

State Agreements and Resources Operations

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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. This enables government and company to structure regulation for the operation where existing law is absent or inappropriate.¹
- [2] Western Australia, of anywhere in world, makes the most use of State Agreements in regulating mining projects and associated infrastructure.² In WA, over 60 extractives projects operate under State Agreements, which is about 80% (value) of minerals & petroleum produced in WA.³ The State Agreement structure is used in many areas outside mining, including oil & gas projects,⁴ land & industrial developments,⁵ inter-governmental agreements,⁶ entertainment & shopping complexes⁷ and even one agreement with Indigenous groups.⁸ WA is the only Australian state with a statute specifically for these legal structures.⁹
- [3] Many legal disputes and court cases involve State Agreements, ranging well beyond traditional 'mining law', eg:
 - environmental protest obstructing work, criminal law;¹⁰

¹ eg. *Commissioner State Revenue -v- OZ Minerals* [2013] WASCA 239, [179].

² Horsley 2013, 284.

³ Barnett 2014, 13.

⁴ eg. *Gorgon Agreement* (2003).

⁵ eg. *Albany Plantation Agreement* (1993), *Cockburn Cement Agreement* (1971), *Dampier Salt Agreement* (1967), *Ord Hydro Agreement* (1994), *Alumina Refinery Agreement* (1961).

⁶ eg. *Commonwealth - State Financial Relations Agreement* (1927).

⁷ eg. *Burswood Agreement* (1985), *Morley Shopping Centre Agreement* (1992).

⁸ *Browse Agreement* (2012).

⁹ *Government Agreements Act 1979 (WA)*.

¹⁰ eg. *Margetts -v- Campbell-Foulkes* [1979] WASC 250; *Buzzacott -v- Sustainability Minister* [2013] FCAFC 111.

- parliamentary power to cancel rights;¹¹
- effect on native title rights and interaction of common law and statute;¹²
- relation between historic & current mining statutes;¹³
- control of port infrastructure, and arrangements with third parties;¹⁴
- tax and land rating (including arrangements between joint venturers¹⁵ and Ministerial powers¹⁶);
- executive government preferencing of established operators;¹⁷
- competition law and rail access;¹⁸ and
- company entitlement to remove resources, and third party rights to contest.¹⁹

[4] State Agreements are less frequent these days for new resources projects.²⁰ But there are many large, existing projects operating under State Agreements which are structured to regulate each operation for its entire life. As at October 2020, the WA Government agency which administers these agreements indicated it had 64 current State Agreements, including the following.

Extract from List of State Agreements in WA²¹

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

Forest products

Albany Hardwood Plantation Agreement Act 1993
Wood Processing (Wesbeam) Agreement Act 2002

Gas

North West Gas Development (Woodside) Agreement Act 1979

¹¹ eg. *Comalco -v- Att Gen (QLD)* [1976] Qd R 231; *Mineralogy P/L -v- WA* [2020] FCA 1517.

¹² eg. *WA -v- Brown* [2014] HCA 8.

¹³ eg. *WA -v- Graham* [2016] FCAFC 47.

¹⁴ eg. *Mineralogy P/L -v- Sino Iron* [2017] FCAFC 55.

¹⁵ eg. *Hancock Prospecting -v- Wright Prospecting* [2012] WASCA 216.

¹⁶ eg. *Pastoral Management -v- Local Gov't Minister* [2014] WASC 378.

¹⁷ eg. *Re: Minister for Resources; ex p Cazaly Iron* [2007] WASCA 175.

¹⁸ eg. *Pilbara Infrastructure -v- ACT* [2012] HCA 36.

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

²⁰ 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).

²¹ WA Gov 2020b.

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

Cement Works (Cockburn Cement Limited) Agreement Act 1971

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.²² Four other ways which are/have been used are:
- (1) direct government involvement,
 - (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 through (4)²³ 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, not executive prerogative.²⁴ There are varying attitudes to the role of State Agreements in WA’s resources regulation.²⁵
- [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:

²² Other options are summarised in AUS Gov 2013, 71 & 75.

²³ OECD 2020, 1; Cameron & Stanley 2017, 61-62 & 88-89; Southalan & o’rs 2015, [6]-[9]. Australia’s Productivity Commission observed ‘Well coordinated approaches within jurisdictions negate the value of State Agreements as a mechanism for facilitating major project approvals’: AUS Gov 2020, 191.

²⁴ *Forrest & Forrest P/L -v- Wilson* [2017] HCA 30, [65] & [69].

²⁵ Three perspectives on State Agreements are extracted at the end of this paper, see below p9.

