

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

EXPLANATORY MEMORANDUM

OVERVIEW OF THE BILL

The Iron Ore Processing (Mineralogy Pty. Ltd.) Agreement Amendment Bill 2020 amends the *Iron Ore Processing (Mineralogy Pty. Ltd.) Agreement Act 2002*.

PRELIMINARY

1 Short Title

Clause 1 provides that the Bill, once enacted, will be known as the *Iron Ore Processing (Mineralogy Pty. Ltd.) Agreement Amendment Act 2020*.

2 Commencement

Clause 2 provides that the Act will commence on the day on which it receives Royal Assent.

3 Act amended

Clause 3 provides that the Act amends the *Iron Ore Processing (Mineralogy Pty. Ltd.) Agreement Act 2002*.

4 Part 1 heading inserted

Clause 4 inserts a new heading (Part 1 — Preliminary) before section 1.

5 Part 2 heading inserted

Clause 5 inserts a new heading (Part 2 — Ratification) after section 2.

6 Section 3 amended

Clause 6 amends section 3 to refer to terms used in the Part, rather than the Act.

PROVISIONS RELATING TO BALMORAL SOUTH IRON ORE PROJECT AND CERTAIN OTHER MATTERS

7 Part 3 inserted

Clause 7 inserts a new Part 3 into the *Iron Ore Processing (Mineralogy Pty. Ltd.) Agreement Act 2002*.

Division 1 – Preliminary provisions

Division 1 of Part 3 contains preliminary provisions.

Proposed section 7 – Terms used

Proposed section 7 defines the terms used in Part 3, including the following key terms.

The term **Agreement** means the Iron Ore Processing (Mineralogy Pty. Ltd.) Agreement, a copy of which is set out in Schedule 1 of the Act, as varied from time to time in accordance with its provisions and as varied by the agreement set out in Schedule 2 of the Act.

The term **amending Act** means the *Iron Ore Processing (Mineralogy Pty. Ltd.) Agreement Amendment Act 2020*.

The term **Balmoral South Iron Ore Project** means the project known as the "Balmoral South Iron Ore Project" as proposed or described from time to time.

The term **civil wrong** includes (without limitation) the following –

- (a) a tort;
- (b) a breach of trust;
- (c) a breach of confidence;
- (d) a breach of a duty in equity;
- (e) a breach of a written law;
- (f) maladministration, misconduct or any other conduct that, under an Act or law, could be the subject of an adverse report, adverse finding, penalty or other sanction of a disciplinary, regulatory or other civil type.

The term **civil wrong** is intended to be broad, to expand the ordinary meaning of the term and, when used throughout the Act, to provide wide protection to the State.

The term **commencement** means the coming into operation of section 7 of the amending Act.

The term **connected with** means directly or indirectly, and wholly or partly –

- (i) in anticipation of; or

- (ii) preparatory to; or
- (iii) relating to; or
- (iv) caused by; or
- (v) arising out of; or
- (vi) resulting from; or
- (vii) in consequence of; or
- (viii) contributed to by; or
- (ix) connected with in any other way.

This definition encompasses a broad conception of "connected with". Paragraph (ix) clarifies that the term ***connected with*** is not limited in any way by the preceding paragraphs.

The term ***disputed matter*** means any of the following –

- (a) the Minister's refusal or purported refusal, on or around 4 September 2012 —
 - (i) to accept the first Balmoral South proposal as valid proposals; and
 - (ii) therefore to consider the first Balmoral South proposal for the purposes of clause 7 of the Agreement;
- (b) the Minister's omission or purported omission, in respect of the first Balmoral South proposal, to give notice to the Project Proponents under clause 7(2) of the Agreement within the 2-month period referred to in that clause;
- (c) the Minister's requirement or purported requirement, on or around 22 July 2014, that the Project Proponents make alterations to the first Balmoral South proposal and comply with various conditions precedent concerning the first Balmoral South proposal;
- (d) the Minister's refusal or purported refusal, on or around 22 August 2013 —
 - (i) to accept the second Balmoral South proposal as valid proposals; and
 - (ii) therefore to consider the second Balmoral South proposal for the purposes of clause 7 of the Agreement;
- (e) the Minister's omission or purported omission, in respect of the second Balmoral South proposal, to give notice to the Project Proponents under clause 7(2) of the Agreement within the 2-month period referred to in that clause;
- (f) to the extent not covered by paragraphs (a) to (e), any conduct of the State, or of a State agent, occurring or arising before commencement and connected with the Balmoral South Iron Ore Project;

- (g) any other conduct of the State, or of a State agent, occurring or arising before, on or after commencement and connected with a disputed matter referred to in any of paragraphs (a) to (f);
- (h) pre-agreement State conduct.

The term ***disputed matter*** is one of two central terms used in the Bill (the other being ***protected matter***). The definition of ***disputed matter*** is intended to be broad and to capture all conduct of the State, or a State agent, connected with the Balmoral South Iron Ore Project or connected with the making of an agreement set out in Schedule 1 or Schedule 2 of the Act.

The term ***first Balmoral South proposal*** means –

- (a) the Project Proponents’ proposals titled “Balmoral South Iron Ore Project; Project Proposal for the Western Australian Government” submitted, or purportedly submitted, under clause 6 of the Agreement on or around 8 August 2012; and
- (b) the addendum to those proposals titled “Balmoral South Iron Ore Project; Project Proposal addendum for the Western Australian Government” submitted, or purportedly submitted, under clause 6 of the Agreement on or around 22 August 2012.

