

**THE ROLE OF THE EXECUTIVE, LEGISLATURE AND JUDICIARY IN  
THE MINERALS RESOURCE RENT TAX ACT 2012  
YEAR 11 & 12 TEACHER RESOURCE**

This resource addresses the following Politics and Law Syllabus Items:

**Unit 1 Year 11 ATAR Course:**

*Roles of the legislative, executive and judicial branches of government*

**Unit 3BPAL Year 12:**

*The accountability of parliament*

- *through judicial review*

**PART ONE: Development of the Minerals Resource Rent Tax Act 2012 (MRRT)**

There are three arms of the Australian Government:

- The **legislature** is the Federal Parliament which consists of the Queen, a Senate, and a House of Representatives. The Parliament is responsible for debating and voting on new laws introduced under the power of s51 of the Australian Constitution.
- The **executive** is responsible for the execution and maintenance of the Constitution, and of the laws created by the legislature. “The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen’s representative.”<sup>1</sup> The Federal Executive Council is an advisory council to the Governor General and is made up of the senior ministers from the legislature (the Cabinet of Australia).
- “The **judiciary** is the legal arm of the Australian Government. It is independent of the other two arms, and is responsible for enforcing the laws and deciding whether the other two arms are acting within their powers.”<sup>2</sup>

See [The Australian Government](#) for more information on the role and structure of the Australian Government.

1. Click on the link to the Timeline: [TimeRime](#). Search for the timeline entitled *Minerals Resource Rent Tax* (Author: FBLEP / Category: Politics). Scroll down the page and click on the *Minerals Resource Rent Tax* timeline link. If you hover your mouse over a date, it will give a brief outline of the events on that date. Double click on the date to get a more detailed explanation. Using the information from the Minerals Resource Rent Tax Timeline, complete the following table and answer the questions below.

DATE	EVENT
2 July 2010	<b>Media Release: The MRRT was announced under the Gillard Government</b>

<sup>1</sup> Commonwealth of Australia Constitution Act (1900) [http://www.austlii.edu.au/au/legis/cth/consol\\_act/coaca430/](http://www.austlii.edu.au/au/legis/cth/consol_act/coaca430/) s61.

<sup>2</sup> Australian Government, *Our Government* (2013) <http://australia.gov.au/about-australia/our-government>

<b>2 November 2011 to 22 November 2011</b>	The MRRT Bill was read and debated in the House of Representatives
7 February 2012 to 19 March 2012	<b>The MRRT Bill was read and debated in the Senate</b>
19 March 2012	<b>The MRRT Bill was passed by both houses of Parliament and became an Act of Parliament</b>
<b>29 March 2012</b>	The MRRT Act was assented to
22 June 2012	<b>High Court proceedings challenging the MRRT Act were commenced by Fortescue Metals Group</b>
<b>1 July 2012</b>	Commencement of the MRRT Act
2 August 2012 to 5 November 2011	<b>High Court Directions Hearings took place</b>
<b>30 November 2012 to 8 February 2013</b>	Written submissions to the High Court by the Plaintiffs, Intervenors and Defendant
6 March 2013 to 8 March 2013	<b>High Court Hearing</b>
<b>7 August 2013</b>	<b>High Court Judgment</b>
13 November 2013 to 20 November 2013	MRRT Repeal and Other Measures Bill 2013 introduced, read and debated in the House of Representatives and third reading agreed to
<b>2 December 2013 to 25 March 2014</b>	MRRT Repeal and Other Measures Bill 2013 introduced, read and debated in the Senate and second reading negatived
1 September 2014	MRRT Repeal and Other Measures Bill 2014 was introduced read and debated in the House of Representatives
1 September 2014 to 2 September	<b>MRRT Repeal and Other Measures Bill 2014 was read and debated in the Senate</b>

2014	
<b>2 September 2014</b>	The House of Representatives considers the message from the Senate and agreed to Senate amendments
2 September 2014	MRRT and Other Measures Bill 2014 passed in both Houses
5 September 2014	<b>Assent of MRRT Repeal and Other Measures Bill 2014: Act no. 96 2014.</b>

