

NICKEL (AGNEW) AGREEMENT AMENDMENT BILL 2023

EXPLANATORY MEMORANDUM

Section 1

Contains the short title of the Act.

Section 2

Provides that

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

Section 3

Specifies that the Act amends the *Nickel (Agnew) Agreement Act 1974*.

Section 4

Amends section 2 of the *Nickel (Agnew) Agreement Act 1974* by:

- (1) inserting a definition of the phrase **2022 variation agreement**, being the agreement, a copy of which is set out in the Third Schedule of the *Nickel (Agnew) Agreement Act 1974*; and
- (2) in the definition of **the Agreement** deleting the words "Variation Agreement" and inserting the words "Variation Agreement and the 2022 variation agreement".

Section 5

Inserts new section 3B (Ratification of the 2022 variation agreement) by which:

- (1) the 2022 variation agreement is ratified;
- (2) the implementation of the 2022 variation agreement is authorised; and
- (3) without limiting or otherwise affecting the application of the *Government Agreements Act 1979*, the 2022 variation agreement operates and takes effect despite any other enactment or law.

Section 6

Inserts a Third Schedule into the *Nickel (Agnew) Agreement Act 1974*, being a copy of the 2022 variation agreement.

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Third Schedule – 2022 variation agreement

PARTIES

The Honourable Mark McGowan, Premier of the State of Western Australia, acting for and on behalf of the State and its instrumentalities (the "**State**"); and

BHP Nickel West Pty Ltd (the "**Joint Venturers**") of the other part.

RECITALS

- A.** Provides that the parties to this Agreement are now the parties to the agreement (herein called the "**1974 Agreement**") dated 21 November 1974, the execution of which by the State was ratified by the *Nickel (Agnew) Agreement Act 1974*. The 1974 Agreement as varied is called the "**Principal Agreement**".
- B.** Advises that the Parties wish to vary the Principal Agreement in accordance with the terms and conditions of this 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 comes into operation on the day on which it is ratified by an Act of the Parliament of Western Australia ("**Operative Date**") unless, before that day, it terminates under clauses 1(4) or 1(5).

Clause 1(3)

Requires the State to introduce into Parliament a Bill prior to 30 June 2023 (or at a later date agreed between the parties) to ratify this Variation Agreement 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 claim against the other in relation to the Variation Agreement) if by 31 December 2023 the Variation Agreement has not been ratified.

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 in relation to the Variation Agreement.

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Variations of the Principal Agreement

Clause 2(1)

Amends clause 1 (Definitions) by:

- (a) inserting new definitions for "Leinster concentrator" "mine closure plan", "Mining Act 1978", "Mining Regulations", "mining tenement", "MRF Act", "non-Agreement nickel concentrates", "non-mineral lease ore", "register", "Relevant Endorsement Time", "Specified Mining Tenement", "Townsite Lease" and "variation date".
- (b) in the definition of: "townsite" deleting the words "land contained in Special Lease 3116/6675" and substituting "townsite constituted under section 10 of the Land Act 1933 (WA) (and which by the Land Act is to be treated as constituted under section 26 of the Land Act) and known as the Leinster Townsite".
- (c) in the definition of "Minister for Mines", after the words "Mining Act" inserting the words "and the Mining Act 1978";
- (d) in the definition of "native title" by:
 - (i) deleting the word "has" and substituting the words "and "native title rights and interests" have"; and
 - (ii) deleting the word "it" and substituting the word "them".
- (e) in the definition of "nickel concentrates", after the words "obtained by treating ore" inserting the words "or non-mineral lease ore or both together".

Note: In relation to ensuing references to the term 'Minister' in this Explanatory Memorandum that the term is currently defined by the Principal Agreement to mean the Minister from time to time responsible for the administration of the *Nickel (Agnew) Agreement Act 1974*, currently being the Minister for State Development.

Clause 2(2)

Inserts after existing clause 2 (Interpretation) a new clause 2A which requires the Principal Agreement and all activities undertaken pursuant to it, to comply with any laws relating to native title.

Clause 2(3)

Amends existing clause 6(1) (Joint Venturers to submit Proposals) for the purpose of updating relevant matters for detailed proposals under the Principal Agreement by:

- (a) deleting in subclause (c) the word "railways" and in subclause (d) the words "facilities for the export of nickel-containing products through a port in the said State;"
- (b) inserting in subclause (g) the word "supply" after "power".

Clause 2(4)

Inserts after existing clause 6A (Increased capacity of project) a new clause 6B (Non-Mineral Lease Ore and Non-Agreement Nickel Concentrates) that provides, subject to new clauses 8(9) to (14), for the Joint Venturers to treat non-mineral lease ore either separately or blended with mineral lease ore at the Leinster concentrator and blend nickel concentrates from both the mineral lease and non-mineral lease sources at the Joint Venturers' facilities on the mineral lease.

