NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 27/01/2021 2:39:17 PM AEDT and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged:	Affidavit - Form 59 - Rule 29.02(1)
File Number:	NSD912/2020
File Title:	CLIVE FREDERICK PALMER v MARK MCGOWAN
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA

Dated: 27/01/2021 3:31:39 PM AEDT Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.

Form 59
Rule 29.02(1)

Affidavit

No. NSD 912 of 2020

Federal Court of Australia

District Registry: New South Wales

Division: General

Clive Frederick Palmer

Applicant

Mark McGowan

Respondent

Affidavit of: Clive Frederick Palmer

Address: Level 17, 240 Queen Street, Brisbane QLD 4000

Occupation: Company Director

Date: 27 January 2021

Contents

Filed on behalf of Clive Frederick Palmer, Applicant
Prepared by Michael John Sophocles
Law firm Sophocles Lawyers
Tel 02 9098 4450
Email mjs@sophocles-lawyers.com
Address for service Level 23, 52 Martin Place, Sydney NSW 2000

I, Clive Frederick Palmer of Level 17, 240 Queen Street, Brisbane QLD 4000, Company Director, say on oath:

1. I am the plaintiff in this proceeding.

2. This is my second affidavit to be filed in this proceeding. Its purpose is to exhibit some further documents relevant to matters deposed to in my first affidavit, which is also dated 27 January 2021 (**my first affidavit**).

3. In paragraph 11 of my first affidavit, I refer to the World Leadership Alliance (**WLA**). Exhibited to me at the time of swearing this affidavit, and marked "**CFP28**", is a true copy of a booklet explaining in further detail what WLA is and what it does.

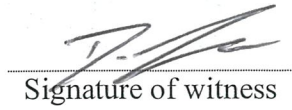
4. In paragraph 98 of my first affidavit, I refer to two arbitral awards made by Mr M H McHugh AC QC as arbitrator and dated 20 May 2014 and 11 October 2019 respectively.

5. Exhibited to me at the time of swearing this affidavit, and marked "**CFP29**", is a true copy of the arbitral award dated 20 May 2014.

6. Exhibited to me at the time of swearing this affidavit, and marked "**CFP30**", is a true copy of the arbitral award dated 11 October 2019.

Sworn by the deponent)
at Brisbane)
in the State of Queensland)
on 27 January 2021)
Before me:)

Signature of deponent



Signature of witness

Name of witness: Daniel Jacobson
Qualification of witness: Solicitor

Annexure Certificate

No. NSD 912 of 2020

Federal Court of Australia

District Registry: New South Wales

Division: General

Clive Frederick Palmer

Applicant

Mark McGowan

Respondent

Annexure Certificate – "CFP28"

The following 16 pages are the annexure "CFP28" to the affidavit of Clive Frederick Palmer sworn before me on 27 January 2021.

.....

Name: Daniel Jacobson

Address:

Solicitor

Solicitor

Filed on behalf of	Clive Frederick Palmer, Applicant
Prepared by	Michael John Sophocles
Law firm	Sophocles Lawyers
Tel	02 9098 4450
Email	mjs@sophocles-lawyers.com
Address for service	Level 23, 52 Martin Place, Sydney NSW 2000

CFP-28

Global Prosperity and Security

WORLD LEADERSHIP ALLIANCE

FOREWORD

PRIME MINISTER
THE NETHERLANDS (1994-2002)

Wim Kok

President of the World Leadership Alliance

The World Leadership Alliance, an independent non-profit organization, brings together global and business leaders to foster democratic values and leadership for the development of effective, sustainable and inclusive societies and global prosperity and security.

The World Leadership Alliance is composed of two main Conventions.

- World Leadership Alliance - Club de Madrid, comprising members who are democratically elected former presidents and prime ministers, the world´s largest forum of independent leaders (over 90 democratically elected former presidents and prime ministers from more than 60 countries), draws on the individual and collective leadership experience as well as the gravitas of its Members to support current leaders facing the daunting challenges of democratic development in a turbulent, new century.
- World Economic Council, convening global business leaders to act as the institutional supporter of the World Leadership Alliance operating through regional Conventions to be established in Asia, Europe, Australasia and the Pacific Islands, North America, Latin America and the Caribbean, Africa, The Middle East, Russia and Central Asia.

"I hope you will support the World Leadership Alliance and its important work globally."

Wim Kok,
PM The Netherlands (1994-2002),
President of the World Leadership Alliance

WORLD LEADERSHIP ALLIANCE

CLUB DE MADRID

WORLD ECONOMIC COUNCIL

WORLD ECONOMIC COUNCIL

PRESIDENT OF THE WORLD ECONOMIC COUNCIL

Professor Clive Palmer

Secretary General of the World Leadership Alliance

The World Economic Council provides an opportunity for global business leaders to collaborate with former world leaders in respect of fostering democratic leadership across the globe.