The term ***liability***, except in the definition of ***non-WA liability*** –

- (a) means a liability, obligation or duty (whether actual, contingent, prospective or otherwise and whether incurred alone or jointly or jointly and severally or otherwise) arising —
 - (i) in contract or tort; or
 - (ii) under the law of restitution; or
 - (iii) in equity; or
 - (iv) under a written law; or
 - (v) under an order, award, ruling, finding or declaration made by an adjudicator; or
 - (vi) under a direction or other requirement (however described) made by a body or person appointed under a written law or under an arrangement; or
 - (vii) on any other basis;

and
- (b) includes (without limiting paragraph (a)) a liability, obligation or duty of the type described in paragraph (a) (whether liquidated or unliquidated) to pay any of the following —
 - (i) damages;
 - (ii) compensation;
 - (iii) a debt;

- (iv) an amount by way of restitution;
 - (v) interest;
 - (vi) legal costs;
 - (vii) any other type of amount; and
- (c) includes (without limiting paragraphs (a) and (b)) a non-WA liability.

The term **loss** –

- (a) means any loss, harm, damage, cost or expense (whether economic, non-economic or otherwise and whether actual, contingent, prospective or otherwise); and
- (b) includes (without limiting paragraph (a)) the following —
 - (i) loss, harm or damage to reputation;
 - (ii) wasted cost or expense;
 - (iii) loss of value of rights or other assets (including loss of value to nil);
 - (iv) loss of royalties or other income or profit;
 - (v) loss of funding or revenue;
 - (vi) loss of opportunity.

The terms **liability** and **loss** are intended to be broad and, when used throughout the Act, to provide wide protection to the State.

The term **Mr Palmer** –

- (a) means the individual who, on 10 August 2020, is named Clive Frederick Palmer and is a director of Mineralogy; and
- (b) includes any executor, administrator or trustee of the estate of the individual referred to in paragraph (a).

The term **non-WA liability** –

- (a) means a liability, obligation or duty (whether actual, contingent, prospective or otherwise and whether incurred alone or jointly or jointly and severally or otherwise) arising on any basis —
 - (i) under the law of the Commonwealth, another State or a Territory;
or
 - (ii) under the law of a country or territory, or of a part of a country or territory, outside Australia; or
 - (iii) under international law (including an international treaty or other agreement or instrument); or
 - (iv) otherwise outside Western Australia;
- and

- (b) includes (without limiting paragraph (a)) any liability, obligation or duty of the type described in paragraph (a) that corresponds to, or is substantially the same as, or is similar to, a liability, obligation or duty of a type described in the definition of liability in this subsection;

The term ***non-WA proceedings*** means anything that corresponds to, or is substantially the same as, or is similar to, any proceedings as defined and that takes place or occurs –

- (a) under the law of the Commonwealth, another State or a Territory; or
- (b) under the law of a country or territory, or of a part of a country or territory, outside Australia; or
- (c) under international law (including an international treaty or other agreement or instrument); or
- (d) outside Western Australia on any other basis.

The term ***Part 3 subsidiary legislation*** means regulations under proposed section 29 or an order under proposed section 30.

The term ***proceedings*** –

- (a) means any of the following —
 - (i) an action, suit, complaint, arbitration or other proceedings brought or made before or to an adjudicator or before or to any other body or person appointed under a written law or under an arrangement;
 - (ii) an application, claim, counterclaim or demand (however described) brought or made before or to an adjudicator or before any other body or person appointed under a written law or under an arrangement;
 - (iii) to the extent not covered by subparagraphs (i) and (ii), a disciplinary, regulatory or other civil investigation, inquiry or proceedings under an Act or law;
 - (iv) a complaint or allegation (however described) that leads to, or is capable of leading to, an investigation, inquiry or proceedings referred to in subparagraph (iii);

and

- (b) includes (without limiting paragraph (a)) proceedings (as defined in paragraph (a)) connected with any of the following —
 - (i) establishing, quantifying or enforcing a liability;
 - (ii) seeking a remedy by way of injunction, declaration, prohibition, mandamus or certiorari or seeking a remedy having the same effect as any of those remedies or otherwise seeking judicial review of any conduct;

- (iii) seeking discovery, provision, production, inspection or disclosure of a document or other thing;
- (iv) seeking recognition or enforcement of an arbitral award;
- (v) seeking any other type of remedy, relief, order, direction, award, ruling or finding (whether interim or permanent and whether procedural or substantive);

and

- (c) includes (without limiting paragraphs (a) and (b)) non-WA proceedings; and
- (d) includes (without limiting paragraphs (a) to (c)) proceedings (as defined in paragraphs (a) to (c)) brought, made or begun as part of, or otherwise in the course of, other proceedings (as so defined).

The term **proceedings** is intended to be broad and, when used throughout the Act, to provide wide protection to the State.

The term **Project Proponents** means Mineralogy and International Minerals.

The term **protected matter** means any of the following (whether occurring or arising before, on or after commencement) –

- (a) the consideration of courses of action for resolving, addressing or otherwise dealing with a disputed matter or liabilities or proceedings, or potential liabilities or proceedings, connected with a disputed matter;
- (b) the preparation of the Bill for the amending Act (including any drafts of that Bill);
- (c) any decision or recommendation to introduce that Bill into Parliament;
- (d) the introduction of that Bill into Parliament or that Bill's passage through Parliament (including any amendment of it during its passage);
- (e) the enactment or coming into operation of the amending Act;
- (f) the consideration of courses of action for resolving, addressing or otherwise dealing with matters or things to be, or potentially to be, the subject of Part 3 subsidiary legislation;
- (g) the preparation of any Part 3 subsidiary legislation (including any drafts of Part 3 subsidiary legislation);
- (h) any decision or recommendation to make any Part 3 subsidiary legislation;
- (i) the making, publication or coming into operation of any Part 3 subsidiary legislation;
- (j) the operation of this Part or any Part 3 subsidiary legislation;
- (k) any of the following connected with a protected matter referred to in any of paragraphs (a) to (j) —

- (i) any explanation, advice, consultation, discussion, communication, announcement, disclosure or statement;
- (ii) any omission to explain, advise, consult, discuss or communicate or to make an announcement, disclosure or statement;
- (iii) any other conduct;
- (l) any matter or thing connected with a protected matter referred to in any of paragraphs (a) to (k).