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Clause 2(5)

Deletes existing clause 8(1) (Additional Proposals) and inserts a new clause 8(1) that relates to clause 6 as amended, acknowledges the authorised activities in new clauses 8(9)(a) and (b) and incorporates the new provisions of clause 8 generally in the administration of proposals submitted under new clause 8(1).

Inserts after new clause 8(1) a new subclauses (2) to (8) that provide that within 2 months of receipt of a proposal from the Joint Venturers, the Minister, subject to the EP Act, must give notice to the Joint Venturers of his decision in relation to the proposal. The Minister may approve the proposal, defer consideration until the Joint Venturers provide additional information, require as a condition precedent the Joint Venturers make alterations to or comply with conditions in relation to the proposal, or in the case of a proposal that does not comply with the Principal Agreement, not consider the proposal. The Joint Venturers have the opportunity to consult the Minister in relation to his decisions but may only refer the Minister's decision to arbitration where the Joint Venturers consider any conditions precedent to be unreasonable. The new aspects of the provision dealing with the express capacity for the Minister to refuse to consider non-compliant proposals are consistent with the risk-management policy position taken by the State in the *Railway (BBI Rail Aus Pty Ltd) Agreement Act 2017*.

Inserts new subclause (9) that authorises the Joint Venturers to continue to treat at the Leinster concentrator non-mineral lease ore from specified mining leases within a volume range for a specified term, as well as blend non-Agreement nickel concentrates treated at the Mount Keith concentrator from specified mining leases within a volume range for a specified term.

Inserts new subclauses (10) and (11) that specify the treatment at the Leinster concentrator of non-mineral lease ore and the blending of non-Agreement nickel concentrate from sources other than those defined in subclause (9) or the subject of approved proposals, are regarded as significant modifications for the purpose of clause 8 and require submission of a proposal that must clearly identify the non-mineral lease ore or non-Agreement concentrates.

Inserts new subclause (12) that requires the Joint Venturers to obtain the prior consent of the Minister to treat ore or blend concentrates using non-mineral lease ore obtained from outside Australia.

Inserts new subclause (13) that requires the Joint Venturers to obtain the prior consent of the Minister to submit a proposal for the grant of any lease, licence or other tenure to support the treatment of non-mineral lease ore or blending of non-Agreement nickel concentrates.

Inserts new subclause (14) that states that activities in relation to non-mineral lease ore and non-Agreement nickel concentrates, including mining, treatment outside the mineral lease, transport to and from the mineral lease, smelting and refining, will not be activities that may be undertaken under the Principal Agreement.

Clause 2(6)

Inserts in existing subclause 10(2) (Use of Local Professional Services Labour and Materials) a reference to the new subclause 10B(7) enabling the Minister to also request the Joint Venturers submit a report about the implementation of their Local Participation Plan obligations relating to third party contracts.

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Clause 2(7)

Inserts after existing clause 10 (Use of Local Professional Services Labour and Materials) new clauses 10A (Community Development plan) and 10B (Local Participation Plan) in respect to the Joint Venturers providing a Community Development Plan and Local Participation Plan.

Clause 10A (Community Development Plan) addresses the Joint Venturers' requirement to provide and implement a Community Development Plan.

- (a) Subclauses (1)(a)-(e) define what “community and social benefits” include.
- (b) Subclause (2) states that the Joint Venturers acknowledge the need for community and social benefits flowing from the Principal Agreement.
- (c) Subclauses (3)(a)–(c) require the Joint Venturers to prepare a draft Community Development Plan and to confer with the Minister on the plan within 2 months after the variation date. Following that conferral, and within 3 months after the variation date, the Joint Venturers are required to provide to the Minister the Community Development Plan.
- (d) Subclause (4) requires the Joint Venturers, at least 3 months before the anticipated submission of proposals under clause 8, to advise the Minister about how their proposed activities will affect the Community Development Plan.
- (e) Subclause (5) requires the Joint Venturers to implement the Community Development Plan.
- (f) Subclause (6) requires the Joint Venturers to report annually to the Minister on the implementation of the Community Development Plan.
- (g) Subclause (7) allows the Minister and the Joint Venturers to confer as to any amendments desired to the Community Development Plan.

Clause 10B (Local Participation Plan) addresses the Joint Venturers' requirement to provide and implement a Local Participation Plan.

