

State Agreements: summary and references

Mining and Resources Law Update (Legalwise, Perth, 8 March 2023)

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[law current as at 1 March 2023]

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Western Australia – State of [agreement] Excitement

- [1] A State Agreement is the legislative approval of a contract between the executive government and a company to build/operate a specified development. Most State Agreements comprise a long contract between the company and the executive (eg. Minister, Premier) which is scheduled to a short covering statute documenting the legislature’s approval.

- [2] Western Australia, of anywhere in world, makes the most use of State Agreements in regulating mining and resources projects and associated infrastructure.¹ In WA, over 60 extractives projects operate under State Agreements, which is about 80% (value) of minerals & petroleum produced in WA.² It is also the regulatory format of South Australia's *Olympic Dam* operations,³ Northern Territory's *McArthur River Mine*,⁴ Queensland's *Mt Isa Mines*,⁵ and many other operations in Australia and overseas.⁶ The State Agreement structure is also in many areas outside mining and resources, including: land & industrial developments,⁷ inter-governmental agreements,⁸ entertainment & shopping complexes⁹ and even one agreement with Indigenous groups.¹⁰ WA is the only Australian state with a statute specifically for these legal structures.¹¹
- [3] Many legal disputes and court cases involve State Agreements, ranging well beyond traditional 'mining and resources law', eg:
- environmental protest obstructing work, criminal law;¹²
 - parliamentary power to cancel rights;¹³
 - effect on native title rights, interaction of common law and statute;¹⁴
 - relation between historic and current mining statutes;¹⁵
 - control of port or rail infrastructure, access by third parties & competition law¹⁶
 - tax and land rating (including arrangements between joint venturers¹⁷ and Ministerial powers¹⁸);
 - executive government preferencing of established operators;¹⁹ and
 - company entitlement to remove resources, and third party rights to contest.²⁰

¹ Horsley 2013, 284.

² Barnett 2014, 13.

³ *Olympic Dam Agreement* (1982).

⁴ *McArthur River Agreement* (1992).

⁵ *Mt Isa Mines Agreement* (1985).

⁶ Southalan & o'rs 2015, [13]-[14].

⁷ eg. *Albany Plantation Agreement* (1993), *Cockburn Cement Agreement* (1971), *Dampier Salt Agreement* (1967), *Ord Hydro Agreement* (1994), *Alumina Refinery Agreement* (1961).

⁸ eg. *Commonwealth - State Financial Relations Agreement* (1927).

⁹ eg. *Burswood Agreement* (1985), *Morley Shopping Centre Agreement* (1992).

¹⁰ *Browse Agreement* (2012).

¹¹ *Government Agreements Act 1979* (WA).

¹² eg. *Margetts -v- Campbell-Foulkes* [1979] WASC 250; *Buzzacott -v- Sustainability Minister* [2013] FCAFC 111.

¹³ eg. *Comalco -v- Atit Gen* [1976] Qd R 231; *Mineralogy P/L -v- WA* [2021] HCA 30.

¹⁴ eg. *WA -v- Brown* [2014] HCA 8.

¹⁵ eg. *WA -v- Graham* [2016] FCAFC 47.

¹⁶ eg. *Mineralogy P/L -v- Sino Iron* [2017] FCAFC 55; eg. *Pilbara Infrastructure -v- ACT* [2012] HCA 36.

¹⁷ eg. *Hancock Prospecting -v- Wright Prospecting* [2012] WASCA 216.

¹⁸ eg. *Pastoral Management -v- Local Gov't Minister* [2014] WASC 378.

¹⁹ eg. *Re: Minister; ex p Cazaly Iron* [2007] WASCA 175.

²⁰ eg. *Buurabalayji Thalanyji -v- Onslow Salt* [2017] WASC 19; *Buurabalayji Thalanyji -v- Onslow Salt* [2020] FCA 1717.

- [4] State Agreements are less frequent these days for new resources projects.²¹ But there are many large, existing projects operating under State Agreements which are structured to regulate each operation for its entire life. State Agreement regimes regulate 98% of current iron ore mining in the Pilbara.²² The WA Government agency which administers State Agreements (the Department of Jobs, Tourism, Science and Innovation or 'JTSI') indicates it has 64 current State Agreements, including the following.

Extract from List of State Agreements in WA²³

Alumina

Alumina Refinery Agreement Act 1961
Alumina Refinery (Wagerup) Agreement and
Acts Amendment Act 1978

Charcoal iron and steel

Wundowie Charcoal Iron Industry Sale
Agreement Act 1974

Coal

Collie Coal (Griffin) Agreement Act 1979
Collie Coal (Western Collieries) Agreement Act
1979

Copper

Western Mining Corporation Limited (Throssell
Range) Agreement Act 1985

Diamonds

Diamond (Argyle Diamond Mines Joint
Venture) Agreement Act 1981

Energy

Goldfields Gas Pipeline Agreement Act 1994
Ord River Hydro Energy Project Agreement Act
1994

Gas

North West Gas Development (Woodside)
Agreement Act 1979
Barrow Island Act 2003 (which incorporates the
Gorgon Gas Processing and Infrastructure
Project Agreement)

Iron ore and steel

Iron Ore Agreements Legislation (Amendment,
Termination and Repeals) Act 2011
Iron Ore (FMG Chichester Pty Ltd) Agreement
Act 2006
Iron Ore (Hamersley Range) Agreement Act
1963
Iron Ore (Mount Newman) Agreement Act 1964
Iron Ore Processing (Mineralogy Pty Ltd)
Agreement Act 2002

Mineral sands

Mineral Sands (Eneabba) Agreement Act 1975
Mineral Sands (Beenup) Agreement Act 1995

Miscellaneous

Railway (BBI Rail Aus Pty Ltd) Agreement Act
2017
Silicon (Kemerton) Agreement Act 1987

Nickel

Nickel (Agnew) Agreement Act 1974
Poseidon Nickel Agreement Act 1971

Oil

Oil Refinery (Kwinana) Agreement Act 1952

Salt

Dampier Solar Salt Industry Agreement Act 1967
Onslow Solar Salt Agreement Act 1992

Uranium

Uranium (Yeelirrie) Agreement Act 1978

'State Agreements and the Famous Five' ways of regulating resources operations

- [5] A State Agreement is just one way to regulate a large resources project.²⁴ Four other ways which are/have been used are:

(1) direct government involvement,

²¹ AUS Gov 2020, 110. In WA, the most recent new (as opposed to amendment of existing) State Agreement for a *mining* project is the *FMG Agreement* (2005). Recent State Agreements include *Canning Basin Agreement* (2012), *BBI Rail Agreement* (2017), and *Roy Hill Infrastructure Agreement* (2010). Trends and use also summarised in Reinmuth & o'rs 2020.