- *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.*²⁶

[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’.²⁷ 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.²⁸

[9] The State Agreement specifies the proposals to be submitted by the company, for example:²⁹

- provide a feasibility study of \$A for whole operation;
- 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. 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.³⁰ South Australia’s *Olympic Dam Agreement*³¹ was described as the ‘modern paradigm’ in 2005.³² More recent developments in WA have seen increased requirements for local industry and community development, through a planning and reporting structure.³³

[11] The main function of State Agreements in the resources area is the ‘proposals procedure’ described above. In addition to the ‘proposals procedure’, common provisions in many

²⁶ WA Gov 2020c.

²⁷ Hunt & o’rs 2015, 16; eg. *Commissioner State Revenue -v- OZ Minerals* [2013] WASCA 239, [180]-[183].

²⁸ *Mineralogy P/L -v- Sino Iron* [2017] FCAFC 55, [229] & [232].

²⁹ Summarised from Southalan & o’rs 2015, [8].

³⁰ 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. NRG 2014; Cameron & Stanley 2017.

³¹ *Olympic Dam Agreement* (1982).

³² Fitzgerald 2005, 687.

³³ eg. *Canning Basin Agreement* (2012), cl 6 & 7; and these frameworks have also been added to earlier State agreements eg. *Iron Agreements Amendment Act 2011 (WA)*.

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);³⁴
- (b) financial provisions (eg. altering duties, royalties from norm);³⁵
- (c) procedural matters (eg. assignment, dispute resolution, force majeure, termination);³⁶
- (d) land & infrastructure (access & use, existing and future);³⁷
- (e) relations with existing law (incl potential exemptions/exclusions);³⁸
- (f) local content (use or preferencing of local services, labour or materials)³⁹ - 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.⁴⁰

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

- 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).⁴¹
- Western Australia also has more extensive procedures for making regulation, making a different context within which any new State Agreement is made (eg. regulatory impact assessment⁴²), and any decision-making and processing by government agencies (eg. application of freedom of information⁴³ and regulator transparency policies⁴⁴).

[13] International human rights mechanisms and standards, in particular, provide increasing responsibilities on companies regardless of the law of the specific jurisdiction.⁴⁵

- International procedures have identified state/company failures where the domestic laws or engagement was inadequate.⁴⁶

³⁴ eg. *BBi Rail Agreement* (2017), clauses 3 (introduce Bill to parliament), 14 & schedule (grant of titles).

³⁵ eg. *BBi Rail Agreement* (2017), cl 20 (protection from discriminatory taxes)

³⁶ eg. *BBi Rail Agreement* (2017), clauses 29 & 30.

³⁷ eg. *BBi Rail Agreement* (2017), clauses 8 & 15 (existing infrastructure), 16 (new infrastructure), 21 (government power to resume land for project).

³⁸ eg. *BBi Rail Agreement* (2017), clauses 22 (controlling local government powers), 24 (state government powers).

³⁹ eg. *BBi Rail Agreement* (2017), clauses 9-11.

⁴⁰ AUS Gov 2020, 304.

⁴¹ Southalan & Fardin 2019, [6]; see also expectations of ‘durable extractives contracts’ in OECD 2020.

⁴² WA Gov 2020a.

⁴³ Applied in a State Agreement context in *McGowan -v- Minister for Regional Development & Mineralogy P/L* [2011] WAICmr 2 (politician FOI request for documents concerning director and a company which held a State Agreement).

⁴⁴ eg. WA Gov 2020d.

⁴⁵ Southalan 2016.

⁴⁶ eg. *CERD dec 2(54) AUS* (1999) (parts of 1998 native title amendments); NOR NCP 2011 (domestic law certification regarding consultation was insufficient).

- 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.⁴⁷
- 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.⁴⁸

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

[14] 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' situation is the terms of a State Agreement are not given statutory force *unless* that is specifically stated in the parliamentary statute.⁴⁹ 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.

[15] There are very few WA exceptions to the standard 'contract' arrangement, where the Parliament instead enacts *all* the terms of the document. One example the *Rhodes Ridge Agreement Act 1972*.⁵⁰ However, even where the Agreement terms are not enacted, there are variations in the extent of parliament's approval/endorsement of the agreement terms.⁵¹

[16] 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.⁵² 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 uniform constitutional theory.

- 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'.⁵³
- A subsequent Full Federal Court suggested that parliamentary ratification overcomes contractual inabilities of the executive: 'The State Agreement was then

⁴⁷ eg. *Länsman -v- FIN* UN doc CCPR/C/52/D/511/1992 (quarrying impact on reindeer herding); *Mabuiika -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).

