make or revoke a declaration…and for that reason…is invalid.'[lxvi] In its entirety, although it was determined in *Wainohu* that presentation of evidence or non-disclosure of matters would not, in itself, be invalid, this is regarding the representation of an actual organisation or body.[lxvii] It does not include the non-disclosure of reasonings by an individual that is otherwise acting on his or her expert opinion, where there would be a duty to disclose. In the *Agreement Act* (WA), it was the Western Australian Parliament that did not disclose the specifics of the arbitration matters because they do not have a legal duty to do so.

Note in the mentioned cases the issues connected to the separation of powers of Chapters III and V of the *Constitution*. This was done via different contexts involving application of a strict separation, an eventually narrowing down of it, and the interpretation and attempt of defining it by the courts using the *Constitution* as its guide. On its face, this seems to revolve under the central theme that in criminal proceedings, due process of law must be strictly adhered to under doctrine of the presumption of innocence. This was reiterated and used in the determination of the invalidity a New South Wales law in the *International Finance Trust Company* case.[lxviii] Here, the law in question pertained to the confiscation assets owned by individuals assumed to be party to criminal activities with no notice given to those accused. In this regard, it should be the courts who decides the guilt or none-guilt of accused through its specific powers of Chapter III.

The *Agreement Act* (WA) is a civil matter between two parties in disagreement with each other. It does not hold criminal jurisdiction nor does the civil dispute between Western Australia and Mineralogy Pty. Ltd. directly involve one party being unfairly disadvantaged if mining development by Mineralogy Pty. Ltd. did occur. Although there is a current case regarding this issue where Martin J found that 'whatever the standing of the 2020 Amendments, there is an order of this court enforcing the terms of the two awards which may, in the circumstances…be

set aside.'[lxix] Thus, it is currently in adjournment and no final judgement has been decided on its supposed invalidity. Hence, the debate remains open. As Dr. Anthony Gray said:

> *although state laws were invalidated in cases such as Totani, International Finance Trust and Wainohu, it must be conceded that at state level there is nothing necessarily obnoxious about the fact that powers essentially similar in nature are given to the judiciary and the legislature.*[lxx]

CONCLUSION

The *Agreement Act* (WA) may be contentious because of some of the laws it purports to execute. These include directing the law to one organisation, nullifying the possibility of Mineralogy Pty. Ltd. from appealing any decisions made by Western Australia in the negative against its wishes, not needing to disclose all information in disputed matters, and excluding Western Australia from any liability.[lxxi] However, there appears to be no breach of law if looked at in a separation of powers context within the *Australian Constitution*[lxxii]. Based on previous discussion, there has been no specific action to which Mineralogy Pty. Ltd. was disadvantaged by Western Australia rejecting the proposal because there was no binding contractual obligation between the two parties that occurred.[lxxiii] It has also been shown from case precedent that there is the reality of potential overlap between traditional judicial powers and legislative powers occurring but not constituting a separation of powers breach.[lxxiv] And finally, the fact that there is no current binding decision on this matter determining that the *Agreement Act* (WA) is invalid, it is opined that the *Agreement Act* (WA) is valid.[lxxv]

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ENDNOTES

[i] See generally Anthony Gray, *Criminal Due Process and Chapter III of the Australian Constitution* (The Federation Press, 2016) 8-16, 45-90 & George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams Australian Constitutional Law and Theory: Commentary and Materials* (The Federation Press, 7th ed, 2018) 15-28.
[ii] See *Irone Ore Processing (Mineralogy Pty. Ltd.) Agreement Amendment Act 2020* (WA) ss 10-12, 18-20.
[iii] See, eg, *Kable v The Director of Public Prosecutions for New South Wales* (1996) 189 CLR 51, *Mistretta v United States* 480 U.S. 361 (1989), *Lyanage v The Queen* [1967] 1 AC 259, *Nicholas v the Commonwealth* [2011] HCA 29, *Wainohu v New South Wales* [2011] HCA 24, *International Finance Trust Company Limited v New South Wales Crime Commission* [2009] HCA 49, *Duncan v ICAC* [2015] HCA 32, & *Bachrach (HA) P/L v Queensland* [1998] HCA 54
[iv] Charles Baron De Montesquieu, *The Spirit of the Laws: Complete Edition* (Thomas Nugent trans, Cosimo Classics, 2011) 152.
[v] Iain Stewart, 'Men of Class: Aristotle, Montesquieu and Dicey on Separation of Powers and The Rule of Law' (2004) 4 *Macquarie Law Journal* 187, 198.