The primary objective of the World Economic Council is to support the mission and objectives of the World Leadership Alliance by bringing to it the corporate and business experience of its members and specifically, to raise and provide long term support of the functions of the World Leadership Alliance and the organizations which are part of it. This new relationship between former world leaders and global business leaders in the World Leadership Alliance will involve a great degree of reciprocity. It is expected that this interaction will include advising countries that are likely to host the G20.

"I am supported in this work by Mr Stephen Smith, nephew of former President John F. Kennedy, as President of the United States Convention and Vice President of the World Economic Council. I hope you too will support the World Economic Council to make a difference in the world."

Professor Clive Palmer,
President of the World Economic Council

WORLD ECONOMIC COUNCIL

CLUB DE MADRID

WORLD LEADERSHIP ALLIANCE

WORLD LEADERSHIP ALLIANCE

The World Leadership Alliance is a collaborative structure, the mission and vision of which is to foster and strengthen democratic values, democratic leadership, the rule of law and the development of effective, sustainable and inclusive societies.

The World Leadership Alliance is especially focused on enabling the transition of non-democratic countries to democracy. It aims to achieve this by engaging business, political, academic and other leaders of society to shape global, regional and industry agendas.

The core of the World Leadership Alliance comprises the world's foremost leaders from the political, business and academic world committed to addressing the key issues confronting society. This includes over 90 distinguished democratically elected former presidents and prime ministers from more than 60 countries. A distinguished group of scholars, former policy makers, senior government officials and political leaders provides additional advice and assistance on a wide range of issues.

WORLD LEADERSHIP ALLIANCE

CLUB DE MADRID

WORLD ECONOMIC COUNCIL

OUR MEMBERS

AMERICAS

Oscar Arias - President Costa Rica (1986-1990, 2006-2010)
Alvaro Arzú - President Guatemala (1996-2000)
Patricio Aylwin - President Chile (1990-1994)
Michelle Bachelet - President Chile (2006-2010)
Belisario Betancur - President Colombia (1982-1986)
Kim Campbell - Prime Minister Canada (1993)
Fernando Henrique Cardoso - President Brazil (1995-2003)
Jean Chrétien - Prime Minister Canada (1993-2003)
William J. Clinton - President USA (1993-2001),
Honorary Chair of the Club de Madrid
Leonel Fernández - President Dominican Republic (1996-2000, 2004-2012)
José María Figueres - President Costa Rica (1994-1998)
Vicente Fox - President Mexico (2000-2006)
Eduardo Frei Ruiz-Tagle - President Chile (1994-2000)
César Gaviria - President Colombia (1990-1994)
Osvaldo Hurtado - President Ecuador (1981-1984)
Luis Alberto Lacalle Herrera - President Uruguay (1990-1995)
Ricardo Lagos - President Chile (2000-2006)
Andrés Pastrana - President Colombia (1998-2002)
Percival Noel James Patterson - Prime Minister Jamaica (1992-2006)
Javier Pérez de Cuéllar - President Peru (2000-2001)
Jorge Quiroga - President Bolivia (2001-2002)
Gonzalo Sánchez de Lozada - President Bolivia (1993-1997, 2002-2003)
Julio María Sanguinetti - President Uruguay (1985-1990, 1995-2000)
Alejandro Toledo - President Peru (2001-2006)
Martín Torrijos - President Panama (2004-2009)
Ernesto Zedillo - President Mexico (1994-2000)

AFRICA AND MIDDLE EAST

Abdul-Kareem Al-Eryani - Prime Minister Yemen (1980-1983, 1998-2001)
Sadig Al Mahdi - Prime Minister Sudan (1966-1967, 1986-1989)
Joaquim Chissano - President Mozambique (1986-2005)
Luisa Diogo - Prime Minister Mozambique (2004-2010)
Amine Gemayel - President Lebanon (1982-1988)
Alpha Oumar Konare - President Mali (1992-2002)
John Kufuor - President Ghana (2001-2009)
Antonio M. Mascarenhas Monteiro - President Cape Verde (1991-2001)
Ketumile Masire - President Botswana (1980-1998)
Thabo Mbeki - President South Africa (1999-2008)
Benjamin Mkapa - President Tanzania (1995-2005)
Festus Mogae - President Botswana (1998-2008)
Olusegun Obasanjo - President Nigeria (1976-1979, 1999-2007)
Fuad Siniora - Prime Minister Lebanon (2005-2009)
Cassam Uteem - President Mauritius (1992-2002)