### **The Role of the Three Arms of Government in the MRRT**

2. Which of the three arms of government proposed the MRRT and who had it drafted? Explain your answer.

**The Cabinet initiated the Bill and therefore it would be the Executive that proposed the MRRT Bill. The MRRT Bill was introduced by the Deputy Prime Minister, the Hon. Wayne Swan MP, who was a member of the Executive. The drafting of the Bill would have been by the Minister introducing the Bill and Parliamentary Counsel.**

3. Which of the three arms of government was responsible for debating and approving the MRRT Bill?

**The Legislature was responsible for debating and approving the MRRT Bill. There were first, second and third reading debates in both houses of the Australian Parliament and the Bill was passed.**

4. Which of the three arms of government was responsible for enacting this Act of Parliament?

**The Executive was responsible for enacting the legislation. When both houses of parliament had passed the Bill, it became an Act of Parliament and the Governor General, who is part of the Executive, representing the Crown assented to the Act by signing it.**

5. Which of the three arms of government is responsible for interpreting the validity of the MRRT Act if required to do so?

**The Judiciary is responsible for interpreting legislation if required. The High Court of Australia is responsible for the interpretation of the constitution.**

### **The Process to Challenge the MRRT**

6. Did Fortescue Metals Group appeal to the High Court or initiate proceedings in the High Court? Explain why.

**Fortescue Metals Group initiated proceedings in the High Court by issuing a Writ of Summons to the Defendant and submitting a Notice of Constitutional Matter to the High Court. The High Court has original jurisdiction on constitutional matters.**

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**The FMG matter questioned the validity of the MRRT Act on constitutional grounds, so FMG was unable to initiate proceedings in a State or Territory court.**

7. What claims did FMG make in its High Court proceedings against the MRRT?

**Fortescue Metals Group Ltd (FMG) and some of its subsidiary companies initiated proceedings in the High Court claiming that certain provisions of the MRRT Act and Imposition Acts were not constitutional.**

**"Fortescue claimed the MRRT was unconstitutional because:**

- **The MRRT is discriminatory between states, contrary to Section 51(ii) of the Commonwealth of Australia Constitution;**
- **The MRRT contravenes Section 99 of the Constitution by giving preference to one State over another State;**
- **The MRRT is invalid because it will limit the State's ability to govern itself. The Constitution does not authorise legislation that will either control or create a hindrance to the States in the execution of their governmental functions; and**
- **The MRRT is inconsistent with section 91 of the Constitution, which reserves the State's rights to grant any aid or bounty for the mining metals which it sees fit."**<sup>3</sup>

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<sup>3</sup> Dan Toombs, *High Court Upholds Mining Tax* (2013), <http://www.lawbuddy.com.au/knowledge-base/high-court-upholds-mining-tax/>

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## Fortescue Metals Group Limited v The Commonwealth [2013] HCA 34 (7 August 2013)

### PART TWO: Judicial Review of the MRRT and its Constitutional Validity

Whenever there is a dispute about the meaning of legislation, the third arm of government, the judiciary, has the role of interpreting and clarifying the legislation. Fortescue Metals' challenge about the validity of the MRRT had its foundation in three different sections of the Commonwealth of Australia Constitution Act (1900):

s51

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

- (i) trade and commerce with other countries, and among the States;
- (ii) taxation; but so as not to discriminate between States or parts of States;

S99

The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof.

S91

Nothing in this Constitution prohibits a State from granting any aid to or bounty on mining for gold, silver, or other metals, nor from granting, with the consent of both Houses of the Parliament of the Commonwealth expressed by resolution, any aid to or bounty on the production or export of goods.<sup>4</sup>

### DISCUSSION

8. Using the link [Arguments for and against the challenge](#), what were the grounds for Fortescue Metals Group seeking clarification of the Commonwealth of Australia Constitution Act (1900) from the High Court?