²² Brown 2022, 8.

²³ WA Gov 2020b. Checked as at 1 March 2023, and no more recent information.

²⁴ Other options are summarised in AUS Gov 2013, 71 & 75.

- (2) project-specific legislation,
- (3) through contracts without parliamentary ratification, and
- (4) through general law applicable in the jurisdiction.
- [6] The ‘ideal’ objective regulation is general law (4)²⁵ but that is not always achievable. These days, (1) & (3) are rare, and not feasible for mining in Australia because management of public land and resources must be by parliamentary law, and not executive prerogative.²⁶ A State Agreement enables government and company to structure regulation for the operation where existing law is absent or inappropriate.²⁷ There are varying attitudes to the role of State Agreements in WA’s resources regulation.²⁸
- [7] The WA Government has indicated it will consider using a State Agreement in the following circumstances.
- The Minister for State Development will consider if a particular development needs a State Agreement and advise the proponents accordingly. Some of the criteria used in determining this need include:*
- *matters that cannot be dealt with under the laws of the land e.g. private rail, local content, domestic gas reservation*
 - *the lifespan of the project*
 - *the requirement for long-term certainty for the proponents*
 - *the existence of extensive or complex land tenure issues*
 - *whether the project is located in a relatively remote area of WA, thus requiring significant infrastructure development, such as rail networks*
 - *significance of the project to our economic development.*²⁹
- [8] State Agreements, in resources projects, usually provide a structure for the operations to be proposed and approved in stages, known as the ‘proposals procedure’.³⁰ This involves the company first submitting a proposal, which the government then considers/requests revision and, when the government has approved the proposal, the company is then *obligated* to implement that approved proposal.³¹
- [9] The State Agreement specifies the proposals to be submitted by the company, for example:³²
- provide a feasibility study of \$A for whole operation;

²⁵ OECD 2020, 1; Cameron & Stanley 2017, 61-62 & 88-89; Southalan & o’rs 2015, [6]-[9]. Australia’s Productivity Commission has observed ‘Well coordinated approaches within jurisdictions negate the value of State Agreements as a mechanism for facilitating major project approvals’: AUS Gov 2020, 191.

²⁶ eg. *Forrest & Forrest P/L -v- Wilson* [2017] HCA 30, [65] & [69].

²⁷ eg. *Commissioner State Revenue -v- OZ Minerals* [2013] WASCA 239, [179].

²⁸ Three extracts at the end of this paper, see *Annex 2: Three perspectives on State Agreements* (p20 below).

²⁹ WA Gov 2020d.

³⁰ Hunt & o’rs 2015, 16; eg. *Commissioner State Revenue -v- OZ Minerals* [2013] WASCA 239, [180]-[183].

³¹ *Mineralogy P/L -v- Sino Iron* [2017] FCAFC 55, [229] & [232].

³² Summarised from Southalan & o’rs 2015, [8].

- submit a mine-plan for a mine of B magnitude, and then constructing that;
- operate a mine to extract C tons/year;
- provide mining infrastructure to process/transport D amount;
- ensure social infrastructure for E people; and/or
- have environmental management to ensure F outcomes.

[10] The ‘usual’ State Agreement content has changed over time.

- (a) Earlier versions gave extensive land with little control over operations (similar to other forms of mining regulation at that time) but contemporary State Agreements have greater attention to community impacts and lesser exemptions from general laws.³³ A 2022 study characterised three different ‘eras’ of State Agreement in WA’s iron ore regulation.

The scope of each category of Pilbara agreement terms was affected by the political and social mores of the time. Broadly, the 1960s agreements conferred extensive rights and concessions in exchange for proponents’ obligation to develop a steel industry, the 1970s agreements reflect the era’s social movement and the public’s expectations regarding the government assuming responsibility for environmental protection, and the 1990s agreements illustrate a winding back of the proponents’ rights and concessions as it became clear a State steel industry was unlikely to eventuate.

- (b) In 2005, South Australia’s *Olympic Dam Agreement*³⁴ was described as the State Agreement’s ‘modern paradigm’.³⁵ More recent developments in WA have seen increased requirements for local industry and community development, through a planning and reporting structure.³⁶

[11] The main function of State Agreements in the mining and resources area is the ‘proposals procedure’ described above (ie. a framework for the proposal and approval of construction and operation). In addition to the ‘proposals procedure’, common provisions in many State Agreements include the following (with footnotes referencing examples from the most recent WA State Agreement).

- (a) **government obligations** (including introducing bill to Parliament, grant specified rights/permits);³⁷
- (b) **financial provisions** (eg. altering duties, royalties from norm);³⁸

³³ Southalan & o’rs 2015, [17]. This is consistent with contemporary ‘best practice’ of mining regulation, which encourages balancing of impacts and benefits across mine-life, eg. NRG1 2014; Cameron & Stanley 2017.

³⁴ *Olympic Dam Agreement* (1982).

³⁵ Fitzgerald 2005, 687.

³⁶ eg. *Canning Basin Agreement* (2012), cl 6 & 7; and these frameworks have also been added to earlier State agreements eg. *Iron Ore Agreements Legislation Amendment Act 2011 (WA)*. The increased application of community development plans and local participation plans is summarised in Reinmuth & o’rs 2020.

³⁷ eg. *BBI Rail Agreement* (2017), clauses 3 (introduce Bill to parliament), 14 & schedule (grant of titles).

³⁸ eg. *BBI Rail Agreement* (2017), cl 20 (protection from discriminatory taxes)

- (c) **procedural matters** (eg. assignment, dispute resolution, force majeure, termination);³⁹
- (d) **land & infrastructure** (access & use, existing and future);⁴⁰
- (e) **relations with existing law** (incl potential exemptions/exclusions);⁴¹
- (f) **local content** (use or preferencing of local services, labour or materials)⁴² - it has been noted, however, that 'local' has often been understood (and mandated) only meaning from the State, rather than necessarily from the area and communities next to the resources' operation.⁴³

[12] The autonomy which State Agreements provided in previous decades has diminished in contemporary times.

- (a) State Agreement operations are subject to increasing regulation of particular aspects by structures outside WA, including Commonwealth laws (eg. environmental biodiversity, native title, Indigenous heritage) and international law (eg. international investment law, anti-corruption measures, human rights).⁴⁴
- (b) Western Australia also has more extensive procedures for making regulation, creating a different context within which any new State Agreement is made (eg. regulatory impact assessment⁴⁵) and also any decision-making and processing by government agencies (eg. application of freedom of information⁴⁶ and regulator transparency policies⁴⁷).