EUROPE

Valdas Adamkus - President Lithuania (1998-2003, 2004-2009)
Esko Aho - Prime Minister Finland (1991-1995)
Martti Ahtisaari - President Finland (1994-2000)
José María Aznar - President Government of Spain (1996-2004)
Carl Bildt - Prime Minister Sweden (1991-1994)
Valdis Birkavs - Prime Minister Latvia (1993-1994)
Kjell Magne Bondevik - Prime Minister Norway (1997-2000, 2001-2005)
Gro Harlem Brundtland - Prime Minister Norway (1981, 1986-1989, 1990-1996)
John Bruton - Prime Minister Ireland (1994-1997)
Aníbal Cavaco Silva - Prime Minister Portugal (1985-1995),
President Portugal (2006)
Philip Dimitrov - Prime Minister Bulgaria (1991-1992)
Vigdís Finnbogadottír - President Iceland (1980-1996)
Felipe González - President Government of Spain (1982-1996)
Mikhail Gorbachev - President Soviet Union (1990-1991)
Alfred Gusenbauer - Chancellor Austria (2007-2008)
António Guterres - Prime Minister Portugal (1995-2002)
Lionel Jospin - Prime Minister France (1997-2002)
Helmut Kohl - Chancellor Germany (1982-1998)
Horst Köhler - President of Germany (2004-2010)
Wim Kok - Prime Minister The Netherlands (1994-2002)
Milan Kucan - President Slovenia (1991-2002)
Zlatko Lagumdzija - Prime Minister Bosnia and Herzegovina (2001-2002)
Aleksander Kwasniewski - President Poland (1995-2005)
Ruud Lubbers - Prime Minister The Netherlands (1982-1994)
Tadeusz Mazowiecki - Prime Minister Poland (1989-1991)
Rexhep Meidani - President Rep. of Albania (1997-2002)
Romano Prodi - President Council of Ministers Italy (1996-1998, 2006-2008)
Poul Nyrup Rasmussen - Prime Minister Denmark (1993-2001)
Mary Robinson - President Ireland (1990-1997)
José Luis Rodriguez Zapatero - President Government of Spain (2004-2011)
Petre Roman - Prime Minister Romania (1989-1991)
Jorge Sampaio - President Portugal (1996-2006)
Mario Soares - Prime Minister Portugal (1976-1978, 1983-1985),
President Portugal (1986-1996)
Adolfo Suárez - President Government of Spain (1976-1981)
Hanna Suchocka - Prime Minister Poland (1992-1993)
Guy Verhofstadt - Prime Minister Belgium (1999-2008)
Vaira Vike-Freiberga - President Latvia (1999-2007)

ASIA PACIFIC

Yasuo Fukuda - Prime Minister Japan (2007-2008)
Bacharuddin Jusuf Habibie - President Indonesia (1998-1999)
Han Seung-soo - Prime Minister Rep. of Korea (2008-2009)
Chandrika Kumaratunga - President Sri Lanka (1994-2005)
Lee Hong-koo - Prime Minister Rep. of Korea (1994-1995)
Anand Panyarachun - Prime Minister Thailand (1991-1992)
Fidel Valdez Ramos - President The Philippines (1992-1998)
Jennifer Mary Shipley - Prime Minister New Zealand (1997-1999)

HONORARY MEMBERS

Kofi Annan - UN Secretary General (1997-2007)
Jimmy Carter - President USA (1977-1981) and Nobel Peace Prize (2002)
Jacques Delors - President EU Commision (1985-1995)
Aung San Suu Kyi - Myanmar Opposition Leader and Nobel Peace Prize (1991)

CONSTITUENT FOUNDATIONS

Representatives of the World Leadership Alliance - Club de Madrid
Diego Hidalgo - Founder and Honorary President, FRIDE
Anthony Jones - Executive Director GFNA
George Mathews - President GFNA
José Manuel Romero - Vice President, FRIDE

INSTITUTIONAL MEMBERS

World Leadership Alliance - Club de Madrid
Incumbent Presidents of the Government of Spain, of the Madrid Regional Government and the Mayor of Madrid

WORLD ECONOMIC COUNCIL MEMBERS

Clive Palmer - President of World Economic Council
Stephen Smith - Vice President (United States Convention)
Anna Palmer - Trustee of the Board of the World Leadership Alliance
Michael Palmer - Trustee of the Board of the World Leadership Alliance

BOARD OF TRUSTEES

WORLD LEADERSHIP ALLIANCE

President:
Wim Kok, PM The Netherlands (1994-2002)

Wim Kok studied at the Nyenrode Business School (Netherlands). Before serving as Minister of Finance and Deputy Prime Minister from 1989 to 1994, he was chairman of the Dutch Confederation of Trade Unions (1973-1985) and leader of the parliamentary group of the Dutch Labour Party (1986-1989). In 1994 he was elected Prime Minister of the Netherlands and was reelected in 1998, a position he took until 2002. After having stepped down from active politics Wim Kok served amongst others as an independant director in boards of multinational companies.

Vice-President:
Dame Jenny Shipley, Prime Minister of New Zealand (1997-1999)

During the 1990s Jenny Shipley held several Ministerial roles including Minister of Social Welfare, Women's Affairs , Minister of Health, Transport, State Services and SOEs. In 1997 Dame Jenny became Prime Minister and Leader of the National Party. Today she is a Director on China Construction Bank and chairs five companies in New Zealand.

