IRON ORE PROCESSING (MINERALOGY PTY. LTD.) AGREEMENT AMENDMENT BILL 2020

Standing Orders Suspension — Motion

MR D.A. TEMPLEMAN (Mandurah — Leader of the House) [4.55 pm] — without notice: I move —

> That so much of standing orders be suspended as is necessary to enable an urgent bill that is very much in the state's interest to be introduced into the Parliament without notice, first read, and for the Attorney General to make his second reading speech.

This bill is essential to answer a claim against Western Australia and prevent potentially dire financial consequences for the state. The government has drafted the bill in answer to damages that have been claimed against it that are nearly equivalent to the state's total annual budget or, put another way, if the claim were shared equally amongst all Western Australians, it would cost every Western Australian more than $12 000. This claim is sought while the state is in a state of emergency dealing with a global pandemic and at a time when the people of Western Australia are most in need of public money. The damages claimed arise because of the decisions made by the former government. Although the McGowan government is not critical of these decisions, it has inherited the consequences of them. Having done so, the McGowan government, through the State Solicitor's Office, is vigorously defending the claim but the risk of the state not succeeding is too great to ignore.

I seek members' indulgence as I share with them a minimal amount of information in advance of the introduction of a bill. However, I assure members that the government will not seek to debate the bill tonight; rather, the Attorney General will provide briefings and we will seek to debate the bill on the next sitting day.

Question to be Put

Mr W.J. JOHNSTON: I move —

> That the question be now put.

Question put and passed.

Standing Orders Suspension Resumed — Motion

The SPEAKER: As this is a motion without notice to suspend standing orders, it will need an absolute majority in order to succeed. If I hear a dissentient voice, I will be required to divide the Assembly.

Question put and passed with an absolute majority.

Introduction and First Reading

Bill introduced, on motion by **Mr J.R. Quigley (Attorney General)**, and read a first time.

Explanatory memorandum presented by the Attorney General.

Second Reading

MR J.R. QUIGLEY (Butler — Attorney General) [5.00 pm]: I move —

> That the bill be now read a second time.

The Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Bill 2020 seeks to deal with damages claims arising or potentially arising from proposals that were submitted by Mr Clive Palmer, Mineralogy Pty Ltd and International Minerals Pty Ltd pursuant to the terms of the Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002. Those proposals were submitted in August 2012 and June 2013 and relate to a project called the Balmoral South iron ore project. The August 2012 proposal was at first rejected, and then later significantly conditioned, by former Premier, Hon Colin Barnett. Those decisions led to Mr Palmer, Mineralogy and International Minerals now claiming billions of dollars in damages in an arbitration against the state.

There is a history to these damages claims of which members of this chamber and the other place need to be aware. The Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act came into operation on 25 September 2002 following royal assent on 24 September 2002, after having been considered by both houses of Parliament in June 2002. Attached to the act, by way of a schedule, was a state agreement entered into between what were Mineralogy-related parties and the state. On 14 November 2008, the parties to the state agreement varied the state agreement by the Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Bill—a bill that passed both Houses of Parliament in December 2008, and, after receiving royal assent, came into operation on 11 December 2008. The state agreement provided a process by which Mineralogy would, alone or with one of six co-proponents, one of which is International Minerals, develop projects for the mining, concentration and processing of iron ore in the Pilbara region.

The state agreement was in a form that was reasonably standard at that time, in particular as concerns the framework for the submitting of project proposals and their ministerial consideration for approval. As far as project proposals

are concerned, the state agreement provided that Mineralogy and any co-proponent would submit proposals for particular types of projects to the Minister for State Development. Such project proposals were, and are, required to be detailed, and address a large number of specific matters relating to the establishment and operation of the project. Once the minister receives such a proposal, the minister is, and was in this case, required to either approve the proposal, defer consideration of the proposal, or require as a condition precedent to giving approval to the proposal that the project proponents make reasonable alterations or comply with reasonable conditions.

This type of clause exists in most other state agreements, and in the ordinary course of conducting business with the state, a state agreement proponent comes to the state and discusses its proposal in draft form, including making appropriate changes in consultation with the state, before it is formally submitted for ministerial consideration and approval. There is good reason for this: the state and the state agreement proponent or proponents need to be aligned on the detail of the proposal, bearing in mind that the state is agreeing, by the very nature of a state agreement, to the efficient and effective development of the state's natural resources; that any such developments are maximised for long-term certainty and investment security to the mutual economic advantage of both project proponents and the state; and to ensure that the interactions between the project proponents and the community will achieve a level of development that will benefit all Western Australians. Indeed, these are some of the primary objectives that underpin the state's decision to enter into a state agreement with a project proponent.