[13] International human rights mechanisms and standards also provide increasing responsibilities on companies regardless of the law of the specific jurisdiction.⁴⁸

- (a) International procedures have identified state/company failures where the domestic laws or engagement was inadequate.⁴⁹
- (b) International procedures can, however, also find that the relevant domestic law and engagement process (around rights) was appropriate, and reject claims that a government/company contravened international standards.⁵⁰

³⁹ eg. *BBi Rail Agreement* (2017), clauses 29 & 30.

⁴⁰ eg. *BBi Rail Agreement* (2017), clauses 8 & 15 (existing infrastructure), 16 (new infrastructure), 21 (government power to resume land for project).

⁴¹ eg. *BBi Rail Agreement* (2017), clauses 22 (controlling local government powers), 24 (state government powers).

⁴² eg. *BBi Rail Agreement* (2017), clauses 9-11.

⁴³ AUS Gov 2020, 304.

⁴⁴ Southalan & Fardin 2019, [6]; see also expectations of 'durable extractives contracts' in OECD 2020.

⁴⁵ WA Gov 2020a.

⁴⁶ Applied in a State Agreement context in *McGowan -v- Minister for Regional* [2011] WAICmr 2 (politician FOI request for documents concerning director and a company which held a State Agreement).

⁴⁷ eg. WA Gov 2020e.

⁴⁸ Southalan 2016.

⁴⁹ eg. *CERD dec 2(54) AUS* (1999) (parts of 1998 native title amendments); NOR NCP 2011 (domestic law certification regarding consultation was insufficient).

⁵⁰ eg. *Länsman -v- FIN* (UN doc CCPR/C/52/D/511/1992) (quarrying impact on reindeer herding); *Mabuika -v- NZL* UN doc CCPR/C/70/D/547/1993 (fishing permits and indigenous rights); NOR NCP 2016, (the laws and engagement regarding impact assessment were sufficient); AusNCP 2021 (complaints regarding dust impacts in Port Hedland).

- (c) Many human rights *can* be limited through parliamentary laws, but at an international level this is not recognised unless there has been careful parliamentary / judicial review of the necessity of limitations.⁵¹

[14] State Agreements present some anomalies in mining regulation *within* Western Australia. The Auditor General, in various reports,⁵² has examined the operation of State Agreements, noting some benefits which have arisen through State Agreement operations, but also some ongoing issues.

- (a) There is a need for **clarity and transparency between government agencies** about their respective roles and responsibilities regarding mining that takes place under State Agreements. The Auditor-General reported, in 2011 and 2014, that the forerunners of DMIRS and JTISI needed ‘more transparent and better coordination of agency effort for these sites, including timelines for reporting and providing advice, and inspection responsibilities’.⁵³ In 2015, a protocol was agreed between these agencies, dealing with ‘Co-operative working arrangements in environmental management of State Agreement projects’.⁵⁴
- (b) State Agreement operations are **not included in WA’s Mining Rehabilitation Fund**. ‘Mines operating under State Agreements are not required to participate in the Fund, although the legislation allows them to sign up. None of the operations under the 29 State Agreement operations clearly involved in mining have so far joined up’.⁵⁵ There are some protections in place over operations under State Agreements: ‘Operators of these mines are required to rehabilitate their sites and State Agreements generally require them to meet best practice, but are not specific on how that should happen’.⁵⁶ State Agreements not engaging with the general fund arrangements means this ‘considerably lessens the amount that could be paid into the Fund and the interest that could be earned to act on abandoned sites. Also, State Agreement site disturbance information is not included in EARS2 [environmental assessment and regulatory system], and therefore the State loses information and knowledge about large mines’.⁵⁷

[15] The implications of this were reinforced in a 2022 academic study, noting Western Australia ‘does not have legally binding financial protection in the case of rehabilitation failures for mines operating under its 29 State agreements’.⁵⁸ This study identified other State Agreements inconsistencies in the regulation and transparency of mine closure

⁵¹ eg. allowed in *Animal Defenders -v- GBR* (2013, ECHR Application 48876/08) (controls on political advertising), but rejected in *Hirst v GBR* (2005, ECHR Application no 74025/01) (prisoners’ right to vote). This is similar to the Australian constitutional law concept of ‘principle of legality’ – covered in this paper, below, at [37]-[37].

⁵² WA Gov 2004, WA Gov 2011, WA Gov 2014.

⁵³ WA Gov 2014, 18.

⁵⁴ WA Gov 2015.

⁵⁵ WA Gov 2014, 18.

⁵⁶ WA Gov 2014, 18.

⁵⁷ WA Gov 2014, 18.

⁵⁸ Brown 2022, 20.

management. One of the problems arising is the lack of data and awareness of the potential for (and regulation of) cumulative impacts.⁵⁹

When is a statute not a statute? When it's a contract

- [16] Legally, the terms in a State Agreement can be one of two broad options, either: remaining clauses of a contract (between the two parties) or having direct statutory force (generally binding on everyone). The 'default' or 'standard' situation is that the terms of a State Agreement are not given statutory force *unless* that is specifically stated in the parliamentary statute.⁶⁰ The status of the agreement (eg. contract or statute) is relevant in how to interpret the document and what implications it has for third parties.
- [17] There are very few WA exceptions to the standard 'contract' arrangement, where the Parliament instead enacts *all* the terms of the document. One example is the *Rhodes Ridge Agreement Act 1972*.⁶¹ Some State Agreements are mixed, with some terms having explicit statutory enactment while the bulk of the document remains contractual. However, even where the Agreement terms are not enacted, there are variations in the extent of parliament's approval/endorsement of the agreement terms.⁶²
- [18] Parliament can indicate which laws takes priority in the event of any inconsistency (eg. State Agreement terms, or other statutory law). If the particular matter is not addressed, any areas of inconsistency then fall to be addressed through interpretation and construction of the relevant documents.⁶³ This has resulted in the relationship between State Agreements and existing law being addressed within each the particular dispute, rather than in a context of some uniform constitutional theory.
- (a) The Full Federal Court in 2016 examined mining leases granted pursuant to a State Agreement and ruled: "The State cannot, by contract, give to itself a right to alienate Crown land. Accordingly, the government agreement in such a case cannot be the source of power to grant a mining lease. The source of power remains the [earlier Mining] Act".⁶⁴
 - (b) A subsequent Full Federal Court suggested that parliamentary ratification overcomes contractual inabilities of the executive: "The State Agreement was then ratified by the Parliament ... Ratification by Parliament of the State Agreement was

⁵⁹ Brown 2022, 37-41.

⁶⁰ *Hancock Prospecting -v- BHP Minerals* [2003] WASCA 259, [65]-[66]; *WA -v- Graham* [2016] FCAFC 47, [38].

⁶¹ *Iron Ore (Rhodes Ridge) Act 1972* (WA), s3 states "When the agreement ... is duly executed by all the parties thereto, the agreement shall, subject to its provisions, operate and take effect as though those provisions were enacted in this Act".