⁴⁸ 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).

⁴⁹ *Hancock Prospecting -v- BHP Minerals* [2003] WASCA 259, [65]-[66]; *WA -v- Graham* [2016] FCAFC 47, [38].

⁵⁰ *Rhodes Ridge Agreement Act 1972*, 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'.

⁵¹ A useful schema is provided in Warnick 1998, 882-890.

⁵² 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 (Qld)* [2011] QSC 246, [33]-[46] and *Genbow P/L -v- Griffin Coal* [2013] WAMW 11, [79]-90] & [99]-[108].

⁵³ *WA -v- Graham* [2016] FCAFC 47, [38]. Special leave to appeal was refused in *Graham -v- St Ives Gold* [2016] HCATrans 241.

ratified by the Parliament ... Ratification by Parliament of the State Agreement was necessary because dealing in Crown land, including minerals, can only be authorised and supported by Statute: *Western Australian Constitution Act 1890*.⁵⁴

Enforcement / implementation – who and how?

[17] A key interest from all the above – and where the legal complexities abound – is the implementation or application of any particular State Agreement. We can group four aspects to help understand the law. 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** where it considers the government is not meeting its State Agreement obligations. Third is **enforcement by government** where 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

[18] 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.⁵⁵ The legal status of proposals (under a State Agreement) and their implications, is an area of increasing attention. The ‘usual’ State Agreement terms mean:

- the Government cannot reject a proposal, but can only approve or suggest changes;⁵⁶ and
- a document requires some connection with the project in order to be a proposal, eg. ‘in relation to’, ‘in conformity with the primary purpose’⁵⁷ – so a document that is not ‘relevantly related to/connected with a Project’ is not a proposal which the Government can consider;⁵⁸ however
- 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.⁵⁹

[19] There is a *possible* constitutional law consideration from the executive government’s limited autonomy to deal with public land and resources (as that is parliament’s remit⁶⁰). While this has not been specifically addressed in the State Agreement context, it seems unlikely to

⁵⁴ *Mineralogy P/L -v- Sino Iron* [2017] FCAFC 55, [195]. The Constitution referred to here is a statute of the British Parliament (*WA Constitution Act 1890 (GBR)*) which attached the document which had been passed by the WA’s Legislative Council the year earlier: *Constitution Act 1889 (WA)*.

⁵⁵ See [8] above.

⁵⁶ *Mineralogy -v- WA* [2005] WASCA 69, [34].

⁵⁷ *Mineralogy -v- WA* [2005] WASCA 69, [67].

⁵⁸ *Mineralogy -v- WA* [2005] WASCA 69, [68] & [1].

⁵⁹ *Mineralogy -v- WA (Award)* (2014), [55] & [24].

⁶⁰ *Forrest & Forrest P/L -v- Wilson* [2017] HCA 30, [65] & [69]; *Wright Prospecting -v- Hancock Prospecting* [2016] WASCA 50, [40]-[41].

cause any significant concern given that parliamentary ‘delegation’ of decisions and structures to the executive is a common and legally valid regulatory form (eg. in framework legislation⁶¹ and Henry VIII clauses⁶²). 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.⁶³ The legislative endorsement of that structure, in its earlier State Agreement legislation, is likely to be sufficient parliamentary engagement for the executive then to have the autonomy to consider and approve proposals (which operate without parliamentary oversight).

2. *Enforcement by company*

[20] Some short principles can be summarised from previous cases:

- where State Agreement creates a *duty* on the government to do something, then the courts can enforce that,⁶⁴ but where no duty is created by the State Agreement then damages are likely the only remedy for breach;⁶⁵
- judicial review of government action under a State Agreement is available;⁶⁶
- there has been one arbitration against WA Government (regarding approval of proposals);⁶⁷ 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.⁶⁸

[21] State Agreement disputes between companies and governments are infrequently resolved through litigation, with more use of negotiation⁶⁹ (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. There is, however, more known about recent arbitration proceedings between the WA Government and Mineralogy companies as a result of litigation *about that arbitration*⁷⁰ and

⁶¹ eg. AUS Plmnt 2012, ch 5.

⁶² 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.

⁶³ 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].

⁶⁴ eg. *BHP Coal -v- Resources Minister (Qld)* [2011] QSC 246.

⁶⁵ *Ansett Transport v Commonwealth* [1977] HCA 71.

⁶⁶ eg. *BHP Coal -v- Resources Minister (Qld)* [2011] QSC 246, [3] & [68]-[69].