[vi] Kate Chetty, 'Persona Designata, Punitive Purposes and the Issue of Preventative Detention Orders: All Roads Lead to Infringement of the Separation of Judicial Power' (2016) 40(87) *Melbourne University Law Review* 87, 94.
[vii] David Bennett, 'Application of the Kable Principle: Invalidity of Functions Conferred by State Laws on State Courts' (2010) 20 *Litigation Notes* 15, 16.
[viii] M J C Vile, *Constitutionalism and the Separation of Powers* (Liberty Fund, 2nd ed, 1998) 353, quoted in Peter Anastasius Gerangelos, *The Separation of Powers and Legislative Interference with Judicial Functions: A Comparative Anasis* (Phd Thesis, University of New South Wales, 2004) 239.
[ix] Anthony Gray, *Criminal Due Process and Chapter III of the Australian Constitution* (The Federation Press, 2016) 49.
[x] *Huddart, Parker & Co Pty Ltd v Moorehead* (1908) 8 CLR 357, quoted in Anthony Gray, *Criminal Due Process and Chapter III of the Australian Constitution* (The Federation Press, 2016) 49 – 50.
[xi] Ibid ss 77(ii)-(iii).
[xii] Peter Anastasius Gerangelos, *The Separation of Powers and Legislative Interference with Judicial Functions: A Comparative Analysis* (Phd Thesis, University of New South Wales, 2004) 8 – 9.
[xiii] Gray (n 9), 89-90.
[xiv] *R v Kirby; Ex Parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 289.
[xv] *Australian Constitution* s 108.
[xvi] (2003) 217 CLR 545, 616-617.
[xvii] *Australian Constitution* s 109.
[xviii] Chris Molnar, 'High Court decides on WorkChoices' (2007) 81(4) *Law Institute Journal*, 37.
[xix] Ibid.
[xx] *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346 at 375 at para [83], quoted in Molnar (n 19) 37.
[xxi] *Building Construction Employees and Builder's Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372, 385 quoted in George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams Australian Constitutional Law and Theory: Commentary and Materials* (The Federation Press, 7th ed, 2018) 336.
[xxii] George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams Australian Constitutional Law and Theory: Commentary and Materials* (The Federation Press, 7th ed, 2018) 394.
[xxiii] Nick Seddon, 'The Palmer Act' (AUSPUBLAW, 31 August 2020 AEST) <https://auspublaw.org/2020/08/the-palmer-act/>.
[xxiv] The Law Society of Western Australia, 'Media Statement on the Iron Ore Processing (Mineralogy Pty. Ltd.) Agreement Act' (Media Release, 19 August 2020).
[xxv] (n23).
[xxvi] Ibid.
[xxvii] *Irone Ore Processing (Mineralogy Pty. Ltd.) Agreement Amendment Act 2020* (WA) div 2 sub-div 1.
[xxviii] Ibid div 2 sub-div 1 s 10(1)-(7).

[xxix] Ibid div 2 sub-div 1 s 11 and see s 11 sub-ss (1)-(9).
[xxx] Ibid div 2 sub-div 1 s 12 and see s 12 sub-ss (1)-(9).
[xxxi] 18 How. (U.S.) 272, 276 (1855) quoted in Charles M. Hough, 'Due Process of law Today' (1919) 32(3) *Harvard Law Review* 218, 223.
[xxxii] Trischa Mann (ed), *Australian Law dictionary* (Oxford University Press, 3rd ed, 2017) 56.
[xxxiii] *Buckley* 140 CLR at 20-21 quoted in Justice Steven Rares, 'The Role of Courts in Arbitration' (Federal Court of Australia – Judges' Speeches by former Judges, 04 August 2012) < https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-rares/rares-j-20120804>.
[xxxiv] *Wainohu v New South Wales* [2011] HCA 24 [180].
[xxxv] (n27) div 2 sub-div 2.
[xxxvi] Ibid div 2 sub-div 2 s 18 and see s 18 sub-ss (1)-(8).
[xxxvii] Ibid div 2 sub-div 2 s 19 and see s 19 sub-ss (1)-(8).
[xxxviii] Ibid div 2 sub-div 2 s 20 and see s 20 sub-ss (1)-(10).
[xxxix] (n15) s 73.
[xl] Ibid s 76 ss (i) – (iv).
[xli] *Constitution Act 1889* (WA) s 2.
[xlii] See especially (n14).
[xliii] *Mining Act 1978* (1978) ss 23 & 27.
[xliv] Ibid s 109 ss (1)(a).
[xlv] See, eg, *Australian Constitution* s 18.
[xlvi] Ibid ss 76 – 78.
[xlvii] See (n14).
[xlviii] (1985) 157 CLR 57.
[xlix] Ibid, 73.
[l] S 6D.
[li] (n17) ss 77 & 108.
[lii] *Kable v The Director of Public Prosecutions for New South Wales* (1996) 189 CLR 51.
[liii] S 2(1).
[liv] (n51) 106.
[lv] Ibid 101.
[lvi] Ibid 121.
[lvii] *HA Bachrach (HA) PL v Queensland* [1998] 195 CLR 547.
[lviii] Ibid.
[lix] Ibid 599.
[lx] Ibid 554.
[lxi] Ibid.
[lxii] *Totani & Anor v the State of South Australia* [2009] SASC 301, 274.
[lxiii] *Totani* (2009) 259 ALR 673, 708 quoted in Ayowande A McCunn, 'The Resurgence of the Kable Principle: International Finance Trust Company' 17 *James Cook University Law Review* 110, 114.
[lxiv] (n34).
[lxv] *Crimes (Criminal Organisations Control) Act 2009* (NSW) s 9(1) sub-sec (a)-(b).
[lxvi] (n34) [104].
[lxvii] (n34) [180].
[lxviii] See *Criminal Assets Recovery Act 1990* (NSW) s 10.
[lxix] *Mineralogy Pty Ltd & Anor v The State of Western Australia* [2020] QSC 344, 143.
[lxx] Anthony Gray, 'The Constitutionality of Queensland's Recent (Legal) War on Bikies' (2004) *Deakin Law Review* 19(1) 51, 60.
[lxxi] See (n27), (n34) & (n38).
[lxxii] see the *Australian Constitution*, chs *3 & 5*.
[lxxiii] See (n33).
[lxxiv] See (n8).
[lxxv] See (n69).