⁶² A useful schema is provided in Warnick 1998, 882-890.

⁶³ eg. later law can impliedly repeal earlier inconsistent law, but a general law is subject to a specific law (cases summarised in Southalan 2013, 174-175) recent examples are *BHP Coal -v- Resources Minister* [2011] QSC 246, [33]-[46] and *Genbow P/L -v- Griffin Coal* [2013] WAWM 10, [79]-90] & [99]-[108].

⁶⁴ *WA -v- Graham* [2016] FCAFC 47, [38]. Special leave to appeal was refused in *Graham -v- St Ives Gold* [2016] HCATrans 241.

necessary because dealing in Crown land, including minerals, can only be authorised and supported by Statute: *Western Australian Constitution Act 1890*.⁶⁵

Enforcement / implementation – who and how?

[19] A key interest from all the above – and where the legal complexities abound – is the implementation or application of any particular State Agreement. It is trite to observe that **the procedures and rights of parties** (the company, the State, and sometimes third parties) **depend on the particular wording in:**

- (a) **the original contract between the company and government**, which is publicly available as an attachment to the relevant State Agreement Act; but also
- (b) **the relevant proposal and government approval**, which are not publicly available and are usually negotiated between the company and the government agency responsible for this area (currently, in WA, JTSI, but for many years, the Department of State Development).

[20] We can, however, group four aspects to help comprehend the relevant law and issues around implementation and enforcement. First is the **proposals and approvals** which are exchanged between a government and company under a State Agreement, and what rights and obligations these entail for parties. Second is **enforcement by the company** if the company considers the government is not meeting its State Agreement obligations. Third is **enforcement by government** if it considers the company has been delinquent under the State Agreement. Last is **third parties and State Agreements**, encompassing issues of enforceability (by government or the company) against third parties, and also enforceability *by* third parties.

1. Proposals and approvals

[21] Recall the usual process under a State Agreement is the company submits a proposal, and government approval of that comprises the lawful authority and obligation for the proposed activity to occur.⁶⁶ These documents are not publicly available and the approach of the Department managing State Agreements appears to be that ‘information ... is not publicly accessible due to the commercial confidentiality of development proposals and

⁶⁵ *Mineralogy P/L -v- Sino Iron* [2017] FCAFC 55, [195]. The Constitution referred to here is a statute of the British Parliament (*Western Australia Constitution Act 1890* (IMP)) which attached the document which had been passed by the WA’s Legislative Council the year earlier: *The Constitution Act 1889* (WA).

⁶⁶ See [8] above.

related documents'.⁶⁷ Such an approach is questionable in its rationale⁶⁸ and credibility⁶⁹ but, regardless, *some* information in proposals and approvals *can* be obtained through pre-action discovery,⁷⁰ freedom of information,⁷¹ or in the state archives after the relevant time period has passed.⁷²

[22] The legal status of proposals (under a State Agreement), and their implications, is an area of increasing attention.⁷³ A few decided cases which have touched on the proposals/approvals dynamic, and these show the 'usual' State Agreement terms mean:⁷⁴

- the Government cannot reject a proposal, but can only approve or suggest changes;⁷⁵ and
- a document requires some connection with the State Agreement project in order to qualify as a proposal, eg. 'in relation to', 'in conformity with the primary purpose'⁷⁶ – meaning that a document that is not 'relevantly related to/connected with a Project' is not a proposal which the Government can consider;⁷⁷ however

⁶⁷ Brown 2022, 7 (explaining the inability of that author to be able to access information about mine closure addressed in proposals). Previous researchers have also reported inability to access any information about proposals: Ward 2015, 462.

⁶⁸ The approach runs counter to:

- the WA Government's principle for resources sector regulation to 'Foster public trust and confidence ... [including] Greater expectations for regulatory and approvals transparency and accountability has resulted in increasing needs for effective community engagement by industry and government. ...[and that] The community needs to be confident that the regulatory framework promotes a culture of integrity...': WA Gov 2018, 24 (see also p18 stating that 'The Department of Mines, Industry Regulation and Safety supports transparency across government and ... is committed to ongoing improvements in the accessibility of information and ensuring that all information that can legally be requested by the community is made publicly accessible'); and
- to the growing trend of greater transparency around contracting in the mining and resources sector (eg. OECD 2020, II, VI & [22]; Pitman & o'rs 2018).

This is not to say that *some* matters within exchanges around proposals/approvals are legitimately confidential and should remain so. Rather it flags the untenable position of asserting blanket confidentiality of all proposals and approvals.

⁶⁹ The Information Commissioner has issued numerous decisions that JTSI make documents available after it refused to do so in response to Freedom of Information requests, eg: *Onslow Resources -v- JTSI*, [2022] WAICmr 6; *Gilbert & Tobin -v- JTSI* [2022] WAICmr 4; *Onslow Resources -v- JTSI* [2022] WAICmr 2; *Gaffney -v- JTSI* [2019] WAICmr 3).

The Information Commissioner also explicitly rejected an argument run by JTSI's predecessor Department that a State Agreement has 'an implied term ... that the parties to the Agreement are required to keep secret and confidential any information exchanged between them because that information is exchanged on a mutual understanding of confidentiality that exists to facilitate the development of the mineral resources of the State for the benefit of the State': *Kimberley Diamond Co -v- Dept Resource Development* [2000] WAICmr 63, [41] (Departments submission) and [44]-[45] (Commissioner's decision).

⁷⁰ eg. *Buurabalayji Thalanyji -v- Onslow Salt* [2017] WASC 19, [19]

⁷¹ eg. *Mineralogy P/L -v- Department of Industry & Resources* [2008] WAICmr 36

⁷² eg. Brown 2018, 24 & 29.

⁷³ eg. Brown 2022; Brown 2018; *Mineralogy P/L -v- Sino Iron* [2017] FCAFC 55, [11]; *Buurabalayji Thalanyji -v- Onslow Salt* [2017] FCA 1240, [10], [18] & [40].

⁷⁴ The following three dot points in the text are summarised from cases which were decided on the particular wording of the State Agreement in the dispute there, rather than application of some general principle that 'this is how all State Agreements operate'. However, given the wording of many relevant clauses in State Agreements is similar, these decisions have some relevance/weight in understanding these issues in other State Agreements.

⁷⁵ *Mineralogy P/L -v- W/A* [2005] WASC 69, [34].

⁷⁶ *Mineralogy P/L -v- W/A* [2005] WASC 69, [67].

⁷⁷ *Mineralogy P/L -v- W/A* [2005] WASC 69, [68] & [1].