Notwithstanding the standard practice of consultation undertaken between every other state agreement proponent and the state in relation to project proposals, Mr Palmer, Mineralogy and International Minerals chose not to adopt a consultative or cooperative approach. Instead, Mr Palmer and the Mineralogy parties submitted a proposal for approval in August 2012 with little engagement with, or prior warning to, the state. That proposal was for a project called the Balmoral South iron ore project—or BSIOP—which had an estimated lifespan of 28 years. It was a proposal to construct and operate infrastructure to produce and export 24 million tonnes per annum of iron ore concentrate. Under the proposal, it was proposed that the project would be developed in two phases. Phase 1 contemplated, under a licence granted to International Minerals by Mineralogy, the mining of one billion tonnes of iron ore from Mineralogy-owned tenements; and under phase 2 there would be a right to mine a further one billion tonnes. The BSIOP proposal aimed to commence in September 2012, with the first shipment in 2016. Mr Palmer, Mineralogy and International Minerals intended to sell the BSIOP to Chinese government–owned corporations, and, in fact, had even secured a letter of intent from the Industrial and Commercial Bank of China, one of China's largest banks, expressing willingness and interest in financing the project.

On 4 September 2012, just weeks after it had been submitted, the BSIOP proposal was rejected as invalid by Hon Colin Barnett. It was rejected because the proposal proposed to undertake works that were already approved to be undertaken pursuant to another project, which is under the same state agreement, and because the proposal failed to provide sufficient detail, clarity and firm commitments. The Department of State Development promptly wrote to Mineralogy and International Minerals identifying key issues to be addressed and recommended that a further version of the proposals be provided in draft form for further review. Mr Palmer was not happy with that ministerial decision, but he did not discuss the matter with the state, nor did he seek to amend his proposal to deal with what the then minister and his department considered to be the deficiencies. Instead, Mr Palmer, Mineralogy and International Minerals disputed that Hon Colin Barnett had the ability to reject the proposal. He did that by referring the matter to arbitration under the terms of the state agreement.

In 2013, while that arbitration was still on foot, Mineralogy and International Minerals submitted a further BSIOP. On 22 August 2013, Hon Colin Barnett, as Minister for State Development, wrote to Mineralogy and stated that this proposal had not met the state agreement's proposal pre-conditions and that the Department of State Development would write to identify the items that needed to be addressed. Soon after, the Department of State Development wrote to Mineralogy identifying the items that needed to be addressed. Mineralogy did not address these items or otherwise seek to progress this proposal.

That arbitration concerning Hon Colin Barnett's rejection of the August 2012 BSIOP proposal was heard by former High Court Judge Mr Michael McHugh, AC, QC, who handed down an award dated 20 May 2014. Mr McHugh found in favour of Mineralogy and International Minerals, declaring that while the BSIOP was a defective proposal, it was nonetheless a proposal that had to be considered by the minister in accordance with the terms of the state agreement; that is, the minister had no ability to simply treat the proposal as invalid. In another arbitration which is now underway, and which I will come back to—it is dealt with by this bill—Mr Palmer, Mineralogy and International Minerals have said that this rejection of the BSIOP proposal by Hon Colin Barnett was a breach of the state agreement for which they are entitled to damages, and they call it the "first damages breach". Members, this is a matter I will return to at a later point.

As a consequence of Mr McHugh's award, the August 2012 BSIOP proposal was considered further by Hon Colin Barnett, who was still the responsible minister. On 22 July 2014, he advised Mineralogy and International Minerals that the proposal would need to be altered and comply with 46 conditions. Those conditions

ranged from requiring Mineralogy and International Minerals to state that they would comply with various regulatory requirements, confirm they had access to adequate estimated ore reserves to sustain the proposed project and provide further technical plans and details. Again, Mr Palmer was not happy with that decision and now argues in the current arbitration that Hon Colin Barnett as minister, and therefore the state, further breached the obligations of the state agreement by imposing 46 conditions to giving his approval, and that this further breach also gives rise to a claim for damages. Mr Palmer, Mineralogy and International Minerals have termed this the "second damages breach". Importantly, Mr Palmer, Mineralogy and International Minerals did nothing in relation to the August 2012 BSIOP proposal for a number of years after 2014, and so in August 2017, they were notified that the state was treating the proposal as having lapsed.

Mr Palmer, Mineralogy and International Minerals now seek to claim damages against the state for the decisions of the former minister. In relation to the first damages claim, which is the claim arising from Hon Colin Barnett's September 2012 rejection of the August 2012 proposal, Mr Palmer, Mineralogy and International Minerals seek damages in the vicinity of $US7.68 billion, or $A10.72 billion using yesterday's exchange rate. All these figures I am providing are based on yesterday's exchange rate—that is, the rate from Monday, 10 August 2020.