**Fortescue Metals Group claimed that particular provisions of the MRRT Act and Imposition Acts were invalid because they were contrary to the Australian Constitution. FMG submitted a Notice of Constitutional Matter to the High Court so that the relevant sections of the constitution could be clarified and determine whether the MRRT was invalid.**

#### Ground 1

**FMG claimed that the legislation was discriminatory against the states.**

**“The laws relating to taxation which discriminate between States are contrary to the Commonwealth *Constitution* s 51(ii) which confers power on the Commonwealth to make laws with respect to taxation, but so as not to discriminate between the States.”<sup>5</sup>**

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<sup>4</sup> Commonwealth of Australia Constitution Act (1900) [http://www.austlii.edu.au/au/legis/cth/consol\\_act/coaca430/](http://www.austlii.edu.au/au/legis/cth/consol_act/coaca430/)

<sup>5</sup> Herbert Smith Freehills, *Fortescue Metals Group Limited and Ors v The Commonwealth of Australia* [2013] HCA 34 <http://www.herbertsmithfreehills.com/insights/legal-briefings/fortescue-metals-group-limited-and-ors-v-the-commonwealth-of-australia-2013-hca-34>

## Ground 2

FMG claimed that the MRRT favoured the states that didn't offer reductions in mining royalties which goes against s99 of the Constitution.

“The laws seek to regulate trade, commerce or revenue, in a way which is contrary to the Commonwealth *Constitution* s 99 relating to the freedom of trade between States, by giving preference to one State over another State.”<sup>6</sup>

## Ground 3

Some of the Australian states provided incentives for mining companies to invest in their state by reducing the mining royalties. The MRRT meant that such incentives would be ineffective thereby interfering in the governing of the state.

“The laws contravene the [Melbourne Corporation doctrine](#), on the basis that the legislative powers of the Commonwealth do not authorise legislation directed to the control or hindrance of the States in the execution of their governmental functions (Ground 3). (The *Melbourne Corporation* doctrine is an implied limit on Commonwealth legislative power under the *Constitution*. The doctrine renders constitutionally invalid any Commonwealth law that is otherwise valid under a head of power in s 51 of the *Constitution*, if it denies the existence or ability of a State to govern itself or the federal structure of the Commonwealth and singles out States).”<sup>7</sup>

## Ground 4

By making the mining incentives offered by some of the states ineffective, the MRRT Act went against s91 of the Constitution.

“The laws are inconsistent with the Commonwealth *Constitution* s 91, which is a prohibition directed to any law made under a head of power in the *Constitution* which may hinder a State from granting aid or any bounty in respect of mining for certain minerals.”<sup>8</sup>

9. Using the link in question 1 give a brief summary of the High Court's decision.

“The Full Court unanimously dismissed the challenge to the validity of the Acts. The Court held that the treatment of State mining royalties by the MRRT Act and the Imposition Acts did not discriminate between States and that the Acts did not give preference to one State over another. The Court also rejected the submissions that the Acts breached the [Melbourne Corporation doctrine](#) or contravened s 91 of the Constitution.”<sup>9</sup>

## Ground 1

The MRRT applied to all states equally and did not discriminate between states even though it had a different effect in each state because of the differences in the mining royalties between states.

“The High Court held that a law would only be found to be discriminatory if the distinction drawn by it was not appropriate and adapted to the attainment of a

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<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> High Court of Australia Judgment Summary Notes (2013),

[http://www.hearsay.org.au/index.php?option=com\\_content&task=view&id=1689&Itemid=203](http://www.hearsay.org.au/index.php?option=com_content&task=view&id=1689&Itemid=203)

proper objective. More specifically, the High Court found that the high purposes protected by the Constitution are not defeated by uniform Commonwealth laws which have different effects between one State and another because of their interactions with different State legal regimes. Consequently, it was held that it was incorrect to say that the MRRT differs depending on the location of the miner, as the MRRT is levied at a constant rate irrespective of the State in which the miner operates - it is the State Mining Royalties which vary between States. The High Court found that the MRRT legislation did not discriminate between the States.”<sup>10</sup>

#### Ground 2

The MRRT Act did not single out any particular state and therefore did not give preference to one state over another.