Secretary General:
Carlos Westendorp y Cabeza, Secretary General of the Club of Madrid

Spanish Diplomat, was the first Ambassador to the EU, Secretary of State and Minister of Foreign Affairs (1995-96). Since then he has been Ambassador to the UN, High Representative in Bosnia Herzegovina, Member of the European Parliament and Ambassador to the US.

Clive Palmer, President of the World Economic Council
Joint Secretary General, World Leadership Alliance

Clive Palmer is the owner and Chairman of Mineralogy Pty Ltd which owns one of the world's largest iron ore deposits in Western Australia. Mr Palmer was named as Australia's 5th wealthiest person and was also inducted as an Australian National Living Treasure by the National Trust in Australia. Australian National Living Treasures are people who have made outstanding contributions to Australian society. Mr Palmer was made a World Fellow with the Duke of Edinburgh Award.

WORLD LEADERSHIP ALLIANCE

CLUB DE MADRID

WORLD ECONOMIC COUNCIL

BOARD OF TRUSTEES

WORLD LEADERSHIP ALLIANCE

Stephen E. Smith, Junior – Vice President (United States Convention)

Stephen E. Smith, Jr. is the nephew of former President John F. Kennedy, and a Director of The John F. Kennedy Library Foundation in Boston. Mr Smith holds an M.A. from Harvard University, a J.D. from Columbia University, and an M.A. Ed. from Harvard's School for Education. He served as Deputy Campaign Manager for Senator Edward Kennedy during his presidential and senatorial campaigns. He also served on the staff of the Senate Judiciary and Foreign Relations Committees, and taught negotiation at Harvard University Law School. He is a three-time winner of Harvard's Danforth Award for Excellence in Teaching and a recipient of the Lyndehurst Foundation prize for social and artistic achievement. Mr Smith has been involved in several high-level peace negotiations and has served as a consultant to the Irish peace process and the organization of African Unity.

Jorge Quiroga - President of Bolivia (2001-2002)

Jorge Quiroga graduated summa cum laude in Industrial Engineering at the College Station of Texas A&M University. Upon completing his studies, Mr. Quiroga worked in the private sector. In 1992 he became Minister of Finance. In 1998, at age 37, he was elected Vice President of Bolivia and acceded to the Presidency in 2001.

Vaira Vīke-Freiberga - President of Latvia (1999-2007)

Vaira Vike-Freiberga earned a PhD. in Experimental Psychology at the University of Toronto. She has held prominent positions in national and international scientific and scholarly organisations. In 1998, Dr. Freiberga returned to Latvia from exile in Canada and a year later, she was elected President of Latvia. Dr. Vīke-Freiberga is Member of the Council of Women World Leaders since 1999.

WORLD ECONOMIC COUNCIL

CLUB DE MADRID

WORLD LEADERSHIP ALLIANCE

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WORLD LEADERSHIP ALLIANCE

Cassam Uteem
President of the Republic of Mauritius (1992- 2002)

Mr. Uteem studied at Paris VII University. In 1969 he was elected Councillor of the City of Port Louis. He became the city's Lord Mayor in 1986. In 1976 he was elected Member of the Mauritian Parliament. He successively served as Minister of Employment, Deputy-Prime Minister and Minister of Industry. In 1992 he was elected President of the Republic of Mauritius and re-elected in 1997.

Kim Campbell
Prime Minister of Canada 1993

The first female Prime Minister of Canada, she also held cabinet portfolios: Minister of State for Indian Affairs, Minister of Justice and Attorney General, and Minister of National Defence and Veterans' Affairs. Thereafter, she served as Canadian Consul General in Los Angeles, taught at the Kennedy School of Government at Harvard and chaired the Council of Women World Leaders, she was President of the International Women's Forum and served as Secretary General of the Club de Madrid. Today, she chairs the steering committee for the World Movement for Democracy.

Anna Palmer

Anna Palmer has many years of experience in international commerce. She has worked with Price Waterhouse and Rio Tinto. As a member of the Institute of Chartered Accountants in Australia and a member of the Hong Kong Institute of Certified Public Accountants she has a tenacious commitment to strong corporate governance. She is currently involved in major projects aimed at bettering international cooperation and understanding.

Michael Palmer

Michael Palmer is a young World Fellow. He is the personal assistant to Professor Clive F. Palmer and has been active in Public Affairs in Australia. He has previously spent time working with the late US Senator Edward Kennedy.

WORLD LEADERSHIP ALLIANCE

CLUB DE MADRID

WORLD ECONOMIC COUNCIL

OUR WORK

WORLD LEADERSHIP ALLIANCE

CLUB DE MADRID

CRISIS RESPONSE AND DIPLOMACY

The World Leadership Alliance - Club de Madrid will continue to offer advice and counsel to foster democratic values and prevent and resolve conflicts and help reconcile opposing positions. It fosters and supports national and regional capacities to prevent conflicts between and within countries.