- (a) Subclauses (1)(a)-(c) define what “local industry participation benefits” mean.
- (b) Subclause (2) states that the Joint Venturers acknowledge the need for local industry participation benefits flowing from the Principal Agreement.
- (c) Subclause (3) requires the Joint Venturers to provide a Local Participation Plan to the Minister within 3 months of the variation date. Subclauses (3)(a)–(d) set out the information that is required to be included in the Local Participation Plan.
- (d) Subclause (4) allows the Minister and the Joint Venturers to confer as to any amendments desired to the Local Participation Plan.
- (e) Subclause (5) requires the Joint Venturers, at least 3 months before the anticipated submission of proposals under clause 8, to give the Minister information about the implementation of the Local Participation Plan in relation to the activities to be the subject of the proposals.
- (f) Subclause (6) requires the Joint Venturers to implement the Local Participation Plan.
- (g) Subclause (7) requires that Joint Venturers shall ensure that third party contractors undertake procurement activities in accordance with the provisions of this clause and use reasonable endeavours to ensure the third party complies with the provisions of the clause.

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Clause 2(8)

Amends existing clause 11(5) (Liability) to make it consistent with the *Local Government Act 1995* by:

- (a) in subclause (a), deleting the words "a municipality and the said roads shall be deemed to be streets under the care control and management of the Joint Venturers" and substituting the words "a local government and the said roads shall each be deemed to be a thoroughfare under the care control and/or management of the Joint Venturers and which the public are allowed to use"; and
- (b) deleting the existing subclause (b) and inserting a new subclause (b) "for the purposes of this Clause the terms "local government" and "thoroughfare" shall have the meanings which they respectively have in the *Local Government Act 1995* (WA)."

Clause 2(9)

Amends existing clause 12 (Railway) by deleting redundant subclauses (1), (untitled) (2) (Other Commodities), (3) (Road Licences), (5) (New Railway) and (7) (Other Facilities).

Clause 2(10)

Amends existing clause 13 (Purchase of Electricity) by:

- (a) deleting redundant subclauses (1) (Purchase of Electricity), (4) (Acquisition of Facilities), (5) (Charges for Electricity) and (6) (Bulk Supply to State); and
- (b) amending subclause (2) (Electricity Generation) to remove the reference to deleted subclause (1).

Clause 2(11)

Inserts after existing clause 15(3) (Labour conditions) a new subclause (3a) (Rent) that requires, from the variation date, that the Joint Venturers pay rent for the mineral lease in the amounts and in accordance with the *Mining Act 1978* and *Mining Regulations 1981*.

Inserts after existing clause 15(7) (Surrender of part of Mineral Lease) a new subclause (8) (MRF Act) that, from the variation date, deems the mineral lease to be a mining authorisation for the purposes of the *Mining Rehabilitation Fund Act 2012* and associated regulations.

Inserts after new subclause (8) new subclauses (9) to (14) (Mine closure planning):

- (a) subclause (9) requires the Joint Venturers to lodge with the State a mine closure plan for approval by the Minister for Mines within 6 months of the variation date and deems the mineral lease to conditions relating to the review of and compliance with the mine closure plan;
- (b) subclauses (10) and (11) requires the Joint Venturers to review and lodge the mine closure plan at the times required by the *Mining Act 1978* or otherwise at times determined by the Minister for Mines;
- (c) subclause (12) provides that the Minister for Mines (with the concurrence of the Minister) may approve the mine closure plan or a reviewed mine closure plan as lodged or subject to changes required by the Minister for Mines (acting with the concurrence of the Minister). If the Joint Venturers are unwilling to accept the changes they are required to inform the Minister and the question of the reasonableness of the changes may be referred to arbitration by either party.

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- (d) subclause (13) requires the Joint Venturers to implement the mine closure plan.
- (e) subclause (14) specifies that the obligations under subclause (13) continue beyond the cessation or determination of the Principal Agreement and provides that the Joint Venturers may enter the land to implement the mine closure plan.

Clause 2(12)

Inserts after existing clause 16 (Mineral Claims in the yellow areas) a new clause 16A (Incorporation of Specified Mining Tenements in the mineral lease and continuation proposals).

Subclauses (1) and (2) of clause 16A require the Joint Venturers to submit proposals under clause 8(1) for continuation of their current and contemplated activities upon the Specified Mining Tenements within 2 months of the variation date and that, if approved, the proposals take effect from the date that the Specified Mining Tenements are endorsed in the register maintained under the *Mining Act 1978* to ensure continuity of mining operations on the Specified Mining Tenements in transitioning to the Principal Agreement.

Subclause (3) specifies that at the date that the Specified Mining Tenements are endorsed in the register, they are deemed surrendered and are deemed to be included in the area of the mineral lease, subject to such of their existing conditions as the Minister for Mines determines, but otherwise subject to the conditions of the mineral lease.