“The High Court also held that because the MRRT Act and the Imposition Acts did not discriminate between one State and another (in contravention of s 51(ii) of the Constitution), neither did they give preference to one State over another (contrary to s 99 of the Constitution).”<sup>11</sup>

#### Ground 3

The MRRT Act was not aimed at how a state may govern itself and did not prevent any state from providing a reduction in mining royalties.

“It was also found that the MRRT Act and Imposition Acts were not aimed at States and did not impose any special burden or disability on the exercise of powers and fulfilment of functions of States that contravened the *Melbourne Corporation* principle. The legislation did not deny the ability of a State to fix a rate of mining royalty.”<sup>12</sup>

#### Ground 4

The MRRT Act did not stop the states from exercising their own powers in regards to incentives to mining companies.

“Finally, the High Court held that the MRRT Act and the Imposition Acts did not prohibit the States’ legislative powers with respect to granting certain kinds of aid or bounty, such powers being preserved under s 91 of the *Constitution*. That section also does not limit the legislative powers of the Federal Parliament, only confirms that a State may grant aid or bounties. The section does not deal with how Commonwealth laws might interact with that grant.”<sup>13</sup>

The full judgment can be found at

<http://www.austlii.edu.au/au/cases/cth/HCA/2013/34.html>

10. Can Fortescue Metals appeal the decision of the High Court?

**No. The High Court is the ultimate court of appeal in Australia.**

11. What other avenue would be available to remove the Minerals Resource Rent Tax?

<sup>10</sup> Ibid. above n 4

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

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**“As the ultimate court of appeal in Australia, the High Court’s decision has meant that the MRRT may now only be removed by amending legislation passed by both Houses of Parliament.”<sup>14</sup>**

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<sup>14</sup> Mining Tax Beats Challenge.. and what it means for you (2013), <http://www.taxchat.com.au/?p=1801>



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## Minerals Resource Rent Tax Repeal and Other Measures Act 2014

### PART THREE: The Repeal of the Minerals Resource Rent Tax

In 2013 the Abbott Government introduced the Minerals Resource Rent Tax Repeal and other Measures Bill in the House of Representatives to repeal the MRRT. This was to fulfil an election promise and was outlined in the [Explanatory Memorandum](#) that accompanied the Bill in Parliament. The Bill was passed and sent to the Senate for reading and debate.<sup>15</sup>

The Senate did not pass the Bill in 2013 and it was introduced a second time in 2014.

12. The repeal of the Minerals Resource Rent Tax was combined with a number of other amendments as one Bill: The Minerals Resource Rent Tax and Other Measures Bill 2014. Click on the following link and name at least three other Acts that were combined with the MRRT Act as part of the new Bill. [Details of the MRRT Repeal and Other Measures Bill 2014](#)

**The bill: repeals the *Minerals Resource Rent Tax Act 2012 Minerals Resource Rent Tax (Imposition—Customs) Act 2012 Minerals Resource Rent Tax (Imposition—Excise) Act 2012 and Minerals Resource Rent Tax (Imposition—General) Act 2012* ; amends the: *Income Tax Assessment Act 1997 and Income Tax (Transitional Provisions) Act 1997* to provide that companies can carry tax losses forward to use as a deduction for a future year; *Income Tax Assessment Act 1997* to: amend the instant asset write-off threshold provisions for small business entities; provide that motor vehicle purchases made by small business entities will be treated as normal business assets for depreciation purposes; and provide that geothermal energy exploration and prospecting expenditure are no longer immediately deductible; *Superannuation Guarantee (Administration) Act 1992* to enable the Treasurer by non-disallowable legislative instrument to vary the superannuation guarantee charge percentage for a particular year commencing on 1 July; *Superannuation (Government Co-contribution for Low Income Earners) Act 2003* to abolish the low income superannuation contribution; *Social Security Act 1991 and Social Security (Administration) Act 1999* to abolish the income support bonus payment; and *A New Tax System (Family Assistance) Act 1999 A New Tax System (Family Assistance) (Administration) Act 1999 Income Tax Assessment Act 1997 and Social Security (Administration) Act 1999* to abolish the schoolkids bonus payment; and makes consequential amendments to 13 Acts.**

13. On 2 September 2014 the MRRT Repeal and Other Measures Bill was passed in both Houses of Parliament. In order to achieve a successful vote in the Senate, the Prime Minister had to make a deal with a number of Senators. Using the news report [Mining Tax Repeal Passes Senate](#), who was the main influencing senator that reached an agreement with the Prime Minister.

