INQUIRY INTO THE MINERALS RESOURCE RENT TAX

AND

THE EXPANDED PETROLEUM RESOURCE RENT TAX

SUBMISSION OF ALEXANDER STREET SC

I am grateful for the privilege of being invited to make a submission on the constitutionality of the proposed MRRT and PRRT. Given the time constraints and volume of material, I confine myself to the questions asked:

1. **Could the MRRT legislation and the expanded PRRT legislation be struck down by the High Court under section 114 of the Constitution?**

   In my opinion, no.

   First, because there is an express exclusion in relation to property belonging to a State, and although arguably not necessary, also an exclusion in relation to property belonging to a Territory. Secondly the legislation appears to be a tax on profits of the taxpayer and the persons upon whom the tax imposed is charged is not the State. Further, even if a tax on property, rather than an activity involving property, the tax is not in my opinion a tax upon property belonging to a State or upon use of the property of a State.

   The extent to which natural resources dependent upon prerogatives such as the royal metals can be properly described as "*property of any kind belonging to a State*" within s114, rather than property belonging to the Commonwealth is, in my opinion, open to serious doubt[1]. This issue involves consideration of the work done in relation to the vesting of the executive power in s61 of the Chapter II, the preamble, ss3 and 5 of the Constitution Act, consideration of the work done by ss106 and 107 and arguably also the implications that might be drawn from the reference in s91 to "*gold, silver or other metals*" and also to "*goods*" and perhaps, also, s100 in relation to "*water*".

   These Constitutional provisions have an impact as to property in, or ownership of, natural resources given our single common law system in Australia and there

[1] *Cadia Holdings Pty Ltd v State of New South Wales* (2010) 242 CLR 195 at [87]

is scope for the development and refinement of *native title*, radical title of the Crown as to natural resources, Crown prerogatives and the efficacy and consequences of State reservations informed by the nature of the Commonwealth[2]. There is authority[3] arising from s.85 of the Constitution that might be taken to support the natural resources in this legislation as being "*property of any kind belonging to a State*" but this authority has not been determined by reference to the matters of impact referred to above. Ownership of, or property in, natural resources by the Crown, in the right of the State, so as to constitute "*property of any kind belonging to a State*" under s.114, is a concept that, in my opinion, is not settled.

The authority of a State to proscribe, regulate and licence the use of particular natural resources does not mean that the natural resources are owned by the State. Ownership of property is a more narrow legal concept than the phrase "*property of any kind belonging to*". The natural resources in question in this legislation are not, in my opinion, property owned by a State and for the reasons briefly outlined above may not be property "*belonging to a State*" within s.114.

I note that the impact of the United Nations *Convention on the Law of the Sea 1982* beyond the territorial waters of the Commonwealth of Australia[4] and, in particular, Part XI and the *1994 Agreement* raise other important issues involving the common heritage of mankind. Issues may also arise under other international treaties and trade agreements[5].

2. Given the MRRT is supposed to be a tax on profits to be imposed at the point of extraction, when there are no profits, can it be argued that it is in fact a tax on the resource?

In my opinion, no.

The assumptions in Question 2 as to imposition and consequence where there are no profits are not, in my opinion, sound. Measurement and imposition are separate concepts. The tax is not, in my opinion. imposed at the point of extraction. Further, where there are no profits, no tax is imposed.

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[2] *Commonwealth v Cigamatic Pty Ltd (In Liq)* (1962) 108 CLR 372
[3] *Commonwealth v New South Wales* (1923) 33 CLR 1
[4] See s.10A of the *Seas and Submerged Lands Act* 1973
[5] The PRRT does not apply to the Joint Development Area in the Timor Sea

3. If the MRRT is a tax on the resource, who owns that resource at the point of extraction? The State or the mining venture?

The first part of Question 3, in my opinion, does not arise because of the answer to Question 2 above. The second part of Question 3 is premised on the first part, which premise is, in my opinion, unsound. Further, the issue of ownership of natural resources, including royal metals within a State of the Commonwealth, and the meaning of *"property belonging to a State"* as identified in the answer to Question 1 is, in my opinion, more complex than has been assumed, and is open to dispute.

4. When does ownership of the resource pass from the State to the mining venture; at the time of payment of royalties or earlier? If after the point of extraction, what are the implications of that?

In my opinion, the premise in the first part of Question 4 as to the entity from whom ownership of the resource passes, is more complex than assumed, for the reasons identified in answer to Question 1 above. In my opinion, there is no ownership of the resources the subject of the legislation that passes from the State, as the State does not own the resource. For the same reasons, the premise in the second part of Question 4 is, in my opinion, oversimplified. Even if through reservations or otherwise the natural resources were property belonging to the State the legislation is not, in my opinion, a tax on the ownership or use by the State.

5. Could the MRRT and expanded PRRT be struck down by the High Court under section 51(ii) and section 99 of the Constitution?

There are too many provisions to express a firm opinion as to whether each can properly be characterised as a law with respect to taxation or the other legislative powers relied upon by the Commonwealth. At a general review level the MRRT and expanded PRRT appear to be a valid compulsory exaction by reference to criteria of sufficiently general application for the necessary public purpose and not a payment for services rendered. At a general review level, the procedural requirements of s55 appear to have been complied with.

Whilst it is possible that the practical effect of certain provisions under MRRT or the expanded PRRT might be found to amount to impermissible

discrimination or an impermissible preference, at a general review level, there does not, in my opinion, appear to be any obvious impermissible legal effect.

6. Are there any others issues of constitutionality or legality regarding the proposed MRRT and the expanded PRRT legislation?

There are undoubtedly complex legal issues that will arise in relation to the mechanisms that have been created in relation to revenue, expenditure, receipts, allowances, transfers, splits, projects interests, adjustments, licences, blocks, registered holders, refunds, private override royalties, native title payments and valuations. Some of these legal issues may give rise to characterisation or other Constitutional issues. In particular, at a general review level, the PRRT imposition provisions concerning retrospectivity, true factual characterisation as to whether the tax or sum assessed was exigible, treaty obligations, general application in the differentiation of miners, acquisition of property in relation to project interests and conclusive evidence may give rise to contestable validity issues.

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