Subclause (4) requires, as soon as practicable after the approval of proposals contemplated by subclause (1), the State to endorse in the register maintained under the *Mining Act 1978* that the Specified Mining Tenements form part of the mineral lease and the conditions determined under subclause (3).

Subclause (5) clarifies that the endorsements contemplated in subclause (3) (4) may be made in the register without further formalities.

Clause 2(13)

Amends clause 17 (Lands) by:

- (a) In subclause (2) deleting the words “townsites” to the effect that the State does not have further authority to grant leases, licences, easements or rights of way for the purposes of townsites And accordingly the Leinster townsite lease may not be further extended under the Principal Agreement; and
- (b) In subclause (4) (Sale of Land Act), to accommodate new subclause (3) of clause 29.

Clause 2(14)

Amends existing clause 18 (Townsite and town development) by deleting redundant subclause (4) (Existing Towns) as Leinster is the relevant townsite.

Clause 2(15)

Deletes the existing clause 20 (Port) and inserts a new clause 20 (Port) that specifies that after the variation date the transport of nickel containing products either for sale or delivery to a third party or through a port are not activities that can be undertaken under the Principal Agreement.

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Clause 2(16)

Amends existing clause 21 by:

- (a) inserting in subclause (1) (Royalties), after "Mining Act" the words "1978 in respect of mining leases granted under that Act" to require royalties on minerals or products from the mineral lease to be paid at rates set under the *Mining Act 1978*;
- (b) deleting subclause (3) (Return and payment of royalties) and inserting a new subclause (3) (Return and payment of royalties) that requires the Joint Venturers to submit to the State a quarterly return in relation to the minerals mined by them or products produced by them from the mineral lease during the previous 3 calendar months and pay to the State the royalty payable on such minerals and product;
- (c) inserting a new subclause (3A) that requires the Joint Venturers to submit to the State a quarterly return in relation to the treatment non-mineral lease ore to produce nickel concentrates to enable the calculation of royalty payable in respect of nickel mined from each non-mineral lease source;
- (d) inserting a new subclause (3B) that requires the Joint Venturers to submit to the State a quarterly return in relation to the blending of nickel concentrates with non-Agreement nickel concentrates to enable the calculation of royalty payable in respect of each non-Agreement nickel concentrate source;
- (e) amending subclause (4) (Inspection) by:
 - (i) substituting the word "State" for each reference to the "Minister for Mines or his nominee"; and
 - (ii) after the words "royalty payable under this Clause" inserting the words ", and under the Mining Act 1978 in respect of non-mineral lease ore and nickel concentrates and non-Agreement nickel concentrates the subject of approved proposals under this Agreement,"
- (f) inserting new subclauses (5) and (6), which in the context of blending activities, require the Joint Venturers to, within 3 months of the variation date, establish and maintain adequate systems and controls for the correct apportionment between ore and non-mineral lease ore and concentrates and non-mineral lease concentrates and allows the State to suspend authority for such blending activities until this is done.

Clause 2(17)

Deletes clause 24 (Rating) and inserts a new clause 24 (Rating) that applies the State's gross rental valuation policy to the land (including the mineral lease) held under the Principal Agreement.

Clause 2(18)

Deletes clause 26 (Derogating legislation), an old provision, which is not consistent with modern State Agreement policy.

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Clause 2(19)

Amends clause 29 (Assignment) by inserting new subclause (3) that removes the requirement for the Joint Ventures to obtain approval or consent under the *Land Administration Act 1997* or under subclause (1) for subleases of land comprised within the Leinster townsite lease that are within the permitted use of the land the subject of that lease and are for a term less than the term of that lease, provided that the Joint Venturers give notice of such a proposed sublease to the Minister for Lands and the Minister. This amendment will significantly reduce unnecessary regulatory burden, commensurate with the risk of the activity.

Clause 2(20)

Amends clause 35 (Effect of cessation or determination of Agreement) by deletion of subclause (4) to be consistent with the deletion of clause 26.

Clause 2(21)

Amends clause 44 (Arbitration) to update the reference to the repealed *Arbitration Act 1895* and its concept of an 'arbitrator umpire' with reference to the *Commercial Arbitration Act 2012* and the concept of a 'third and presiding arbitrator'.

Clause 2(22)

Amends clause 46 (Interpretation) by requiring the parties to the Principal Agreement to submit to the jurisdiction of the courts of Western Australia in relation to any proceeding to settle a dispute or question in connection with the Principal Agreement, other than in the case of matters that are to be referred to arbitration pursuant to the agreement.