**The Abbott government struck a deal with six crossbenchers and Palmer United Party senators, including PUP Senator Clive Palmer.**

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<sup>15</sup> Minerals Resource Rent Tax Repeal and other Measures Bill (2013).  
[http://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bld=r5142](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r5142)

14. In order to strike a deal, the Prime Minister had to compromise and make some amendments to the Bill. Using the news report [Mining Tax Repeal Passes Senate](#), what were the main changes made to the Bill in order for it to be successfully passed in the Senate?

**“Under the amended bill, the low-income super contribution will stay until June 30, 2017 and the income-support bonus will remain in place until December 31, 2016. Compulsory super will stay at its current level until July 1, 2021 when it will rise to 10 per cent. It will then increase annually until it reaches 12 per cent. The school-kids bonus will be means tested so that only families earning up to \$100,000 will qualify and it will remain until December 31, 2016... The Australian Chamber of Commerce and Industry said the decision to delay superannuation increases was particularly important because it would reduce costs and make it easier for businesses to invest.”**

15. These amendments meant the Bill had to go back to the House of Representatives to be accepted. Using Section 57 of the Australian Constitution, had the Senate rejected the Bill a second time or the House of Representatives did not agree with the amendments made by the Senate, what powers would the Governor General have to resolve the situation?

#### **“S57 Disagreement between the Houses**

**If the House of Representatives passes any proposed law, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, and if after an interval of three months the House of Representatives, in the same or the next session, again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may dissolve the Senate and the House of Representatives simultaneously. But such dissolution shall not take place within six months before the date of the expiry of the House of Representatives by effluxion of time.**

**If after such dissolution the House of Representatives again passes the proposed law, with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may convene a joint sitting of the members of the Senate and of the House of Representatives.**

**The members present at the joint sitting may deliberate and shall vote together upon the proposed law as last proposed by the House of Representatives, and upon amendments, if any, which have been made therein by one House and not agreed to by the other, and any such amendments which are affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives shall be taken to have been carried, and if the proposed law, with the amendments, if any, so carried is affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives, it shall be taken to have been duly passed by both Houses of the Parliament, and shall be presented to the Governor-General for the Queen's assent.”<sup>16</sup>**

<sup>16</sup> Commonwealth of Australia Constitution Act (1900) [http://www.austlii.edu.au/au/legis/cth/consol\\_act/coaca430/](http://www.austlii.edu.au/au/legis/cth/consol_act/coaca430/) s57.

16. In Australia's history, has the Governor General ever exercised this power? If so, what happened, when did it occur and who was the Prime Minister?

**“On Tuesday, November 11th 1975, the Governor-General of Australia, Sir John Kerr, dismissed Gough Whitlam as Prime Minister and appointed Malcolm Fraser as a caretaker Prime Minister. A Double Dissolution election was held on December 13th, 1975, at which the Whitlam Government was soundly defeated. The dismissal of the Whitlam Labor Government was the culmination of a series of dramatic events which began in October, 1975 with the refusal by the Senate to pass the government's budget bills.”<sup>17</sup>**

17. Once the Bill had been passed through both Houses of Parliament, what was the final step that had to be completed before the Bill could become an Act of Parliament and therefore, law and when was this completed?

**The Governor General had to assent to the Bill on behalf of the Queen. This was done on 5 September 2014.**



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<sup>17</sup> Whitlamdismissal.com. *Overview of the Dismissal*. <http://whitlamdismissal.com/what-happened/overview1>