Mr Palmer, Mineralogy and International Minerals are claiming further damages on top of that in the amount of $US8.9 billion, or $A11.37 billion, being the loss associated with being unable to sell any project required under the state agreement. Mr Palmer, Mineralogy and International Minerals claim a further $A37.24 million for the wasted expenditure they say was incurred because of the then minister's decision. Mr Palmer, Mineralogy and International Minerals also claim that they have lost the ability to claim royalties in the sum of $US233.7 million or $A326.18 million.

Interest from October 2012 is then claimed in the amount of $US3.71 billion or $A5.21 billion. In total, therefore, for the first damages claim, Mr Palmer, Mineralogy and International Minerals are claiming a total amount of $US19.84 billion, which, again, based on yesterday's exchange rate, amounts to $A27.66 billion. In addition, Mr Palmer, Mineralogy and International Minerals seek further damages for the second damages claim, which is the claim arising from the then minister's imposition in July 2014 of 46 conditions to approving the August 2012 proposal. The level of damages for the second damages claim is not yet quantified by Mr Palmer, Mineralogy and International Minerals; however, they seek interest from July 2014 on any amount awarded.

In addition to claiming damages for the first and second damages claim, Mr Palmer, Mineralogy and International Minerals also seek costs. The claim for costs is not yet quantified. Besides seeking damages and interest and costs arising from the first and second damages claims, Mr Palmer, Mineralogy and International Minerals seek a declaration that the 46 conditions imposed on the BSIOP proposal by Hon Colin Barnett on 22 July 2014 were not reasonable pursuant to the terms of the state agreement.

In summary, therefore, the claims that are being made against the state for breaches of the state agreement by the then minister amount to nearly $A30 billion, an amount that does not include any amount for the second damages claim. To put that in context, the total net debt of the state of Western Australia is in the order of $A35 billion to $A40 billion, and the budget of the state of Western Australia is approximately $A30 billion. To put it another way, if the cost of Mr Palmer's claim were shared equally amongst all Western Australians, it would cost every man, woman, child and baby in Western Australia more than $12 000; that is, each of the 2.5 million people living in Western Australia would pay Mr Palmer more than $12 000. Mr Palmer wants Western Australia to pay him $30 billion at a time when the state is in a state of emergency dealing with a global pandemic—a pandemic that Mr Palmer has stated is a "media beat-up"—and at a time when the people of Western Australia are most in need of our public money.

It is not in the interests of Western Australians to be exposed to a risk of having to pay Mr Palmer billions of dollars. The men, women and children of Western Australia need the members of both this chamber and the other place to protect them from claims of this nature and concentrate on economic recovery. In this regard, two weeks ago the McGowan government announced the $5.5 billion WA Recovery Plan to drive economic and social recovery across the state, and create a pipeline of jobs for Western Australians. Obviously, if the claimants were to succeed in their damages claim at a level anywhere close to the amount sought, this would have dire financial consequences for the state of Western Australia and Western Australians. Even if Mineralogy and International Minerals succeeded in a fraction of their damages claim, this would have serious financial consequences for the state of Western Australia and Western Australians. For example, the McGowan government's $5.5 billion WA Recovery Plan represents only 20 per cent of Mr Palmer's claim.

Successive governments, both Labor and Liberal, have been involved in the creation and administration of this state agreement. Both Labor and Liberal governments have found themselves dealing with Mr Palmer's various claims against the state. Members of this chamber and the other place now need to work together on the matter for the benefit of the people of Western Australia.

The damages claimed by Mr Palmer, Mineralogy and International Minerals arise because of the decisions made by Hon Colin Barnett when he was Premier. Although the McGowan government is not critical of those decisions, it has inherited the consequences of them. Having done so, the McGowan government, through the State Solicitor's Office, is vigorously defending the claim by Mr Palmer, Mineralogy and International Minerals. The vigorous nature of the defence can be seen in a number of steps that have been taken by the state in an attempt to defeat the claims. Firstly, in September 2019, the state argued that Mr McHugh's 2014 award was final, and that as no award for damages was made at that time, there was no ability for Mr Palmer, Mineralogy and International Minerals to pursue a separate claim against the state. Secondly, there was an inordinate and inexcusable delay on the part of Mineralogy and International Minerals in pursuing their claim for damages, for they had taken no steps to pursue the matter since Mr McHugh handed down his award in May 2014.

