

**RAILWAY AND PORT (THE PILBARA INFRASTRUCTURE PTY LTD)
AGREEMENT AMENDMENT BILL 2018**

EXPLANATORY MEMORANDUM

Section 1

Contains the short title of the Act.

Section 2

Provides that:

- (a) Sections 1 and 2 come into operation on the day on which the Act receives Royal Assent; and
- (b) the rest of the Act comes into operation the day after the Act receives Royal Assent.

Section 3

Specifies that the Act amends the *Railway and Port (The Pilbara Infrastructure Pty Ltd) Agreement Act 2004*.

Section 4

Amends section 3 of the *Railway and Port (The Pilbara Infrastructure Pty Ltd) Agreement Act 2004* by:

- (1) inserting the new definition of **2018 variation agreement** which means the agreement a copy of which is set out in Schedule 3; and
- (2) deleting the definition of **the Agreement** and substituting a new definition of **Agreement** incorporating the 2018 variation agreement.

Section 5

Inserts a new subclause (2B) in section 4 of the *Railway and Port (The Pilbara Infrastructure Pty Ltd) Agreement Act 2004*, which ratifies the 2018 variation agreement.

Section 6

Amends section 6(2) so that the principle that modifications to an enactment are limited to the extent necessary for the provisions of the State Agreement to have effect also operates in relation to 2018 variation agreement.

Section 7

Inserts as Schedule 3 to the *Railway and Port (The Pilbara Infrastructure Pty Ltd) Agreement Act 2004* a copy of the 2018 variation agreement.

SCHEDULE 3 – 2018 VARIATION AGREEMENT

EXPLANATORY MEMORANDUM

PARTIES

The Honourable Mark McGowan, Premier of the State of Western Australia, acting for and on behalf of the said State and its instrumentalities (the "**State**"), The Pilbara Infrastructure Pty Ltd (**Company**) and Fortescue Metals Group Ltd (**Guarantor**).

RECITALS

- A. Provides that the parties to the Variation Agreement are the parties to the *Railway and Port (The Pilbara Infrastructure Pty Ltd) Agreement 2004* (the "**Principal Agreement**") as originally ratified by the *Railway and Port (The Pilbara Infrastructure Pty Ltd) Agreement Act 2004*.
- B. Advises that the parties wish to vary the Principal Agreement on the terms and conditions set out in the Variation Agreement.

THE PARTIES AGREE AS FOLLOWS:

Ratification and operation

Clause 1(1)

Provides that the Variation Agreement (except clause 1) does not come into operation except in accordance with clause 1(2).

Clause 1(2)

States that the Variation Agreement (except clause 1) comes into operation on the day that it is ratified by an Act of Parliament ("**Operative Date**") unless it terminates prior to that day under clauses 1(4) or 1(5).

Clause 1(3)

Requires the State to introduce into Parliament a Bill to ratify this Variation Agreement prior to 30 April 2018 (or a later date as agreed by the parties) and to endeavour to secure its passage as an Act.

Clause 1(4)

Provides, unless the parties otherwise agree, for the termination of the Variation Agreement (and without a party having a claim against another) if by 30 September 2018 the Variation Agreement has not been ratified by an Act.

Clause 1(5)

Specifies that if the Principal Agreement is determined on a day prior to the Operative Date, then the Variation Agreement will also terminate on and from that day and without any party having a claim against any other.

Variations of the Principal Agreement

Clause 2(1)

Amends clause 1 (Definitions) by:

- (a) deleting the definition of “Port Authority” and substituting a new definition.
- (b) inserting new definitions for “Australian Consumer Law”, “LAA Minister” and “second variation date”.
- (c) in the definition of “*Rail Safety Act*” deleting the words “*Rail Safety Act 1998*” and substituting “*Rail Safety National Law (WA) Act 2015*”.
- (d) deleting the definition of “Trade Practices Act”.