⁶⁷ *Mineralogy -v- WA (Award)* (2014).

⁶⁸ This is included in various agreements but has never been successfully argued to challenge amendment of a State Agreement: Hillman 2006, 322.

⁶⁹ 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.

⁷⁰ Including:

- the WA Government contesting a 2019 award: *WA -v- Mineralogy P/L* [2020] WASC 58 (the Court dismissing the Government’s appeal: [79]); and

materials and information made available in parliaments.⁷¹ The various legal proceedings are continuing, and so it is too early to know what authority these may provide.

3. Enforcement by government

- [22] 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. Contractual clauses which seek to promise otherwise (ie. some form of stabilization which prevents future parliamentary amendment) are unenforceable.⁷²
- [23] A significant issue, however, is failure by Government to monitor/implement the terms which it had earlier agreed. The WA Auditor-General has issued reports identifying concerns about inadequate monitoring of State Agreements.⁷³ These reports have been used by proceedings in determining the actual realities of implementation (as opposed to the words in the statutory scheme).⁷⁴ There have been changes following Auditor General's report, with increased reporting required of local content.⁷⁵
- [24] Disputes between Government and the company are usually negotiated/agreed, or (uncommonly) resort to arbitration, but if there is no resolution through these, then government usually only has the 'nuclear option' to terminate everything.⁷⁶
- [25] While there *is* general legislative power to amend or repeal previous statutes (thus State Agreements), it becomes more complicated if court proceedings are currently underway. This 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.
- [26] 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.⁷⁷ 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,⁷⁸ meaning the outcome was the plaintiffs lacked standing to seek

• Mineralogy proceedings in the Federal Court, alleging unconscionable conduct by the WA State in purporting to terminate the arbitration proceedings with legislation: *Mineralogy P/L -v- WA* [2020] FCA 1517 (the Court adjourned these proceedings, pending a decision of the High Court on the validity of the legislation: [45]).

⁷¹ Including:

- the tabling of a 2014 decision and award (Mineralogy P/L -v- WA 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': Quigley 2020, 4596-4597.

⁷² eg. *Re Michael ex p WMC Resources* [2003] WASCA 288, [44]-[48].

⁷³ eg. WA Gov 2004, 20; WA Gov 2011, 21 & 31.

⁷⁴ eg. *Karajarri Traditional Lands Assn -v- ASJ Resources* [2012] NNTTA 18, [85] & [91].

⁷⁵ See fn33 and related text above.

⁷⁶ eg. *Aurukun Repeal Act 2004 (QLD)*; Young & o'rs 2005.

⁷⁷ *Dagi -v- BHP Ltd* [1995] VicSC 510, p288 & 270 per Cummins J.

⁷⁸ *BHP -v- Dagi* [1996] VicRp 62, and High Court leave to appeal that decision was refused: *Dagi -v- Att-Gen (Victoria)*, [1996] HCATrans 37.

remedies regarding contempt, but that did not change the Court’s original finding. That finding remained,⁷⁹ making it contempt, in existing court existing proceedings, to negotiate and agree provisions (framed to be enacted in another jurisdiction) which would have the effect of impeding existing proceedings.

[27] 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.⁸⁰

[28] An arbitration between Mineralogy companies and the WA Government (concerning obligations under a State Agreement) led to the Government’s introduction of a parliamentary bill aimed at limiting the claims and outcomes of that arbitration. The bill was passed by the WA Parliament,⁸¹ while various legal proceedings were underway⁸² (and more have since been commenced⁸³). The WA statute has been colourfully described in a decision of the Queensland Supreme Court.⁸⁴

[126] In 146BC, Rome emerged victorious over Carthage ... The city was razed to the ground, the survivors were sold into slavery and ... [a] common, but erroneous, story emerged in the 19th century in which it was asserted that the Romans had sowed salt into the soil so that nothing would ever grow there again.

[127] WA is not Rome. And Mineralogy is not Carthage. But the authors of the Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020 (WA) might be thought to have had the same level of obliteration in mind when that Act was drafted.

...

[132] There are [many]... provisions excluding liability and creating indemnities ...[including] what has been accurately described as the “mother of all Henry VIII clauses”....

[133] The Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2002 (WA) (as amended), if valid, is a juggernaut destroying everything in its path.

[29] The Mineralogy legislation has resulted in multiple High Court proceedings currently underway,⁸⁵ and other claims being adjourned in the Federal Court⁸⁶ pending the resolution of the High Court’s proceedings.

⁷⁹ 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).