The term **protected matter** is one of two central terms used in the Bill (the other being **disputed matter**). The definition of **protected matter** is intended to be broad and to capture all conduct of the State, or a State agent, broadly connected with the drafting of the Bill, the enactment of the amending Act, and the making of Part 3 subsidiary legislation.

The term **relevant arbitration** means an arbitration –

- (a) that begins before commencement (whether or not it is completed before commencement); and
- (b) that concerns a disputed matter; and
- (c) to which the State and the Project Proponents are parties.

The term **relevant arbitration arrangement** means an agreement connected with a relevant arbitration that is made before commencement by the State, the Project Proponents and the arbitrator.

The term **relevant mediation arrangement** means an agreement for mediation connected with a relevant arbitration that is made before commencement by the State, the Project Proponents and the mediator.

The term **second Balmoral South proposal** means the Project Proponents' proposals titled "Balmoral South Iron Ore Project; Project Proposal for the Western Australian Government" submitted, or purportedly submitted, under clause 6 of the Agreement on or around 21 June 2013.

The term **State** includes (without limitation) the following –

- (a) the Crown in right of the State;
- (b) the Government of the State;
- (c) a State authority.

The term **State agent** means an agent, representative, advisor or contractor of the State (but, to avoid doubt, does not include, apart from the State, a party to the Agreement or Mr Palmer).

The term **State authority** means any of the following –

- (a) the Governor;
- (b) a Minister of the Crown in right of the State;
- (c) a department of the Public Service;
- (d) an agency, authority, instrumentality or other body (whether or not a body corporate) established or continued for a public purpose —
 - (i) under a written law; or
 - (ii) otherwise by the State;
- (e) to the extent not covered by paragraph (d), a government trading enterprise as defined in the *Infrastructure Western Australia Act 2019* section 3;
- (f) a person holding, or exercising the powers of, an office established or continued for a public purpose —
 - (i) under a written law; or
 - (ii) otherwise by the State;
- (g) a ministerial officer, or any other employee, as those terms are defined in the *Public Sector Management Act 1994* section 3(1);
- (h) a member, officer or employee of a State authority referred to in any of paragraphs (d) to (f);
- (i) a person who is appointed to any office or other position under a written law, or otherwise by the State, for a public purpose and who is not covered by paragraphs (a) to (h).

Subsection 7(4) provides that, in Part 3, references to proceedings being brought, made or begun against the State include (without limitation) the following –

- (a) proceedings connected with any of the following being brought, made or begun —
 - (i) establishing, quantifying or enforcing a liability of the State;
 - (ii) in relation to any conduct of the State, seeking a remedy by way of injunction, declaration, prohibition, mandamus or certiorari or seeking a remedy having the same effect as any of those remedies or otherwise seeking judicial review of the conduct;
 - (iii) seeking, by or from the State, discovery, provision, production, inspection or disclosure of a document or other thing;
 - (iv) seeking recognition or enforcement of an arbitral award made in a relevant arbitration;
 - (v) seeking any other type of remedy, relief, order, direction, award, ruling or finding (whether interim or permanent and whether procedural or substantive) that would be against, or unfavourable to, the State or otherwise require the State to do, or not to do, anything;
- (b) a disciplinary, regulatory or other civil investigation, inquiry or proceedings under an Act or law being brought, made or begun in relation to any conduct of the State.

Subsection 7(6) provides for the avoidance of doubt that a reference in Part 3 to the conduct of the State or of a State agent includes conduct of a State authority or State agent even though the State authority or State agent subsequently ceases to exist or the person who is the State authority or State agent subsequently ceases to be a State authority or State agent.

Proposed section 8 – Other preliminary provisions

Subsection (1) provides that Part 3 has effect despite Part 2 of the Act and any other Act or law.

Subsection (2) provides that, subject to subsection (1) and the rest of Part 3, the Agreement continues to operate in accordance with its provisions and as provided for under Part 2 of the Act.

Subsection (3) provides that the Agreement (or any part of the Agreement) is taken not to have been, and never to have been, repudiated by any conduct of the State, or of a State agent, occurring or arising on or before commencement.

Subsection (4) provides that a provision of Part 3 or a provision of any Part 3 subsidiary legislation does not apply to a matter or thing to the extent (if any) that is necessary to avoid the provision or any part of the provision applying to the matter or thing inconsistently with a law of the Commonwealth or not being valid for any other reason.

Subsection (5) provides that if, despite subsection (4), a provision of Part 3 or a part of a provision of Part 3 is not valid for any reason, the rest of Part 3 is to be regarded as divisible from, and capable of operating independently of, the provision or part of a provision that is not valid.

Subsections (4) and (5) are intended to preserve as much of the amending Act as possible if any provision or provisions of the amending Act are found to not be valid for any reason. In particular, this provision seeks to preserve Division 2 Subdivision 2 (which deals with protected matters) if Division 2 Subdivision 1 is found not to be valid.

Subsection (6) provides that Part 3 applies in relation to matters or things occurring or arising outside Western Australia so far as the legislative power of the Parliament permits.