MENA COUNTRIES

Peer-to-peer exchanges aimed at supporting the implementation of democratic political reform, the creation of a multi-party system, good governance strategies, gender issues, and economic reform policies ensuring social justice is already being provided by the World Leadership Alliance - Club de Madrid to key political actors – governmental and non-governmental – in countries of the MENA region like Jordan, Libya and Tunisia. Another key objective of this effort is to increase awareness of the importance of an inclusive, democratic society in achieving the cultural shift towards a multiparty democratic system, based on citizen's trust and participation, which is being sought.

KYRGYZSTAN

Drawing on the political leadership and transitional expertise of the Members of the World Leadership Alliance - Club de Madrid, this project aimed to support the current leaders of Kyrgyzstan in their efforts to consolidate the country´s transition to a parliamentary democracy, create effective institutions, advance democratic transition and address the challenges of ethnic reconciliation in the context of Central Asia.

HAITI

Following the massive destruction of the 2010 earthquake, the World Leadership Alliance - Club de Madrid provided counsel and support to Haitian leaders in support of the country's process of institutional reconstruction and democratic consolidation. In this sense, support and counsel focused on the need to produce legitimate and stable institutions to more effectively convene efforts for the necessary physical reconstruction; to enhance Haitian leadership's leverage in ensuring a Haitian-owned reconstruction process and one that is conductive to Haitian self-sufficiency; and to promote political stability as a sine qua non for the investment essential to development and the improvement of the living conditions of millions of Haitians.

WORLD ECONOMIC COUNCIL

CLUB DE MADRID

WORLD LEADERSHIP ALLIANCE

LEADERSHIP AND DEMOCRATIC GOVERNANCE

The World Leadership Alliance - Club de Madrid will work to strengthen democratic leadership and institutional capacity in countries engaged in democratic transitions as well as in aspects of regional and global governance where its Members' experience can contribute to the latters improvement.

THE SHARED SOCIETIES PROJECT

The Shared Societies Project is designed to respond to the urgent request from leaders for arguments and action plans to help them effectively manage ethnic, cultural, religious, and other types of diversity and to facilitate inclusion, equal opportunities and participation. The project objective is to support democratic development by promoting leadership for dialogue, diversity and social cohesion, and is designed in the belief that societies are most likely to be peaceful, democratic and prosperous when leaders and citizens recognize the value of diversity and actively build a shared society.

THE G-20 IN A POST CRISIS WORLD

This initiative was launched in 2010 to support the G20 Korean Presidency in the development of strong and relevant G20 agenda with a focus on finding solutions to the current systemic crisis, taking the views and concerns of non - G20 countries adequately into account. Since then, the World Leadership Alliance - Club de Madrid has supported the Korean, French and Mexican G20 Presidencies. Although ad hoc, the G20 is more representative than the G8 and must be supported to better serve as an effective transition mechanism, taking us from the 'informal' to a more 'institutionalized' multilateralism, essential to address the daunting 21st century challenges.

GLOBAL LEADERSHIP FOR CLIMATE ACTION

Addressing global climate change and poverty are amongst the most pressing challenges for humanity, requiring an urgent response. The World Leadership Alliance - Club de Madrid has been working on two related and mutually reinforcing fronts: the mobilization of political will for the attainment of a globally effective, efficient and equitable post-2012 climate regime and the promotion of universal access to clean energy for poverty reduction.

It is in this framework that we continue to advocate and convey the urgency in achieving international agreement on both climate change, fulfillment of the Millennium Development Goals and the realistic and strong formulation of the future Sustainable Development Goals beyond Rio + 20.

WOMEN'S LEADERSHIP FOR PEACE AND SECURITY

In 2009, based on the leadership experience of its Members, the World Leadership Alliance - Club de Madrid launched the initiative Women's Leadership for Peace and Security in the Greater Horn of Africa and the Andean Region for an increased and more effective participation of women in peace and security processes, and enhanced respect of their human rights in conflict and post conflict situations. During the past three years, a core group of its Members facilitates and works with the G40 - a group of women leaders from across the Horn of Africa - in order to increase their capacity and engagement in political advocacy.

WORLD LEADERSHIP ALLIANCE

CLUB DE MADRID

WORLD ECONOMIC COUNCIL

CLUB DE MADRID

WORLD LEADERSHIP ALLIANCE
CLUB DE MADRID

World Leadership Alliance – Club de Madrid

The World Leadership Alliance – Club de Madrid is an independent non-profit organization composed of democratically elected former Heads of State and Government from around the globe, with clear and undisputed democratic credentials, constituting the world's largest forum of former Heads of State and Government, who have come together to respond to a growing demand for support in two key areas. Democratic leadership and governance and response to crisis and post-crisis situations, addressing the challenges of democratic governance and political conflict from a democratic perspective, as well as that of building functional and inclusive societies, where their leadership experience is most valuable.