⁸⁰ eg. *Glamis Gold -v- USA (Award)* (2009), [678].

⁸¹ *Iron Ore Mineralogy Amendment Act 2020 (WA)*.

⁸² Including the Federal Court ‘unconscionability’ proceedings noted above (*Mineralogy P/L -v- WA* [2020] FCA 1517) and also the registration of the arbitral awards in the Queensland Supreme Court: *Mineralogy P/L -v- WA* [2020] QSC 344, [2] (orders made on 13 August 2020) and [143] (setting aside the order enforcing the terms of the awards).

⁸³ Including proceedings against WA in the High Court’s original jurisdiction – by Mineralogy (B54 of 2020) and Clive Palmer personally (B52 of 2020) – contesting the validity of the WA actions in preparing and passing the *Iron Ore Mineralogy Amendment Act 2020*. These High Court proceedings are currently listed for next directions 26 February 2021, as to whether the parties can agree on the issues to be determined as a special case by the Full Court: *Palmer -v- WA* [2021] HCATrans 2 (with Kiefel CJ indicating a potential hearing date of that in May 2021).

⁸⁴ *Mineralogy P/L -v- WA* [2020] QSC 344 per Martin J.

⁸⁵ See fn83 above.

⁸⁶ *Mineralogy P/L -v- WA* [2020] FCA 1517, [44]-[45].

4. *Third parties and State Agreements*

[30] Some basic principles can be summarised:

- where a State Agreement has been passed, third parties unlikely to be able to challenge the government’s action in negotiating and passing that law,⁸⁷ nor the company’s subsequent actions under the agreement;⁸⁸
- references in a State Agreement to third parties can give those parties justiciable rights;⁸⁹
- there are increasing moves toward greater agreement transparency and accountability of resources regulation and contracts⁹⁰ but these are not (yet) seeing legal implications in WA.

[31] Third party (fundamental) rights are generally unimpeded by statute *unless* the parliament explicitly indicates otherwise,⁹¹ 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.⁹² 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.⁹³ Other contracts can give third party rights dealing with issues arising under State Agreements, making commitments potentially enforceable through the other contract.⁹⁴

[32] The principle 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 *Brett Cattle -v- Agriculture Minister*, Justice Rares spoke of 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’.⁹⁵

[33] 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).⁹⁶

⁸⁷ Southalan 2013, 172-173.

⁸⁸ Hillman 2006, 325; but contrast *Buurabalayji Thalanyji -v- Onslow Salt* [2017] FCA 1240.

⁸⁹ eg. *Hancock Prospecting -v- BHP Minerals* [2003] WASCA 259, [69]-[70].

⁹⁰ eg. OECD 2020, II; Pitman 2018; Cameron & Stanley 2017, 74.

⁹¹ eg. *Lacey -v- Attorney-General (QLD)* [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’).

⁹² eg. *Argyle Diamond Act 1981 (WA)*, s9; *Government Agreements Act 1979 (WA)*, s4.

⁹³ Recent publications assisting commercial lawyers to understand and advise on human rights aspects include IBA 2016 & IBA 2017.

⁹⁴ eg. *Buurabalayji Thalanyji -v- Onslow Salt* [2017] WASC 19, [34]-[35], [38] & order 1(d).

⁹⁵ *Brett Cattle -v- Agriculture Minister* [2020] FCA 732, [292].

⁹⁶ eg. *Kidd -v- Western Australia* [2014] WASC 99, [119]-[121], [130], [136]-[138] & [142]-[151] (new issue *within* scope of the State Agreement); *Mineralogy -v- WA* [2005] WASCA 69, [53] & [63]-[68] (new issue *outside* scope of State Agreement).

About Resources Law Network

[34] Resources Law Network is network of practicing lawyers, barristers and academics⁹⁷ who consider the development and use of resources (minerals, petroleum, or renewables) is a vitally important activity for any society. The Network members also believe that good regulation maximises the benefits and minimises the negative impacts of resource extraction, and recognise the importance of the rule of law in achieving that balance. This paper has been written by, and is the sole responsibility of, John Southalan

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Annex 1: 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’⁹⁸

Hon. N Moore MLC⁹⁹:

‘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’¹⁰⁰

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.¹⁰¹

⁹⁸ TI Aus 2017, 23 (see, in response: Audeyev & Hancock 2018).

⁹⁹ WA Mining Minister (1997-2001 & 2008-2013) and Shadow Mining Minister (2001-2006).

¹⁰⁰ Moore 2006, 6145.

¹⁰¹ Southalan & o'rs 2015, [2].

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