Subsection (7) provides, for the avoidance of doubt, that the provisions of Part 3 and of any Part 3 subsidiary legislation contain matters that are substantive law and are not procedural in nature.

Subsection (7) is intended (without limitation) to be considered by an interstate court when applying the provisions of any written law which governs the recognition, or enforcement of, a domestic arbitration award in that State.

Division 2 – Main provisions

Division 2 contains the main provisions of Part 3. It is separated into three subdivisions.

Subdivision 1 deals with disputed matters.

Subdivision 2 deals with protected matters.

Subdivision 3 deals with the interaction between the provisions of Subdivision 1 and Subdivision 2.

Division 2 Subdivision 1 – Disputed matters

The purpose of Subdivision 1 is to provide broad protections to the State (and State agents) by terminating the existing claims by the Project Proponents and excluding any future liability or proceedings of any sort against the State (or State agents) in connection with the disputed matters.

Proposed section 9 – Proposals for Balmoral South Iron Ore Project

Subsection (1) provides that, to the extent that it would not otherwise be the case, the first Balmoral South Proposal and the second Balmoral South proposal have no, and cannot have, any contractual or other legal effect under the Agreement or otherwise.

Subsection (2) provides that, for the Balmoral South Iron Ore Project –

- (a) only proposals submitted under the Agreement on or after commencement can be proposals for the purposes of the Agreement; and
- (b) no document provided to the State, or of which the State is otherwise aware, before commencement can be proposals for the purposes of the Agreement.

Proposed section 10 – Relevant arbitrations and awards

The purpose of proposed section 10 is to:

- (a) terminate any arbitration that concerns a disputed matter between the State and the Project Proponents that is on foot prior to commencement, and any relevant arbitration arrangement and any relevant mediation agreement connected with that arbitration;
- (b) render the arbitral awards made on 20 May 2014 and 11 October 2019 in the course of such arbitrations of no legal effect; and
- (c) render the arbitration agreements under which such arbitral awards were made invalid to the extent that they authorised the making of the awards.

Subsection (1) provides that any relevant arbitration that is in progress or not otherwise completed immediately before commencement is terminated.

Subsection (2) provides that any relevant arbitration arrangement and any relevant mediation agreement connected with a relevant arbitration terminated under subsection (1) are terminated.

Subsection (3) provides that certain provisions of the *Commercial Arbitration Act 2012* continue to apply in relation to the relevant arbitration terminated under subsection (1).

Subsection (4) provides that the arbitral award made in a relevant arbitration on 20 May 2014 is of no effect and is taken never to have had any effect, and subsection (5) provides that the relevant arbitration agreement under which that arbitral award was made is not valid and is taken never to have been valid to the extent that it would underpin, confer jurisdiction to make, authorise or otherwise allow the making of that arbitral award.

Subsection (6) provides that the arbitral award made in a relevant arbitration on 11 October 2019 is of no effect and is taken never to have had any effect, and subsection (7) provides that the relevant arbitration agreement under which that arbitral award was made is not valid and is taken never to have been valid to the extent that it would underpin, confer jurisdiction to make, authorise or otherwise allow the making of that arbitral award.

Proposed section 11 – State to have no liability connected with disputed matters

Proposed section 11 provides that the State will not have any liability of any kind to any person that is or would be connected with a disputed matter.

Proposed section 11 provides protection against the claims made to date by the Project Proponents and any future claims which might be made by any person against the State in relation to the first and second Balmoral South proposals, or the State's actions in relation to the disputed matters more generally.

Proposed section 11 provides that no proceedings (broadly defined by proposed section 7) can be brought against the State that are in any way connected with a disputed matter, and that any such proceedings that are in progress are terminated.

Subsection (1) provides that, on and after commencement, the State has no liability to any person that is or would be:

- (a) in respect of any loss, or other matter or thing, that is the subject of a claim, order, finding or declaration made against the State in a relevant arbitration; or
- (b) in respect of any other loss, or other matter or thing, that is or is connected with a disputed matter; or

- (c) in any other way connected with a disputed matter.

Subsection (2) provides that any liability of the type described in subsection (1) that the State has to any person before commencement is extinguished.

Subsection (3) provides that, on and after commencement, no proceedings can be brought against the State to the extent that they are:

- (a) for the purpose of establishing, quantifying or enforcing a liability of the type described in subsection (1);
- (b) in respect of any loss, or other matter or thing, that is the subject of a claim, order, finding or declaration made against the State in a relevant arbitration;
- (c) in respect of any other loss, or other matter or thing, that is or is connected with a disputed matter; or
- (d) in any other way connected with a disputed matter.

Subsection (4) provides that any proceedings brought against the State of the type described in subsection (3) that are brought before commencement but are not completed before commencement or are brought and not completed before the end of the day on which the Amending Act receives the Royal Assent, or both, are terminated.

Subsections (5) and (6) provide that if any proceedings of the type described in subsection (3) are brought against the State after the beginning of the day on which the Bill is introduced into the Legislative Assembly and completed before the end of the day on which the amending Act receives the Royal Assent, any remedy, relief, direction, award or any other outcome of the proceedings is extinguished to the extent that it is unfavourable to the State or otherwise requires the State to do or not to do anything.

Subsections (7) and (8) provide that a person cannot seek payment from the State for any legal costs connected with any proceedings to which subsection (4) or (6) applies or connected with a relevant arbitration, and that the State has no liability for legal costs connected with any such proceedings or arbitration.

Subsection (9) provides that references to the State in proposed section 11 include a State agent, and a person who is a former State authority or a former State agent if the liability or proceedings in question are connected with the person's conduct or role while a State authority or State agent.