- a document need not comply with every detail of a State Agreement in order to be a ‘proposal’ the Government must consider – the essence is a document describing a project and the methods or plan to be used to achieve performance of that project.⁷⁸

[23] There is a *possible* constitutional law dilemma, given that executive government has limited autonomy to deal with public land and resources (because that is parliament’s remit⁷⁹). If the relevant detail about public land/resources is only in the ‘proposal/approval’ and not in the State Agreement – is that contravening parliament’s role? While this has not been specifically addressed in the State Agreement context, it seems unlikely to cause any significant concern given that parliamentary ‘delegation’ of decisions and structures to the executive is a common and legally valid regulatory form in other areas (eg. in framework legislation⁸⁰ and Henry VIII clauses⁸¹). So, a generalisation might be as follows: absent any specific requirement of parliamentary oversight/reporting of proposals in the particular State Agreement in question, there seems little *legal* basis which obligates such a role for parliament.⁸² The legislative endorsement of the ‘proposals procedure’, in the relevant State Agreement legislation, is likely to be sufficient parliamentary engagement for the executive then to have the future autonomy to consider and approve proposals (which then operate without parliamentary oversight).

2. Enforcement by company

[24] Some principles can be summarised from previous cases:

- government discretionary decisions and powers can be used to protect or further developments under a State Agreement;⁸³
- judicial review of government action under a State Agreement is available;⁸⁴
- where a State Agreement creates a *duty* on the government to do something, then the courts can enforce that,⁸⁵ but where no duty is created by the State Agreement then damages are likely the only remedy for breach;⁸⁶

⁷⁸ *Mineralogy P/L -v- WA (Award)* (2014), [55] & [24].

⁷⁹ The control and management of Crown land is vested solely in the legislative arm of the government of the State, eg: *Forrest & Forrest P/L -v- Wilson* [2017] HCA 30, [65] & [69]; *Wright Prospecting -v- Hancock Prospecting* [2016] WASCA 50, [40]-[41].

⁸⁰ eg. AUS Plmnt 2012, ch 5.

⁸¹ eg. ‘[A] statute conferring upon the Executive a power to legislate upon some matter contained within one of the subjects of the legislative power of the Parliament is a law with respect to that subject, and that the distribution of legislative, executive and judicial powers in the Constitution does not operate to restrain the power of the Parliament to make such a law’: *Victorian Stevedoring -v- Dignan* [1931] HCA 34, 101.

⁸² eg. ‘In an Act of Parliament which lays down only the main outlines of policy and indicates an intention of leaving it to the [executive] to work out that policy by specific regulation, a power to make regulations may have a wide ambit.’: *Morton -v- Union Steamship* (1951) 83 CLR 402, approved & applied in *NSW -v- Commonwealth* [2006] HCA 52, [415].

⁸³ eg. *Blue Ribbon Mines -v- Roy Hill Infrastructure* [2022] WASC 362, [209]-[213] (Mining Act envisages conditions on future tenements which prohibit mining activity on an area which injuriously affects existing State Agreement operations on an existing tenement); *Re: Minister; ex p Cazaly Iron* [2007] WASCA 175, [140]-[143] (special leave against that decision was refused in *Cazaly Iron -v- Resources Minister* [2008] HCATrans 155); *Concept Nominees -v- Mines Minister*, [1993] WASC 686.

⁸⁴ eg. *BHP Coal -v- Resources Minister* [2011] QSC 246, [3] & [68]-[69].

⁸⁵ eg. *BHP Coal -v- Resources Minister* [2011] QSC 246.

⁸⁶ *Ansett Transport v Commonwealth* [1977] HCA 71. An example of a damages claim is described in *WA -v- Mineralogy* [2020] WASC 58 (dismissing WA Government application to set aside arbitrator’s ruling that the damages claims could proceed against the WA Government for breach of the state agreement).

- there has been one arbitration against WA Government about its decisions-making on proposals;⁸⁷ and
- *possibly* some protection of the company position could occur through including a ‘manner and form’ provision in the original Agreement which *might* be able to constrain future parliamentary changes.⁸⁸

[25] State Agreement disputes between companies and governments are infrequently resolved through litigation, with more use of negotiation⁸⁹ (particularly in the proposals-approvals process) and, in one case, arbitration (most State Agreements have an arbitration clause). With the private nature of arbitration, usually little can be publicly learnt from these.

[26] There is, however, more known about recent arbitration proceedings between the WA Government and Mineralogy companies as a result of litigation *about that arbitration*⁹⁰ and materials and information made available in parliaments.⁹¹ Various legal proceedings continue, so it is too early to be definite on what authority or principles will result. Key events and decisions are, however, summarised below.

- Various arbitration proceedings were commenced by Mineralogy companies, about disputes over a 2012 proposal under a State Agreement. The arbitrator found for the Mineralogy parties, in procedural decisions, in 2014⁹² and 2019.⁹³ The Mineralogy parties and WA Government were progressing the mediation in 2020,⁹⁴ for a decision in 2021.⁹⁵
- From March 2020, some WA Government Ministers and officers began secretly developing a proposed statutory amendment to terminate the arbitration and nullify

⁸⁷ *Mineralogy P/L -v- WA (Award)* (2014). The outcome of this was subsequently annulled by the WA Parliament in the *Iron Ore Mineralogy Amendment Act 2020* (WA) (challenges to that law were dismissed in *Mineralogy P/L -v- WA* [2021] HCA 30 and *Palmer -v- WA* [2021] HCA 31).

⁸⁸ This is included in various agreements but has never been successfully argued to challenge amendment of a State Agreement: Hillman 2006, 322. The High Court dismissed a ‘manner and form’ argument raised against the recent ‘Mineralogy’ legislation, but circumscribed their reasoning to the particular submissions put (*Mineralogy P/L -v- WA* [2021] HCA 30, [78]-[80] per majority; although Edelman J went further at [117]-[154] and did not necessarily exclude the potential for all ‘manner and form’ control in State Agreement contexts.

⁸⁹ In 2009, it was reported that there had been no arbitration of State Agreements in WA because ‘resolution of differences of opinion have been satisfactorily resolved by negotiation’: Hunt 2009, 20.

⁹⁰ Including:

- the WA Government contesting a 2019 award: *WA -v- Mineralogy* [2020] WASC 58 (the Court dismissing the Government’s appeal: [79]);
- Mineralogy proceedings against the WA Government and officers in the Federal Court: *Mineralogy P/L -v- WA* [2020] FCA 1517 and *International Minerals -v- WA* [2022] FCA 938; and
- [tangentially related, but providing some further detail regarding the arbitration developments] defamation proceedings between Mr Palmer and Mr McGowan: *Palmer -v- McGowan* [2022] FCA 893 and *Palmer -v- McGowan* [2022] FCA 927.