The World Leadership Alliance – Club de Madrid assists in the identification of politically sustainable solutions to the challenges faced by today`s leaders, developing practical recommendations, action plans and implementation strategies. The direct exchanges with current leaders on a peer to peer basis, and our Members' ability to deliver the right message at the right time are an essential part of our work and is the core of our impact. *For further information please go to www.clubmadrid.org*

WORLD ECONOMIC COUNCIL

CLUB DE MADRID

WORLD LEADERSHIP ALLIANCE

WORLD ECONOMIC COUNCIL

The World Leadership Alliance brings together the World Leadership Alliance - Club de Madrid and its Members with the World Economic Council, an entity made up of global business leaders who bring their own experience in addressing global challenges.

The primary objective of the World Economic Council is to support the mission and objectives of the World Leadership Alliance by bringing to it the corporate and business experience of its members and, specifically, to raise and provide funds to support the functions of the World Leadership Alliance and the organizations which are part of it. The World Economic Council exercises its international action in shaping global, regional and sectoral agendas through regional conventions to be established in:

Asia, Europe, Australasia and the Pacific Islands, North America, Latin America and the Caribbean, Africa, The Middle East, Russia and Central Asia.

WORLD LEADERSHIP ALLIANCE

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WORLD ECONOMIC COUNCIL

WORLD ECONOMIC COUNCIL

THE BOARD

Professor Clive Frederick Palmer - President

Clive Palmer is the owner and Chairman of Mineralogy Pty Ltd which owns one of the world's largest iron ore deposits and is actively engaged in the resource business globally. He has been active in business in Europe, China, Australia and the South Pacific. He is also a Director of The John F. Kennedy Library Foundation in Boston. He is a Professor at Bond University on the Gold Coast. Professor Palmer was named as Australia's 5th wealthiest person and was also inducted as an Australian National Living Treasure by the National Trust in Australia. Australian National Living Treasures are people who have made outstanding contributions to Australian society. Mr Palmer is a World Fellow. He is a major supporter of the Duke of Edinburgh Awards. Professor Palmer is known for his philanthropic activities which continue to support those in need.

Stephen E. Smith, Junior – Vice President (United States Convention)

Stephen E. Smith, Jr. is the nephew of former President John F. Kennedy, and a Director of The John F. Kennedy Library Foundation in Boston. Mr Smith holds an M.A. from Harvard University, a J.D. from Columbia University, and an M.A. Ed. from Harvard's School for Education. He served as Deputy Campaign Manager for Senator Edward Kennedy during his presidential and senatorial campaigns. He also served on the staff of the Senate Judiciary and Foreign Relations Committees, and taught negotiation at Harvard University Law School. He is a three-time winner of Harvard's Danforth Award for Excellence in Teaching and a recipient of the Lyndehurst Foundation prize for social and artistic achievement. Mr Smith has been involved in several high-level peace negotiations and has served as a consultant to the Irish peace process and the organization of African Unity.

Geoffrey Smith – Vice President (Australasia and the Pacific Islands Convention)

Geoffrey Smith has over 30 years of experience as a lawyer. Mr Smith has extensive experience in commercial matters, intellectual property and corporate work throughout his long career as a registered arbitrator. He has been active in supporting community based charities. Mr Smith has been active in supporting the international efforts of the World Leadership Alliance.

WORLD ECONOMIC COUNCIL

CLUB DE MADRID

WORLD LEADERSHIP ALLIANCE

WORLD ECONOMIC COUNCIL

THE BOARD

Raymond Tam – Vice President (Asia Convention)

Raymond Tam is a Director of Asia Pacific Shipping Enterprises Pte Ltd. He is based in Hong Kong and travels regularly in Asia. Mr Tam has over 15 years of international business experience and worked for JPMorgan, Citibank and HSBC previously. Mr Tam is a CFA, FRM charter-holder, Certified Accountant of CPA Australia and a member of the Hong Kong Institute of Certified Public Accountants. Mr Tam is an Asia Society Asia 21 Young Leader and was honoured by CPA Australia in 2012 as one of the Top 40 high-achieving senior business leaders worldwide under the age of 40.

Baljeet Singh - Treasurer

Baljeet Singh is the World Project Director of the Titanic II project. The project is rebuilding a replica of the original Titanic. Her work takes her to all corners of the globe. Ms Singh has a strong interest in International Affairs. She is a qualified solicitor and is admitted to practice in the Supreme Courts of Queensland and Western Australia and the High Court of Australia. Ms. Singh is experienced in environmental and native title law and corporate and commercial law she has spent a considerable time working in Hong Kong on major international financial transactions. She has also been active in business matters in Europe, the United States.

Shirley Morgan - Secretary

Shirley Morgan is a qualified solicitor in England & Wales. She is experienced in international corporate finance law, acquisitions finance law, project finance law and property finance law. Ms Morgan has previously worked for Norton Rose, HSBC and Hammonds LLP. Shirley Morgan has played a pivotal role in establishing the World Economic Council and setting up its corporate structure internationally.