Proposed section 12 – No appeal or review in respect of disputed matters

The purpose of proposed section 12 is to protect the State and its agents from a broad range of actions in connection with the disputed matters.

Subsection (1) provides that any conduct of the State that is connected with a disputed matter cannot be appealed against, reviewed, challenged, quashed or called into question on any basis or be the subject of a remedy by way of injunction, declaration, prohibition, mandamus or certiorari or a remedy of the same effect.

Subsection (2) provides that the rules known as the rules of natural justice do not apply to any conduct of the State that is connected with a disputed matter.

Subsection (3) provides that the conduct of the State covered by subsections (1) and (2) includes conduct that occurs or arises before commencement.

Subsection (4) provides that any proceedings, to the extent that anything described in subsection (1) is being done or sought, brought before commencement but are not completed before commencement or are brought and not completed before the end of the day on which the Amending Act receives the Royal Assent, or both, are terminated.

Subsections (5) and (6) provide that, if any proceedings in which anything described in subsection (1) is done or sought are brought after the beginning of the day on which the Bill is introduced into the Legislative Assembly and completed before the end of the day on which the amending Act receives the Royal Assent, any remedy, relief, direction, award or any other outcome of the proceedings is extinguished to the extent that it is unfavourable to the State or otherwise requires the State to do or not to do anything.

Subsection (7) provides that a person cannot seek payment from the State for any legal costs connected with any proceedings to which subsection (4) or (6) applies, and that the State has no liability for legal costs connected with any such proceedings.

Subsection (8) provides that references to the State in proposed section 13 include a State agent, and subsection (9) provides that references to the State in subsections (6) and (7) include a person who is a former State authority or a former State agent if the proceedings in question are connected with the person's conduct or role while a State authority or State agent.

Proposed section 13 – Documents

Proposed section 13 removes the application of the *Freedom of Information Act 1992* and pre-action document discovery processes from documents connected with disputed matters given that the capacity to bring claims in relation to these matters is removed by the Bill.

Subsections (1) to (3) provide that Parts 2 and 4 of the *Freedom of Information Act 1992* do not apply to a document connected with a disputed matter despite any provision of that Act, and that any application under section 11 for access to a document connected with a disputed matter is extinguished.

Subsection (4) provides that, on and after commencement, no proceedings in which documents or other things connected with a disputed matter are sought from the State can be brought.

Subsection (5) provides that any proceedings of the type described in subsection (3) that are brought before commencement but are not completed before commencement or are brought and not completed before the end of the day on which the Amending Act receives the Royal Assent, or both, are terminated.

Subsections (6) and (7) provide that, if any proceedings of the type described in subsection (4) are brought after the beginning of the day on which the Bill is introduced into the Legislative Assembly and completed before the end of the day on which the amending Act receives the Royal Assent, any remedy, relief, direction, award or any other outcome of the proceedings is extinguished to the extent that it is unfavourable to the State or otherwise requires the State to do or not to do anything.

Subsection (8) provides that a person cannot seek payment from the State for any legal costs connected with any proceedings to which subsection (5) or (7) applies, and that the State has no liability for legal costs connected with any such proceedings.

Subsection (9) provides that references to the State in proposed section 13 include a State agent, and a person who is a former State authority or a former State agent if the proceedings in question are connected with the person's conduct or role while a State authority or State agent.

Proposed section 14 – Indemnity by Mineralogy, International Minerals, Mr Palmer and relevant transferees

The purpose of proposed section 14 is to provide greater protection for the State in respect of proceedings connected to a disputed matter by creating a statutory obligation on Mineralogy, International Minerals, Mr Palmer and their transferees to indemnify the State against:

- (a) protected proceedings;
- (b) any loss and liability to any person connected with a disputed matter;
- (c) legal costs of the State connected with protected proceedings; and
- (d) any loss connected with a stated intention of or a threat by a person to bring protected proceedings.

The indemnity extends to proceedings that are brought by Mineralogy, International Minerals, Mr Palmer and/or their transferees themselves, and liabilities the State has to 1 or more of those persons.

Proposed section 14 enables the State to enforce the indemnity by setting off the liability owed to it under the indemnity against any liability that the State has to

Mineralogy, International Minerals, Mr Palmer or their transferees, or by not paying or otherwise meeting the liability the State has to that person.

Subsection (1) defines terms used in proposed section 14.

Loss is defined as including a loss of or reduction in revenue or funding that would otherwise have been received by the State from the Commonwealth.

Non-WA right –

- (a) means a right, entitlement or interest (whether legal or beneficial or otherwise and whether actual, contingent, prospective or otherwise and whether held alone or jointly or jointly and severally or otherwise) arising on any basis –
 - (i) under the law of the Commonwealth, or the law of another State or a Territory; or
 - (ii) under the law of a country or territory, or of a part of a country or territory, outside Australia; or
 - (iii) under international law (including an international treaty or other agreement or instrument); or
 - (iv) otherwise outside Western Australia; and
- (b) includes (without limiting paragraph (a)) a right, entitlement or interest of the type described in paragraph (a) that corresponds to, or is substantially the same as, or is similar to, a right, entitlement or interest of a type described in paragraph (b) of the definition of *right* in subsection (1).

Protected proceedings means proceedings brought, made or begun, or purportedly brought, made or begun, and connected with a disputed matter.

Relevant person is defined by reference to proposed subsection 14(2) (see below).

Relevant transferee is defined by reference to proposed subsection 14(3) (see below).