Clause 2(2)

Deletes clause 4, amends the title to “Obligations of the State” and substitutes with the following subclauses that oblige the State, subject to certain conditions, to arrange the issue of requisite authority under the *Land Administration Act 1997 (WA) (LAA)* to allow the Company to enter upon Crown land (excluding Port land), to carry out all works for the purpose of undertaking its investigative obligations under clause 5(1) applied pursuant to clause 12(2a).

Subclause (1) The State shall arrange for the issue of requisite authority under one or both of (a) section 91 or (b) section 182 of the LAA, to allow the Company to enter upon Crown land to carry out all works to the extent reasonably necessary for the purposes of undertaking its obligations under clause 5(1).

Subclause (2) Section 182 of the LAA shall be applied as if the Project is a proposed public work for which the LAA Minister is, under that section, authorised to take interests in land within the meaning of that section.

Subclause (3) The Company acknowledges that it shall be responsible for obtaining all consents of each person, whose consent the LAA Minister requires for the grant of any requisite authority referred to in subclause (1), in a form and substance acceptable to the LAA Minister.

The amended clause makes clear that the requisite authority may be granted pursuant to section 91 and/or section 182 of the LAA and is consistent with the approach taken to the provision of investigative authority under the *Railway (BBI Rail Aus Pty Ltd) Agreement Act 2017*.

Clause 2(3)

Amends clause 7(3) by deleting paragraph (a).

This subclause is no longer required as the issuing of requisite authority is now covered in clause 4.

Clause 2(4)

Inserts after clause 9 a new clause “9A Local Participation Plan” containing the following:

Subclause (1) Defines "local industry participation benefits".

Subclause (2) States that the Company acknowledges the need for local industry participation benefits to flow from the Agreement.

Subclause (3) Obliges the Company to prepare and provide to the Minister, within 3 months after the second variation date, a plan which contains a clear statement on the strategies which the Company will use, and require a third party to use to maximise local industry participation benefits.

Subclause (4) Obliges the Company to implement the plan provided in compliance with this clause.

Subclause (5) Provides for the Minister and the Company, at the request of either of them from time to time, to confer and agree to amend the plan or to substitute a new plan for the one previously provided.

Subclause (6) At least 3 months before the anticipated submission of detailed proposals under clauses 12, 12A or 13, the Company must, unless the Minister otherwise requires, give to the Minister information about the implementation of the plan relating to the activities to be the subject of detailed proposals.

Clause 2(5), 2(6) and 2(7)

The clauses are amended to include compliance with clause 9A “Local Participation Plan”.

Clause 2(8)

Deletes clause 15(3) and substitutes a new clause.

The new clause obliges the Company to provide crossings for livestock and for existing roads, other railways, conveyors, pipelines and other utilities included within the Special Railway Licence or in a Lateral Access Road Licence and to allow crossings for roads, railways, conveyors, pipelines and other utilities constructed for future needs on reasonable terms and conditions. Further, the Company is to, if applicable, consent to and otherwise facilitate the grant by the State of any lease, licence or other title to support the new crossing so long as such grant does not in the Minister's opinion unduly prejudice the activities of the Company under the Agreement.

Clause 2(9) and clause 2(10)

Deletes the words “Trade Practices Act” in clauses 16(6) and 18(6) and substitutes “Australian Consumer Law”.

Clause 2(11)

Inserts after subclause 21(2) a new subclause that obliges the Company, except as otherwise agreed by the Minister, to include in its contracts with third parties a condition that the third party shall undertake its procurement activities in accordance with the relevant local participation plan under new clause 9A.

Clause 2(12)

Updates clause 35(1) relating to arbitration so that it refers to the *Commercial Arbitration Act 2012* rather than the former *Commercial Arbitration Act 1985*.

Clause 2(13)

Amends clause 41 by requiring the parties to the Principal Agreement to submit to the jurisdiction of the courts of Western Australia.

Confirmation of Guarantee**Clause 3**

Confirms that the Guarantor's guarantee in favour of the State contained in clause 39 of the Principal Agreement shall continue notwithstanding the above-mentioned variations to the Principal Agreement.