Clive Mensink – Board member of the World Economic Council

Clive Mensink is a senior executive with Queensland Nickel and a Non-executive Director of Australasian Resources Ltd (ASX Code: ARH). He has over 25 years of experience in the iron ore and resource industry. Mr Mensink was the Director of Project Development from 1998 to 2007 facilitating one of the largest investments ever made outside China by the Chinese Government. Mr Mensink is active internationally being responsible for Operations of what are the world's largest nickel producers in the Philippines, Indonesia, New Caledonia, Hong Kong and China.

Along with additional memebers appointed by the World Leadership Alliance - Club de Madrid

WORLD LEADERSHIP ALLIANCE

CLUB DE MADRID

WORLD ECONOMIC COUNCIL

WORLD
ECONOMIC
COUNCIL

Enquire about Membership

PERSONAL DETAILS

☐ Mr ☐ Mrs ☐ Ms ☐ Miss Surname: .....

Given Names: .....

TYPE OF MEMBERSHIP

☐ Corporate ☐ Individual

REGIONS OF INTEREST

☐ Asia
☐ Australasia and the Pacific Islands
☐ North America
☐ Africa
☐ Russia
☐ Europe
☐ Latin America and the Caribbean
☐ The Middle East
☐ Central Asia

Email: ..... Phone: .....

Address: .....

.....

Post Code: ..... Country: .....

Please scan or cut out and email to:
World Economic Council
Email: opportunity@worldeconomiccouncil.org

World Leadership Alliance
Carrera de San Jeronimo, no 15, 3 planta
28014 Madrid (Spain)
Tel: +34 911 548 230
Fax: +34 911 548 240
Email: admin@world-leadership-alliance.com

World Leadership Alliance - Club de Madrid
Carrera de San Jeronimo, no 15, 3 planta
28014 Madrid (Spain)
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Annexure Certificate

No. NSD 912 of 2020

Federal Court of Australia

District Registry: New South Wales

Division: General

Clive Frederick Palmer

Applicant

Mark McGowan

Respondent

Annexure Certificate – "CFP29"

The following 51 pages are the annexure "CFP29" to the affidavit of Clive Frederick Palmer sworn before me on 27 January 2021.

.....

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IN THE MATTER OF THE COMMERCIAL ARBITRATION ACT 1985

(WA)

AND

IN THE MATTER OF AN ARBITRATION

BETWEEN:

MINERALOGY PTY LTD ACN 010 582 680

- and -

INTERNATIONAL MINERALS PTY LTD
ACN 058 341 638 Applicants

- and -

THE STATE OF WESTERN AUSTRALIA Respondent

AWARD

1. The principal issue in this arbitration is whether a document entitled *Balmoral South Iron Ore Project: Project Proposal for the Western Australian Government* (the August 2012 submission) was a "proposal submitted pursuant to Clause 6" of the *Iron Ore Processing Mineralogy Agreement* (the State Agreement) made between the Applicants, other companies and the State of Western Australia. If it was a proposal for the purpose of that Agreement, clause 7 of the Agreement required the Minister to deal with it. In very general terms, the Minister could defer consideration of the proposal until certain matters were remedied or he could impose conditions before approving the proposal. However, he had no power to reject the proposal if it was a proposal for the purpose of Clause 7.

2. The Applicants contend that the August 2012 submission was a proposal within the meaning of the State Agreement. The Respondent asserts that it was not such a proposal because it failed to make provision or adequate provision for many of the matters specified in Clause 6(2) and other provisions of the State Agreement. The Respondent also contends the August 2012 submission was not a proposal because it failed to specify with precision which of the four permitted types of project was proposed. The Respondent also asserts that the August submission was not such a proposal because it proposed activities, contrary to an implied term in the State Agreement, that a proposal would not conflict with facilities used in a project already approved by the Minister without the consent of the Proponents of that proposal.

3. The State Agreement was made on 5 December 2001; variations were made to the Agreement in November 2008. The Agreement recited that the Applicant was the holder of mining tenements in the Pilbara region and that it had granted various rights in relation to certain of those tenements to other companies described as "Co-Proponents". It further recited that the Applicant by itself or in conjunction with one or more of the Co-Proponents wished to develop projects incorporating the mining and concentration of iron ore in what was described and identified as Area A, the transport of magnetite concentrates and processed iron ore within the Pilbara region, the establishment of new port facilities in that region and the shipping of processed iron ore through such port facilities. The Agreement recited that the State had agreed to assist the establishment of the proposed projects upon and subject to the terms of the Agreement. Clause 28 of the Agreement provided that it took effect notwithstanding the provisions of certain subsidiary agreements between the parties.