Right, except in the definition of non-WA right in this subsection –

- (a) means a right, entitlement or interest (whether legal or beneficial and whether actual, contingent, prospective or otherwise and whether held alone or jointly or jointly and severally or otherwise) arising on any basis; and
- (b) includes (without limiting paragraph (a)) a right, entitlement or interest of the type described in paragraph (a) arising -
 - (i) in contract or tort; or
 - (ii) under the law of restitution; or
 - (iii) under a trust or otherwise in equity; or

- (iv) under a written law; or
- (v) under an order, award, ruling, finding or declaration made by an adjudicator; or
- (vi) under a direction or other requirement (however described) made by a body or person appointed under a written law or under an arrangement; and
- (c) includes (without limiting paragraphs (a) and (b)) a non-WA right; and
- (d) includes a part or share of a right, entitlement or interest of a type described in paragraphs (a) to (c).

Transfer, in relation to a right, means assign, transmit, vest or otherwise transfer the right whether by instrument, by operation of law or in any other way.

Subsection (2) provides that, for the purposes of proposed section 14, the following persons are a **relevant person**:

- (a) Mineralogy;
- (b) International Minerals;
- (c) Mr Palmer;
- (d) every relevant transferee;
- (e) every former relevant transferee.

Subsection (3) provides that, for the purposes of proposed section 14, a person (*person A*) is a **relevant transferee** if:

- (a) person A has a right in or respect of any protected proceedings (or the subject matter of any protected proceedings) or any liability of the State connected with a disputed matter (or the subject matter of such a liability); and
- (b) that right was transferred to person A from a relevant person or created in favour of person A out of a right held by a relevant person.

Subsection (4) provides that every relevant person must indemnify the State against:

- (a) any protected proceedings;
- (b) any loss or liability to any person connected with a disputed matter;
- (c) any legal costs of the State connected with any protected proceedings;
- (d) any liability of the State to pay any legal costs of any person connected with any protected proceedings; and
- (e) any loss connected with a stated intention of or a threat by any person to bring protected proceedings.

Subsection (5) provides that the liability of the relevant persons to indemnify the State under subsection (4) is joint and several, although subsection (6) limits the liability of a relevant transferee or former relevant transferee to matters in which the transferee has or had a right.

Subsection (7) provides that the State may enforce the indemnity under subsection (4) even if it has not made any payment or done anything to address the proceedings, liability or loss in question. It further provides that the State may enforce the indemnity by setting off the liability of the relevant persons under the indemnity against any liability that the State has to 1 or more of them.

Subsection (8) provides that the matters or things covered by the indemnity in subsection (4) include, without limitation, the following –

- (a) protected proceedings brought before commencement, or purportedly brought before commencement;
- (b) liabilities or losses that arise before commencement;
- (c) protected proceedings that are brought by 1 or more relevant persons themselves;
- (d) liabilities to 1 or more relevant persons themselves.

Subsection (9) provides that, to the extent the State is indemnified for a liability it owes to 1 or more relevant persons themselves, the State may enforce the indemnity by not paying or otherwise meeting the liability.

Proposed section 15 – Further indemnity

The purpose of proposed section 15 is to provide greater protection for the State in respect of proceedings connected to a disputed matter by creating a more confined statutory obligation on other persons (being a person defined by subsection (1) as a ***relevant person***) to indemnify the State.

Subsection (1) provides that, for the purposes of proposed section 15, the following persons are a ***relevant person***:

- (a) in relation to any protected proceedings, any person who has, or has had, a right in, or in respect of, the protected proceedings or their subject matter; and
- (b) in relation to a liability of the State connected with a disputed matter, any person who has, or has had, a right in, or in respect of, the liability or its subject matter.

Subsection (1) provides that *protected proceedings* and *right* have the same meaning as in section 14.

Subsection (2) provides that every relevant person in relation to any protected proceedings must indemnify, and must keep indemnified, the State against the protected proceedings (including legal costs of the State and any liability of the State to pay legal costs).

Subsection (3) provides that every relevant person in relation to a liability of the State connected with a disputed matter must indemnify, and must keep indemnified, the State against the liability.

Subsection (4) provides that, if there is more than 1 relevant person, the liability of the relevant persons to indemnify the State under subsections (2) and (3) is joint and several.

Subsection (5) provides that the State may enforce the indemnity under subsection (2) or (3) even if it has not made any payment or done anything to address the proceedings, liability or loss in question. It further provides that the State may enforce the indemnity by setting off the liability of the relevant persons under the indemnity against any liability that the State has to 1 or more of them.

Subsection (6) provides that the protected proceedings covered by the indemnity in subsection (2) include, without limitation, the following –

- (a) protected proceedings brought before commencement, or purportedly brought before commencement;
- (b) protected proceedings that are brought by 1 or more relevant persons themselves.

Subsection (7) provides that the liabilities covered by the indemnity in subsection (1) include, without limitation, the following –

- (a) liabilities that arise before commencement;
- (b) liabilities to 1 or more relevant persons themselves.

Subsection (8) provides that, in relation to a liability of the type referred to in subsection (7)(b), the State may enforce the indemnity under subsection (3) by not paying, or otherwise meeting or performing, the liability.

Proposed section 16 – Matters relating to Commonwealth

The purpose of proposed section 16 is to provide further protection to the State by creating a statutory obligation on Mineralogy, International Minerals, Mr Palmer and their transferees to indemnify the State if proceedings are brought against the Commonwealth or the Commonwealth incurs a liability to any person, or a loss, and the proceedings, liability or loss are connected with a disputed matter.

Without limitation, this provision (with proposed section 23) seeks to protect Western Australia in the event that a foreign company with a connection to Mineralogy or International Minerals brings an investor-state dispute settlement claim against the Commonwealth under a free trade agreement.

Subsection (1) defines terms used in proposed section 16.