⁹¹ Including:

- the tabling of the decision (*Mineralogy P/L -v- WA (Award)* (2014)) in Queensland parliament: Douglas 2014, 2216;
- statements about matters and claims in the arbitration, during the second reading speech of the ‘Iron Ore Processing (Mineralogy Pty. Ltd.) Agreement Amendment Bill 2020’: WA Gov 2020c, 4596-4597.

⁹² *Mineralogy P/L -v- WA (Award)* (2014)

⁹³ Described in the WA Government ‘appeal’: *WA -v- Mineralogy* [2020] WASC 58

⁹⁴ *Palmer -v- McGowan* [2022] FCA 893, [24]-[25].

⁹⁵ Ross 2021, 56

the previous decisions.⁹⁶ A bill was introduced and passed by the WA Parliament, in August 2020, stated to terminate the extant arbitration and previous decisions made in that arbitration.⁹⁷

- (c) The High Court dismissed challenges to the August 2020 law,⁹⁸ but only formally ruled on the validity of six sub-sections of that law, explaining that broader questions on the law's validity were not appropriately before the High Court.⁹⁹
- (d) There is an international investment arbitration claim underway.¹⁰⁰
- (e) Various Federal Court proceedings have been commenced, two of which are no longer on foot. The first of these, in 2020, contested the 2020 bill's introduction as a breach of contract and contrary to the *Australian Consumer Law*. These proceedings were adjourned pending the High Court's decision.¹⁰¹ The High Court's reasons acknowledged various sections of the 2020 Act could arise in these Federal Court proceedings, but that was not yet known, and so the High Court did not rule on those sections.¹⁰² These Federal Court proceedings were subsequently discontinued in December 2021.¹⁰³ In January 2022, further Federal Court proceedings were commenced by Mineralogy parties against the State of Western Australia, Premier, Attorney-General and State Solicitor.¹⁰⁴ The Mineralogy parties sought to discontinue these proceedings in March 2022, but the Court ordered that could only occur on the condition no further proceedings about the August 2020 law can be commenced without leave.¹⁰⁵ The Court's website recorded these proceedings as 'Finalised - Discontinued / Withdrawn' in September 2022.¹⁰⁶
- (f) In October 2022, new Federal Court proceedings were commenced against Western Australia and the Commonwealth.¹⁰⁷ The Court has programmed submissions and interlocutory applications before the next case management hearing on 16 March 2023.¹⁰⁸ Little public information is available from the Court's records on this, but media described the proceedings as concerning the 'legislation that scuppered

⁹⁶ *Palmer -v- McGowan* [2022] FCA 893, [25]-[35].

⁹⁷ *Iron Ore Mineralogy Amendment Act 2020* (WA).

⁹⁸ Summarised in Southalan 2021.

⁹⁹ *Mineralogy P/L -v- WA* [2021] HCA 30, [67].

¹⁰⁰ It is reported that by 'letter dated 14 October 2020 to Senator the Hon Marise Payne ... Palmer's solicitors, commenced consultations under SAFTA [Singapore-Australia Free Trade Agreement] on behalf of Zeph [a Palmer-related company]': Ross 2021, 58. On 15 October 2021, the West Australian reported 'Mr Palmer and the Commonwealth have failed to reach a resolution in a six month consultation process related to various free trade agreements. ...[I]t is understood Mr Palmer had been awaiting the result of the High Court...before he launched formal international arbitration': Scarr 2021.

¹⁰¹ *Mineralogy P/L -v- WA* [2020] FCA 1517.

¹⁰² *Mineralogy P/L -v- WA* [2021] HCA 30, [65] & [67].

¹⁰³ The ComCourts website describes the proceedings *Mineralogy Pty Ltd (ACN 010 582 680) & Anor v The State Of Western Australia* (QUD257/2020) as 'closed' and that, on 13 December 2021 the proceedings were 'Discontinued (leave not required)' (<https://www.comcourts.gov.au/file/Federal/P/QUD257/2020/actions> accessed 31 January 2022).

¹⁰⁴ *International Minerals -v- WA* [2022] FCA 938, [14]-[15] (claiming \$50 million for unconscionable conduct contravening the Australian Consumer Law leading up to and surrounding the enactment of the August 2020 law, and also the tort of misfeasance in public office).

¹⁰⁵ *International Minerals -v- WA* [2022] FCA 938, [77].

¹⁰⁶ <https://www.comcourts.gov.au/file/Federal/P/NSD54/2022/actions> (accessed 1 Mar 2023)

¹⁰⁷ *Clive Palmer v State of Western Australia & Anor* (NSD905/2022)

¹⁰⁸ Orders of Justice Lee, 23 November 2022.

Palmer’s right to claim compensation of up to \$30 billion over a stalled mining tenement in the Pilbara...[and] Palmer now wants to have WA’s August 2020 ruling [? statute] rendered invalid, alleging his company was entitled to damages relating to a deal Mineralogy signed in 2001. Palmer claims multiple parts of WA’s legislation are invalid under the Australian constitution, including things like no challenge or discovery provisions’.¹⁰⁹

- (g) Court proceedings are still underway in Queensland, where Palmer Parties obtained registration of the earlier arbitral awards, which the WA Government then had set aside by the Queensland Supreme Court in November 2020.¹¹⁰ The Palmer Parties appealed that decision to the Queensland Court of Appeal,¹¹¹ which heard the matter in April 2022 and judgement has been reserved.¹¹²

[27] The outcome of these various proceedings will likely provide further understanding about compliance and enforcement options for State Agreements.

3. Enforcement by government

[28] The government can act to prevent interference with a State Agreement. WA’s *Government Agreements Act 1979* makes it a (jailable) offence for anyone ‘without lawful authority’ to hinder the implementation of a ‘Government agreement’.¹¹³ The statute defines ‘Government agreement’ to mean the ‘State Agreement’ but *also includes* ‘any document ... made, executed, issued, or obtained for the purposes of that agreement or its implementation’.¹¹⁴ Thus, ‘Government agreement’ – and, relevantly, the prohibition on hindering its implementation - includes not only the original contract but *also every proposal and approval*.

[29] Parliamentary sovereignty, as understood in Australian law, means a parliament can change or repeal *any* previous legislation (within its constitutional power). So, a statute approving a State Agreement *can* be changed or repealed, regardless of political assertions to the contrary.¹¹⁵ Contractual clauses which seek to promise otherwise (ie. some form of stabilisation to prevent future amendment) are unenforceable.¹¹⁶

[30] A significant dynamic in understanding government enforcement, however, is government failure to monitor/implement the terms which it had earlier agreed. The WA Auditor-General has issued reports identifying concerns about inadequate monitoring of State

¹⁰⁹ Mason 2022.