These arguments before the arbitrator, Mr McHugh, were unsuccessful, and he ordered that there had not been inexcusable delay and that Mineralogy and International Minerals were not foreclosed from recovering damages from the state as a consequence of Hon Colin Barnett's decision to treat the Balmoral South iron ore project proposal as invalid.

This state then sought leave to appeal the decision by Mr McHugh to the Supreme Court of Western Australia in one relevant respect—namely, that Mr McHugh had erred in deciding that his 2014 award had not finally determined any damages arising from the minister's failure to consider the BSIOP proposal because he thought it an invalid proposal. Mineralogy and International Minerals applied to have the state's appeal summarily dismissed on the basis that the state was unable to utilise the appeal and review regime of the now-repealed Commercial Arbitration Act 1985 and was limited to the more limited review regime under the Commercial Arbitration Act 2012. This application was heard by Hon Kenneth Martin, Justice of the Supreme Court of Western Australia, who handed down his decision on 28 February 2020. In his judgement, Mr Justice Martin agreed with Mineralogy and International Minerals' contention that the Commercial Arbitration Act 2012 applied and dismissed the state's appeal. As I have said, Mr Palmer, Mineralogy and International Minerals are now pressing ahead with their damages claims before Mr McHugh, as arbitrator, in the amount of nearly $A30 billion.

On 26 June 2020, Mr McHugh ordered that there be a hearing of the matter for 15 days commencing 30 November 2020 to enable him to consider his decision over the Christmas and New Year period, with a view to providing an award in the new year. Although very sound and respectable defences are available to the claim of Mr Palmer, Mineralogy and International Minerals, the state has been unsuccessful in the past in dealing with Mineralogy's claims relating to the August 2012 proposals, so a successful defence of the claim is not guaranteed. In addition, members, because the matter is being dealt with by arbitration, there are very limited opportunities to appeal any adverse decision. Notwithstanding the defences available to the state, the McGowan government is not prepared to risk the financial consequences to the state of an adverse arbitral award, and one in which the state of Western Australia and taxpayers could be exposed to billions of dollars. To do so would be fiscally irresponsible. Indeed, it would be fiscally irresponsible for members of both this chamber and the other place to risk a successful arbitral damages award in favour of Mr Palmer, Mineralogy and International Minerals. Consequently, the McGowan Government is taking the necessary steps to protect the state and the people of Western Australia from the rapacious nature of Mr Palmer, Mineralogy and International Minerals.

The bill is essentially divided into two aspects: one deals with disputed matters and the other with protected matters.

Beginning with the disputed matters aspect of the bill, clause 9 provides that the August 2012 and June 2013 BSIOP proposals will have no further contractual or other legal effect to the extent that they in fact have such effect. If Mineralogy and International Minerals wish to pursue the BSIOP, they can submit new proposals in accordance with the state agreement.

Clause 10 terminates any arbitration which the state, Mineralogy and International Minerals are party to and which concerns a disputed matter.

"Disputed matter" is a term used in the bill and is defined to include Hon Colin Barnett's 2012, 2013 and 2014 decisions relating to the BSIOP proposals and any conduct of the state connected with those decisions and the Balmoral South project more generally. Clause 10 also invalidates the two arbitral awards of Mr McHugh.

Clause 11 provides that the state, its officers and agents will not have any liability of any sort to any person in respect of the arbitrations or connected with a disputed matter; that is, it provides protection against the first and second damages claims and any future claims that might be made against the state in relation to the BSIOP proposal or the state's actions in relation to the Balmoral South project more generally. Clause 11 also provides that no proceedings can be brought against the state to the extent that they seek to establish such a liability against the state and that any such proceedings that are in progress and not completed are also terminated.

Clause 12 prevents any appeal or similar action against the conduct of the state that is connected with a disputed matter.

Clause 13 removes the application of the Freedom of Information Act and document discovery and production processes from documents connected with disputed matters, given that the capacity to bring claims in relation to these matters is removed by the bill.

Clauses 14 and 15 provide further protection for the state by creating a statutory obligation on Mineralogy, International Minerals and Mr Palmer and any person who brings, or has an interest in, proceedings connected with a disputed matter to indemnify the state against such proceedings or loss and liability to any person connected with a disputed matter.

Clause 16 provides that if proceedings connected with a disputed matter are brought against the commonwealth or create a liability for the commonwealth, the state can also enforce its statutory indemnity to protect the commonwealth or cover any loss the state may suffer as a consequence.

Clause 17 prevents a liability of the state connected with a disputed matter being paid or enforced through various means.

Turning now to the protected matters aspect of the bill, clause 18 protects the state from collateral litigation and claims by providing that protected matters do not have certain legal effects, and clause 19 protects the state, its officers and agents against any liability and proceedings that may arise connected with a protected matter.