Subsections (2) and (3) provide that if proceedings are brought against the Commonwealth or the Commonwealth incurs a liability to any person or a loss, and the proceedings, liability or loss are connected with a disputed matter, each indemnity under proposed section 14(4) or 15(2) or (3) applies as if the proceedings were brought against the State or the liability or loss were incurred by the State, and the State may enforce each indemnity accordingly.

Subsection (4) provides that, for the avoidance of doubt:

- (a) nothing in subsection (3) makes the State liable to indemnify the Commonwealth against the proceedings, liability or loss nor otherwise affects any liability of the State to the Commonwealth; and
- (b) subsection (3) applies even if the State has no liability to indemnify the Commonwealth against the proceedings, liability or loss.

Subsection (5) provides that the State may assign to the Commonwealth the State's right to receive an amount owed to the State or any other right the State has under an indemnity (whether by virtue of proposed section 16 or otherwise).

Proposed section 17 – Further provisions about liability of State

Proposed section 17 provides various additional measures to protect the State. They include that no amount can be charged to, or paid out of, the Consolidated Account to meet a liability of the State connected with a disputed matter, no amount can be borrowed by or on behalf of the Crown in right of the State to meet the liability, no asset, right or entitlement of the State (which, under subsection (5) includes State agents, former State authorities, and former State agents) may be taken or used to enforce such a liability, and no execution or other process can be issued out of any court against the State in relation such a liability.

Division 2 Subdivision 2 – Protected matters

Subdivision 2 adopts a cautious approach by adopting broad protective provisions with the purpose of excluding a wide range of proceedings from being initiated against the State or State agents in response to the introduction of the Bill or the enactment of the amending Act.

Subdivision 2 largely mirrors Subdivision 1, with some modifications.

Proposed section 18 – Protected matters not to have certain effects and related provisions

Subsection (1) provides that protected matters do not have the effects specified in that subsection.

Subsection (2) provides that if a protected matter has an effect described in subsection (1) before commencement, the protected matter is taken to never have had that effect.

Subsection (3) further provides that protected matter includes a protected matter combined with another matter or thing; and a matter or thing connected with a protected matter.

Subsection (4) provides that references to the State in proposed subsection (1) include a State agent, and a person who is a former State authority or a former State agent if the effect of the protected matter would be connected with the person's conduct or role while a State authority or State agent.

Subsection (5) provides that no document or other thing, and no oral testimony, connected with a protected matter is admissible in evidence or can otherwise be relied upon or used in any proceedings in a way that is against, or against the interests of State and State agent.

Subsection (6) provides that no document or other thing connected with a protected matter can be required to be provided or disclosed in any proceedings or otherwise under a written law.

Subsection (7) provides that no person is compellable or can be required to provide or disclose a document or other thing connected with a protected matter, answer any question or provide information connected with a protected matter, or give any other type of testimony or evidence connected with a protected matter, in any proceedings or otherwise under a written law.

Subsection (8) provides that subsections (5) to (7) do not limit any other basis on which a person is not compellable, or can refuse, to do anything referred to in those subsections.

Proposed section 19 – State to have no liability connected with protected matters

Proposed section 19 provides that the State will not have any liability of any kind to any person that is or would be connected with a protected matter.

Proposed section 19 provides protection against claims that may be made in response to the introduction of the Bill or the enactment of the Amending Act.

Proposed section 19 also provides that no proceedings (broadly defined by proposed section 7) can be brought against the State that are in any way connected with a protected matter, and that any such proceedings that are in progress are terminated.

Subsection (1) provides that on and after commencement, the State has no liability to any person that is or would be:

- (a) in respect of any loss, or matter or thing, that is or is connected with a protected matter; or
- (b) in any other way connected with a protected matter.

Subsection (2) provides that any liability of the type described in subsection (1) that the State has to any person before commencement is extinguished.

Subsection (3) provides that on and after commencement, no proceedings can be brought against the State to the extent that they are:

- (a) for the purpose of establishing, quantifying or enforcing a liability of the type described in subsection (1);
- (b) in respect of any other loss, or other matter or thing, that is or is connected with a protected matter; or
- (c) in any other way connected with a protected matter.

Subsection (4) provides that any proceedings of the type described in subsection (3) that are brought before commencement but are not completed before commencement or are brought and not completed before the end of the day on which the Amending Act receives the Royal Assent, or both, are terminated.

Subsections (5) and (6) provide that if any proceedings of the type described in subsection (3) are brought against the State after the beginning of the day on which the Bill is introduced into the Legislative Assembly and completed before the end of the day on which the amending Act receives the Royal Assent, any remedy, relief, direction, award or any other outcome of the proceedings is extinguished to the extent that it is unfavourable to the State or otherwise requires the State to do or not to do anything.

The purpose of subsections (5) and (6) is to extinguish the outcome of any proceedings brought against the State (to the extent the outcome is against, unfavourable to the State, or otherwise requires the State to do, or not do anything) at or after the time the Bill is introduced into Parliament.

Subsection (7) provides that a person cannot seek payment from the State for any legal costs connected with any proceedings to which subsection (4) or (6) applies, and that the State has no liability for legal costs connected with any such proceedings.

Subsection (8) provides that references to the State in proposed section 18 include a State agent, and a person who is a former State authority or a former State agent if the liability or proceedings in question are connected with the person's conduct or role while a State authority or State agent.

Proposed section 20 – No appeal or review or criminal liability in respect of protected matters

Proposed section 20 is a mirror provision to proposed section 12, except for the additional protection that subsection (8) provides to the effect that any conduct of the State that is connected with a protected matter does not constitute an offence and is taken never to have constituted an offence.