¹¹⁰ *Mineralogy P/L -v- WA* [2020] QSC 344, [2] (initial order about the awards on 13 August 2020) and [145] (order setting that aside) per Martin J.

¹¹¹ Ross 2021, 57.

¹¹² This is case BS13497/20 (*Mineralogy Pty Ltd -v- State of Western Australia & another*). There appears to be nothing publicly available on this, other than the Queensland courts information. The information on the appeal hearing and judgement reserved was provided on my inquiry to the Queensland Courts ‘Client Communication Unit’ (email on file with author, 8 February 2023).

¹¹³ *Government Agreements Act 1979* (WA), s4(2).

¹¹⁴ *Government Agreements Act 1979* (WA), s2(c).

¹¹⁵ eg. *Mineralogy P/L -v- WA* [2021] HCA 30, [75]-[80].

¹¹⁶ eg. *Re Michael; ex p WMC* [2003] WASCA 288, [44]-[48].

Agreements.¹¹⁷ These reports have been used by proceedings in determining the actual realities of implementation (as opposed to the words in the statutory scheme).¹¹⁸ There have been changes following the Auditor General's report, with increased reporting required of local content.¹¹⁹

- [31] Disputes between government and the company are usually negotiated/agreed, or (uncommonly) resort to arbitration. However, if there is no resolution through these, then government usually only has the 'nuclear option' to legislate, either terminating everything,¹²⁰ or unilaterally amending the terms or effect of certain aspects.¹²¹
- [32] While there *is* general legislative power to amend or repeal previous statutes (thus State Agreement Acts), this becomes more complicated if court proceedings are currently underway. This dynamic arose in the 1990s, during court proceedings in Victoria, when a State Agreement (in the Papua New Guinea parliament) was amended which limited claims against BHP then proceeding in the Victorian courts.
- [33] Victoria's Supreme Court ruled BHP in contempt (for interfering 'with the due administration of justice by impeding the lawful right of the plaintiffs to law') of proceedings before the Court because of the company's involvement in proposed PNG regulation which would have the effect of preventing the proceedings.¹²² There was a question whether other Victorian legislation barred private parties from seeking court orders about contempt, which the trial judge rejected. *That* aspect of the Judge's decision was overturned on appeal,¹²³ meaning the outcome was the plaintiffs lacked standing to seek remedies regarding contempt, but that did not change the Court's original finding. That finding remained.¹²⁴ Thus, it will be a contempt of existing court existing proceedings, to negotiate and agree provisions (framed to be enacted in another jurisdiction) which would have the effect of impeding the existing court proceedings.
- [34] Another issue relevant to State Parliamentary legislating is international investment treaty obligations and procedures on Australia. Sub-national laws impacting investment *can* be a breach of nation's international investment obligations.¹²⁵ There are precedents where valid sub-national law has constituted a breach of national international investment obligations, leading to large financial damages being awarded against the nation through investment treaty arbitration.¹²⁶

¹¹⁷ eg. WA Gov 2004, 20; WA Gov 2011, 21 & 31.

¹¹⁸ eg. *Karajarri Assn -v- ASJ Resources* [2012] NNTTA 18, [85] & [91].

¹¹⁹ WA Gov 2004.

¹²⁰ eg. *Aurukun Associates Agreement Repeal Act 2004* (QLD); described in Young & o'rs 2005.

¹²¹ eg. the Mineralogy amendments, see [26] above and Southalan 2021.

¹²² *Dagi -v- BHP Ltd* [1995] VicSC 510, p288 & 270 per Cummins J.

¹²³ *BHP -v- Dagi* [1996] VicRp 62, and High Court leave to appeal that decision was refused: *Dagi -v- Att-Gen* [1996] HCATrans 37.

¹²⁴ See *Dagi -v- BHP* [1995] VicSC 652, 1-2 per Cummins J and, on appeal: *BHP -v- Dagi* [1996] VicRp 62, 117-118 per Winneke P, 166-167 & 191 per Phillips JA (both Judges indicating the appeal did not concern the original contempt finding), and 208 per Hayne J (who dismissed the appeal).

¹²⁵ eg. *Glamis Gold -v- USA (Award)* (2009), [678].

¹²⁶ Examples include:

- *Tethyan Copper v. Pakistan* (ICSID Case No. ARB/12/1, under Australia - Pakistan BIT 1998) about 'Claims arising out of the decision by the Pakistani province of Balochistan to refuse the application by claimant's local operating subsidiary for a mining lease in respect of the Reko Diq gold and copper site' - award 12 July 2019, US\$4.1B. The original claim

4. Third parties and State Agreements

[35] Some basic principles can be summarised:

- where a State Agreement has been passed, third parties are unlikely to be able to challenge the government's action in negotiating and passing that law,¹²⁷ nor the company's subsequent actions under the agreement;¹²⁸
- references in a State Agreement to third parties *can* give those parties justiciable rights;¹²⁹
- there are increasing moves toward greater agreement transparency and accountability of resources regulation and contracts¹³⁰ but these are not (yet) seeing legal implications in WA.

[36] Third party (fundamental) rights are generally unimpeded by statute *unless* the parliament explicitly indicates otherwise,¹³¹ and this approach would apply to State Agreements. There have been examples where the State Agreement (and covering statute) have restricted or removed third party rights.¹³² There may well be changes in the interaction and efficacy of these types of domestic laws, with increasing international mechanisms addressing corporate impacts on human rights.¹³³ Other contracts can give third party rights dealing with issues arising under State Agreements, making commitments potentially enforceable through the other contract.¹³⁴

[37] The principal of legality, and its potential to limit government action (and parliamentary enactment unless specifically clear) has been extended by a 2020 Federal Court decision. In

was for US\$8.5B (plus interest). The claim was originally made in 2011. The World Bank reports Pakistan's GDP in 2012 as US\$228.39B (Bank 2023), meaning the claim was 4% GDP.

- *CME v. Czech Republic* (under Czech Republic - Netherlands BIT 1991) about 'Claims arising out of actions and omissions attributed to the Media Council, an organ of the Czech Republic that allegedly commercially destroyed the broadcasting station operator which was partly owned by the investor' – award 14 March 2003, \$US270M
- *SAUR v. Argentina* (ICSID Case No. ARB/04/4, under Argentina - France BIT 1991) about 'Claims arising out of the alleged failure of the government of the Argentine province of Mendoza to implement service tariff increases under an agreement between Saur's subsidiary and the federal government, in the wake of the State's 2001-2002 economic crisis' - award 22 May 2014, of US\$39.9M
- *Enron v. Argentina* (ICSID Case No. ARB/01/3, under Argentina - United States of America BIT 1991) about 'Claims arising out of certain tax assessments allegedly imposed by Argentinean provinces in respect to a gas transportation company in which the claimants participated through investments in various corporate arrangements, as well as the Government's alleged refusal to allow tariff adjustments in accordance with the US Producer Price Index' – award 22 May 2007 of US\$106.2M

All the above (except Pakistan GDP data) was extracted from the 'Investment Dispute Settlement Navigator' maintained by the Division on Investment and Enterprise of the UN Conference on Trade and Development:

<https://investmentpolicy.unctad.org/investment-dispute-settlement> (accessed 20 Oct 2021).