"Protected matter" is another key term used in the bill and is defined to include the preparation of this bill, the enactment of the legislation and its operation, and the making and operation of subsidiary legislation under the act and other related matters. The government seeks to enact extensive and broad protections to protect the state, its officers and agents against collateral litigation.

Clause 19 to 25 of the bill are essentially the same provisions as clauses 11 to 17 but in respect of protected matters rather than disputed matters.

Clause 26 of the bill deals with some miscellaneous matters and clarifies the consequences of the bill in terminating the current arbitration, including in relation to costs and confidentiality.

Clause 27 provides that, going forward, the minister's consideration of proposals under the state agreement will not give rise to any capacity for damages or financial compensation to be awarded against the state.

Clause 28 protects persons who fall within the definition of "state authority" or "state agent", or those who previously fell within those definitions, by requiring the state to indemnify those persons against any proceedings connected with a disputed matter or protected matter.

Clause 29 provides a general regulation-making power and clause 30 enables the Governor to make orders to deal with various circumstances, including any matters that may not be adequately or appropriately dealt with by the bill by having regard to the purpose and subject matter of the bill. This includes orders that may improve the effectiveness of the statutory indemnities, including by creating security interests over any type of property of an indemnifying person.

The McGowan government accepts that the bill is unprecedented. It contains a number of provisions and measures that are not usual, but Mineralogy and Mr Palmer are not normal and these measures are needed to best protect the interests of the state and the community. Western Australian governments, from both sides of politics, have always refrained from interfering in the operation of state agreements by statute. This bill does not represent a change to that general and longstanding policy. This bill does not give rise to sovereign risk. Since the 1950s, the state has entered into over 70 state agreements and it currently has over 50 state agreements on foot. In the history of state agreements, no other state agreement proponent has sought to challenge a minister's decision about a proposal or taken the state to arbitration on any matter, let alone a minister's decision to reject or comment on a proposal that has been submitted. Therefore, this bill does not create a risk to other current state agreement parties or to future investors. Other state agreement parties and proponents deal properly and appropriately with the state in the terms of their proposals.

I also wish to make clear that this bill does not override the primary provisions and rights of Mineralogy and International Minerals under the state agreement. This bill affirms the terms of the state agreement and leaves open to Mineralogy and International Minerals the right to submit proposals for the Balmoral South iron ore project should they wish to do so. This bill will remove the capacity for Mr Palmer, Mineralogy and International Minerals to pursue litigation and damages claims regarding prior decisions of the then minister and the state more broadly, or damages for any future decisions of the minister on any new proposals submitted, or purportedly submitted, pursuant to the state agreement. In this regard, it is noteworthy that if the Mineralogy state agreement were statutory so that the decisions of the then minister were administrative—not dissimilar to ministerial decisions relating to the conferral of environmental approval for projects under the Environmental Protection Act 1986—there would be no capacity for damages to be sought.

Members, there are at least four reasons that this bill must pass urgently through Parliament. Firstly, as I have stated, the arbitrator, Mr McHugh, has ordered that a hearing take place commencing on 30 November 2020. A significant amount of time, resources and costs will necessarily be expended by the state, as well as by Mineralogy and International Minerals, ahead of that hearing. In the event that this bill passes, that additional time and cost will be saved. Secondly, the claims made by Mr Palmer are without precedent and outside the convention and practice of state agreements. Thirdly, if the state were to not do anything at this point and instead continued to defend the matter and awaited a decision from Mr McHugh, it is entirely possible—if not probable—that the decision would be handed down during the caretaker government period. Lastly, as I have already indicated, it would be fiscally irresponsible for this claim to continue and for the state and all Western Australians to be exposed to the risk, or even the possibility of a risk, of having to pay Mr Palmer, Mineralogy and International Minerals what might be tens of billions of dollars.

I trust that all members of this chamber and those of the other place will recognise the necessity for this bill. I trust also that members will likewise recognise that the alternative to this bill is to risk both the state and all the people of Western Australia being exposed to an award of damages in the billions of dollars—damages that Mr Palmer says have arisen because of his frustrated attempts to sell the Balmoral South iron ore project to a Chinese-controlled entity. Now, because he could not sell the project to an overseas company, he wants to claim billions of dollars from Western Australia, and he does so notwithstanding that the resources are still in the ground. The McGowan government will not expose the people of Western Australia to that risk, and, in this bill, it has instead taken decisive action to protect the state.

I commend the bill to the house.

Debate adjourned, on motion by **Mr D.A. Templeman (Leader of the House)**.