For clarity, the Bill does not suggest that anything done by a State authority or agent connected with a protected matter would give rise to an offence if not for subsection (8). However, subsection (8) seeks to protect State authorities and agents from complaints that the Project Proponents, or any other person, may make.

Proposed section 21 – Documents

Proposed section 21 is a mirror provision to proposed section 13.

Proposed section 22 – Indemnity by Mineralogy, International Minerals, Mr Palmer and relevant transferees

Proposed section 22 is a mirror provision to proposed section 14.

Proposed section 23 – Further indemnity

Proposed section 23 is a mirror provision to proposed section 15.

Proposed section 24 – Matters relating to Commonwealth

Proposed section 24 is a mirror provision to proposed section 16.

Proposed section 25 – Further provisions about liability of State

Proposed section 25 is a mirror provision to proposed section 17.

Division 2 Subdivision 3 – Interaction between provisions of Subdivisions 1 and 2

Proposed section 26 - Interaction

Subsection (2) provides that, subject to the rest of section 24, an applicable provision (defined by subsection (1) as a provision of Subdivision 1 or Subdivision 2) does not limit any other applicable provision.

Subsection (3) provides that, despite any applicable provision, the State must pay specified fees and expenses to the arbitrator in respect of a terminated arbitration arrangement (defined by subsection (1) as an arbitration arrangement terminated under section 10(2)).

Subsection (4) provides that no applicable provision affects a liability that the State has to any person under an order of a court made before commencement to pay any

of the person's legal costs connected with any proceedings before the court that are completed before commencement.

Subsection (5) provides that subsection (4) does not apply to proceedings to which subsection 11(6), 12(6), 13(7), 19(6), 20(6) or 21(7) applies.

Subsection (6) provides that no applicable provision affects the jurisdiction of a court to grant relief for jurisdictional error.

Subsection (7) provides that the reference in section 18(1)(a) to the commission of a civil wrong by the State includes (without limitation) a breach by the State of a provision of the *Commercial Arbitration Act 2012* that continues to apply under section 10(3).

Division 3 – Other provisions

Division 3 Subdivision 1 – Further provisions about liability and indemnity

The purpose of Subdivision 1 is to protect the State (and State agents) from similar claims being brought in future under the Agreement by excluding any liability of the State for conduct of the State or a State agent under clauses 7 and 8 of the Agreement.

Proposed section 27 – Consideration of proposals

Proposed section 27 provides protection to the State against any future claims which might be made by any person in relation to the Minister's consideration of a proposal or purported proposal under the Agreement.

Proposed section 27 provides that the State has no liability to any person to pay damages, compensation or any other type of amount connected with any of the following occurring at or after introduction time:

- (a) the Minister's consideration of, or the Minister's omission to consider, any proposals or purported proposals under clause 7 or 8 of the Agreement; and
- (b) any other conduct of the State or a State agent under or in relation to clause 7 or 8 of the Agreement.

Proposed section 28 – Indemnity for State authorities and State agents

This provision indemnifies State authorities and State agents against proceedings brought against them in connection with a disputed matter or protected matter, including any legal costs connected to the proceedings.

Subsections (1) and (2) provide that, if proceedings connected with a disputed matter are brought against a person who is a State authority or a State agent, or a former State authority or former State agent in circumstances where the proceedings are connected to the person's conduct in that role (the *respondent*), the State must

indemnify the respondent against the proceedings and pay the respondent's legal costs connected with the proceedings if requested to do so.

Subsection (3) provides that, if the respondent makes such a request, the respondent must allow the State to conduct the respondent's defence or response to the proceedings and comply with any directions given by the State in that regard.

Subsection (4) provides that the State must indemnify the respondent against any loss connected with a stated intention of, or a threat by, any person to bring, make or begin proceedings connected with a disputed matter against the respondent.

Subsections (5), (6) and (7) apply to protected matters and are mirror provisions to subsections (2), (3) and (4).

Subsections (8) to (11) deal with miscellaneous matters.

Division 3 Subdivision 2 – Subsidiary legislation

Proposed section 29 – Regulations

Proposed section 29 provides that the Governor may make regulations prescribing any matters that are necessary or convenient to be prescribed for giving effect to Part 3.

Proposed section 30 – Orders

The purpose of this provision is to provide a broad, but not unlimited, power to the Governor to (on the recommendation of the Minister) amend Part 3 or introduce new provisions to address specified circumstances and thereby further protect the State and State Agents from action by Mineralogy, International Minerals, Mr Palmer or other persons. The Governor may use this power to amend a provision or provisions of Part 3, or to introduce a new provision or provisions.

Subsection (1) provides that subsection (2) applies if the Minister is of the opinion, having regard to the purposes and subject matter of this Part, that 1 or more the circumstances specified at subsection (1)(a) to (e) exist.

Subsection (2) provides that the Governor may, on the Minister's recommendation, by order amend Part 3 to address the circumstances, make any other provision necessary or convenient to address the circumstances, or both.

Subsection (3) provides that the matters or things in respect of which an order can be made under this section include matters or things occurring or arising before commencement.

Subsection (4) provides that an order under this section is subsidiary legislation for the purposes of the *Interpretation Act 1984*.

Proposed section 31 – Supplementary provision

Paragraph (a) provides that Part 3 subsidiary legislation may be expressed to have effect despite the Agreement, Part 2, Part 3 or any other Act or law.

Paragraph (b) provides that Part 3 subsidiary legislation may provide that a specified provision of the Agreement or a written law does not apply, or applies with specified modifications, to or in relation to any matter or thing.

Paragraph (c) provides that Part 3 subsidiary legislation may be expressed to take effect before the day on which the legislation is published in the *Gazette*, but not earlier than commencement.