¹²⁷ Southalan 2013, 172-173.

¹²⁸ Hillman 2006, 325; but contrast *Buurabalayji Thalanyji -v- Onslow Salt* [2017] FCA 1240.

¹²⁹ eg. *Hancock Prospecting -v- BHP Minerals* [2003] WASCA 259, [69]-[70].

¹³⁰ eg. OECD 2020, II; Pitman 2018; Cameron & Stanley 2017, 74.

¹³¹ eg. *Lacey -v- Att-Gen* [2011] HCA 10, [17]. Cases and circumstances detailed in AUS Gov 2016, [2.22]-[2.34]; recent eg. *Brett Cattle -v- Agriculture Minister* [2020] FCA 732, [291]-[293] & [358] (invalidating government order which 'imposed an undue or impermissible burden on the common law right to carry on business').

¹³² eg. *Diamond (Argyle Diamond Mines Joint Venture) Agreement Act 1981* (WA), s9; *Government Agreements Act 1979* (WA), s4.

¹³³ Recent publications assisting commercial lawyers to understand and advise on human rights aspects include IBA 2016 & IBA 2017.

¹³⁴ eg. *Buurabalayji Thalanyji -v- Onslow Salt* [2017] WASC 19, [34]-[35], [38] & order 1(d).

Brett Cattle -v- Agriculture Minister, Justice Rares described an ‘...important common law right, to which the principle of legality attaches, is the right to carry on business in one’s own way within the law’.¹³⁵

- [38] When considering the relationship of an existing State Agreement and a new issue (ie. something not clearly addressed in the document’s text), the Agreement’s scope and purpose are critical. The legal construction of the terms will determine whether any ‘new’ developments/events are *within* the Agreement’s terms or are outside it (and therefore to be addressed within normal law).¹³⁶

Observations...Mineralogy and more...

- [39] The High Court’s decision has disposed of the two writs filed in Mineralogy proceedings. The essence of the High Court’s decision appears to have been summarised, seventeen years earlier, by WA’s Auditor General, in a report on management of state agreements.

*All Agreements contain a provision that they cannot be amended without the consent of the parties. For Parliament to act unilaterally could be seen as a breach of good faith and detrimental to the State’s reputation and interest. Ultimately, however, Parliament’s authority to amend or repudiate its legislation is not restricted.*¹³⁷

- [40] Other proceedings were halted pending the High Court’s decision. This includes the original arbitration, the Palmer Parties’ Federal Court proceedings,¹³⁸ the international investment claims, and the appeal of the Queensland Court decision deregistering the awards. It is now ‘play on’ for many of those proceedings. We can expect to see more analysis of the 2020 Mineralogy Act and its implications for state agreements.
- [41] And, for State Agreements more broadly, a 2020 publication by Allens (on the day the WA Parliament passed the Mineralogy amendments) considered these ‘will remain a key part of the [WA] resources sector landscape for years to come’.¹³⁹

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¹³⁵ *Brett Cattle -v- Agriculture Minister* [2020] FCA 732, [292]. The Commonwealth decided not to appeal that decision: SBS 2020.

¹³⁶ eg. *Kidd -v- Western Australia* [2014] WASC 99, [119]-[121], [130], [136]-[138] & [142]-[151] (new issue *within* scope of the State Agreement); *Mineralogy P/L -v- WA* [2005] WASCA 69, [53] & [63]-[68] (new issue *outside* scope of State Agreement).

¹³⁷ WA Gov 2004, 48.












¹³⁸ Some of which have since been discontinued, and others commenced: see [26](e)-[26](g) above.

¹³⁹ Reinmuth & o’rs 2020.

Annexures

Annexe 1: Images for 9 March 2023 presentation.

The following images were taken from the internet.

 Mining.com 2015	 Pilbara Ports ud	 Hoyle 2015
 Vicinity ud	 Chevron ud	
 MI 2009, cover	 Lake Argyle ud	 Pianegonda 2018
 AAP 2020	 MI 2009, p1-1	 Hastie 2020

Annex 2: Three perspectives on State Agreements

Transparency International:

‘The State Agreement process ... involves considerable Ministerial discretion. When combined with a lack of transparency, and the ability of industry to negotiate directly with politicians regarding projects, considerable risk is created of state and policy capture, and the potential for corruption is increased’¹⁴⁰

Hon. N Moore MLC¹⁴¹:

‘The alternative [to State Agreements] is just a process in which Parliament has no involvement whatsoever. I therefore quite like state agreements as a general way of doing business in Western Australia; they have been extraordinarily successful. Indeed, most of the development of the Pilbara has been as a result of state agreement acts that have been put in place over time. Some have not worked; some have. Some have not proceeded; others have. In fact, I think there are some on the notice paper to be removed in due course as they are past their use-by date. However, as a general rule, state agreement acts have been very successful. We have a very successful resource sector as a result, in many cases, of state agreement acts that have been put in place over time. Anybody who disputes that is simply ignoring the reality of our economy at the present time’¹⁴²

¹⁴⁰ TI Aus 2017, 23 (see, in response: Audeyev & Hancock 2018).

¹⁴¹ WA Mining Minister (1997-2001 & 2008-2013) and Shadow Mining Minister (2001-2006).

¹⁴² Moore 2006, 6145.

IM4DC Research Report:

'Countries aiming to attract large mining operations may consider parliamentary-approved agreements to assist in regulation, and these agreements continue to be used in other countries with existing large operations. This paper identifies improvements for parliamentary-approved agreements in two broad areas:

(1) In the negotiation and establishment of a new parliamentary-approved agreement:

- i) the executive should assess the four areas of regulatory impact assessment (i.e. explain the context, explain the proposal, conduct cost-benefit analysis, and describe the public consultations) as part of its negotiations and formulation of any agreement terms, and then report this work and results to parliament;
- ii) international standards of social and environmental protection should be non-negotiable, and so any proposal that parliament endorse any variance from these standards, through approving an agreement, should be specifically identified for parliamentary consideration; and
- iii) parliament should be provided with adequate time and resources to be able to consider whether to approve any agreement, and that process may be assisted by committee deliberations.

(2) In the operation of an existing parliamentary-approved agreement: regular reports should be provided to parliament about the agreement's implementation.¹⁴³

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¹⁴³ Southalan & o'rs 2015, [2].

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