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# WA government has shifted the sands beneath Clive Palmer's feet

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There is a great deal to dislike, and not much to like, in West Australia's Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020, which overrides the outcomes of the state's long-running dispute with Clive Palmer and extinguishes Palmer's rights to damages.

But, while the legislation is deeply offensive, it reflects genuine issues that forced the state's hand and that must now be fully addressed.

The features that make the legislation so objectionable, even if they do not necessarily render it unconstitutional, are readily apparent.

It is, to begin with, unquestionably a bill of attainder: that is, a law that identifies a specific person, or group of people, and convicts them of a crime, seizes their property or removes their liberty without affording them a trial to contest the issue.

As Blackstone put it in his famous Commentaries on the Laws of England (1765), such legislation — for example, "a particular act of the legislature to confiscate the goods of Titius" — is alien to the very idea of law, because its "operation is spent upon Titius only, [instead of] the community in general", making it "rather a sentence than a law".

It amounts, in other words, to the exercise by parliament, acting without the safeguards of natural justice, of judicial functions, undermining the separation of powers and the protections it brings.

Additionally, the legislation is plainly retroactive: as the state's Attorney-General emphasised in his second reading speech, its purpose is to strip Palmer of rights he enjoyed as a result of the agreement he signed with the state in 2002 and of subsequent legislation.

One of those rights, reinforced by changes to the state's arbitration laws in 2012, was the right to binding determination of any disputes by arbitration. With Palmer having succeeded in the arbitration's initial rounds, and possibly obtaining massive damages in its final round, the legislation nullifies existing determinations, brings the arbitration to a close and shuts any other means Palmer might have for pressing his claim.

To make matters worse, while the legislation deprives Palmer of valuable property by narrowing or eliminating rights he had under the 2002 agreement (which nonetheless remains in place), it provides no compensation whatsoever.

Yet the moral obligation on the sovereign to compensate those whose property it takes was an integral part of English law and custom even before Magna Carta formalised in 1215 the crown's pledge not to "disseise" (that is, dispossess) any free man without due legal process, which at the time included the determination, through the testimony of at least two "worthy and lawful men", of just terms.

Indeed, the very first pipe roll — the distant ancestor of today's budget statement — recorded in 1130 the king's obligation to pay the monks of Northampton Abbey 3s 8d, sufficient to purchase 12 gallons of the finest Gascon wine, for land taken to extend a royal castle.

As a result, while Blackstone regarded it as obvious that an Englishman's "absolute right" to property could be nullified by the legislature, he considered it equally obvious that any such legislation was bound to ensure its victim received "full indemnification for the injury sustained".

Nor does the mere fact that the compensation would benefit Palmer at taxpayers' expense do anything to excuse the state's conduct, as the state's Attorney-General seems to believe. After all, were that "Robin Hood" defence accepted, the state could simply confiscate the assets of its wealthiest citizens, showering the gains on to whatever constituents it favours.

And, while it may be true that Palmer is especially unpopular, that only increases the obligation on parliament to ensure that his rights, including to property, are fully protected.

But although those factors must, individually and collectively, weigh heavily in the balance, it would be a serious mistake to overlook the context in which the dispute arose.

Crucial to that context is the state's reliance over the decades on "state agreements" with project proponents to establish the legal basis for major resource developments.

While ratified in legislation, those agreements are intended to provide a relatively flexible framework for undertaking projects that because of their scale, uncertainty and long-term nature cannot be fully specified in advance.

Inevitably, like other "relational contracts", the agreements are somewhat open-ended, and their smooth operation has always primarily relied on the parties' underlying incentives to forge a co-operative relationship.

However, after his fiascos in Queensland and a prolonged commercial dispute in WA, Palmer seems to have concluded that he was unlikely to obtain further state agreements in the years ahead.

With no broader relationship to preserve, his interests were instead best served by disregarding the conventions on which the system's success has rested — with Palmer refusing, for example, to consult with the state over areas of disagreement and to amend the development plan so as to meet regulatory requirements — while laying the technical grounds for a substantial damages claim.

It is therefore incorrect to argue that the state, in resorting, as it has, to the nuclear option, has

damaged its reputation; rather, it has sought to send an unambiguous signal that repeated failures to act in a manner consistent with the spirit of the agreements can trigger an overwhelming response.

By establishing, with the strong support of both sides of politics, the credibility of that draconian threat, its aim has been to preserve the viability of a system that has generally served the state — and Australia — well and that could otherwise have lost its effectiveness and legitimacy.

Whether that attempt will survive scrutiny by the High Court, as well as a possible challenge under the "investment protection" provisions in Australia's free-trade agreement with Singapore (where Mineralogy's parent company is domiciled), remains to be seen.

But even if the state succeeds, the episode starkly highlights the system's longstanding vulnerabilities — not least the opaque nature of the state agreements' operations, which reduces accountability to taxpayers and increases the risk of malfeasance.

Far from shielding the details of its conflict with Palmer from public scrutiny, as the legislation seeks to do, now is the time for the state to transparently draw the dispute's lessons, providing greater clarity both to the electorate and to the private sector.

Ultimately, no matter how egregious Palmer's behaviour may have been, the state should not have had to trample on basic liberties to ensure its economic future.

To recognise that it acted to protect legitimate interests is therefore not to echo Kent in the opening scene of King Lear, when he says he "cannot wish the fault undone, the issue of it being so proper".

It is, on the contrary, to urge the state to prevent that monstrous fault from reoccurring.