4. As varied, the Agreement provided for the development of four projects: in broad terms, Project 1 meant a project for the production of high-grade iron ore pellets, Project 2 meant a project for the production of direct reduced iron, Project 3 meant a project for the production of steel within Western Australia and Project 4 meant a project for the production of iron ore concentrates within Western Australia for sale or export. The right to develop a Project 4 project was added by a variation to the State Agreement in 2008.

5. Clause 6(1) required the first Applicant alone or with a Co-Proponent to submit to the Minister on or before 30 June 2003 "to the fullest extent reasonably practicable its detailed proposals (including plans where practicable and specifications where reasonably required by the Minister and any other details normally required by the local government in which area any of the works were to be situated) for a project or projects of the type Project 1, Project 2 or Project 3 or a combination thereof. Clause 6(1) also provided that during the currency of the Agreement, the Applicant either alone or with a Co-Proponent might "subject as aforesaid make further such detailed proposals for new projects of the type of Project 1, Project 2, Project 3 or Project 4" or a combination of Projects 1, 2 or 3. Clause 6 (1) declared that the "detailed proposals made pursuant to this Clause in respect of a project are in this Agreement called a 'Project proposal'."

6. Clause 6 (2) declared:

> *"Each Project shall address the establishment and operation of the project concerned and make provision where appropriate for the [Applicant's] workforce required to enable the Project Proponents to mine, recover, concentrate and (if applicable) process or blend iron ore and shall include the location, area, layout, design,*

quantities, materials and time programme for the commencement and completion of construction or the provision (as the case may be) of each of the following matters, if and as they are applicable to the project".

The clause then set out 17 matters in sub-paragraphs (a) – (q).

7. Clause 6 (3) provided that "[t]he proposals constituting a Project proposal may with the approval of the Minister or if so required by the Minister shall be submitted separately and in any order as to the matter or matters mentioned in one or more of paragraphs (a) to (q) of subclause (2)."

8. Clause 6(4) of the Agreement provided that, with the consent of the Minister and of any other parties concerned, a Project proposal may make provision for the use of any existing facilities equipment or services of such kind belonging to the Applicant or the Project Proponents instead of providing for the construction of new Facilities.

9. Clause 7 provides that, in respect of each proposal submitted pursuant to Clause 6 but, subject to the Environmental Protection Act, the Minister has three options. First, he may approve of the proposal without qualification or reservation. Second, he may defer further consideration of or a decision upon it until such time as the Project Proponents submit a further proposal or proposals in respect of matters mentioned in sub-clause (2) of Clause 6 that were not covered by the proposal. Third, he may require as a condition precedent to the giving of his approval to the proposal that the Proponents make such alteration thereto or comply with such conditions in respect thereof as he thinks reasonable. The Court of Appeal of the Supreme Court of Western Australia has held that the Minister has no power to reject a proposal. He must approve it, defer the Proposal until a further proposal is

submitted or require the Proposal to comply with such conditions as he thinks are reasonable.

10. Clause 6(2) provides that, within two months after receipt of a Proposal pursuant to Clause 6, the Minister must give notice to the Project Proponents of his decision in respect of the Proposal. Clause 7(3) provides that, if the Minister defers consideration of or a decision upon a Proposal or requires a condition precedent to the giving of his approval, he must "afford the Project Proponents full opportunity to consult with him and should they so desire to submit new or revised proposals either generally or in respect to some particular matter."

11. The State Agreement also requires various consents or approvals to be obtained before a proposal is submitted to the Minister. Clause 5B(2) provides that, subject to an irrelevant exception, land to be granted pursuant to the Agreement must be drawn from within Area A or "such other land within the vicinity of Area A as the Minister, before the Project Proponents submit proposals in respect thereof, approves". Hence, a proposal must concern land within Area A or, with the Minister's consent, in the vicinity of Area A.

12. I have already referred to Clause 6(3) which provides for proposals which together constitute a Project proposal to be submitted separately, if the Minister approves. Clause 6(6)(a) requires that "[a]t the time when Project Proponents submit each Project proposal" they also submit details of services, works, materials, plant, equipment and supplies that they propose to consider obtaining from outside Australia. Sub-clauses 6(6)(b) and (7) require that, at the time a proposal is submitted to the Minister, the Project Proponents must either demonstrate the availability of finance and their readiness to commence and complete the Project, or

notify the Minister that they are applying to an Export Credit Agency for financial support in connection with the Project.

13. Clause 6(5) entitles the Proponents to refer the decision of the Minister to arbitration if they consider it is unreasonable.

14. The definitions of each type of "Project" in clause 1 of the State Agreement contemplate only those Facilities which are necessary to enable the relevant product to be produced, transported and shipped. It follows from those definitions, and the terms of clause 6 of the State Agreement, that the Facilities proposed in a Project proposal must be devoted to the Project, except where sub-clauses 6(4) or 6(4a) apply.

15. Clause 11(7) provides for Project Proponents, as part of their Project, to undertake the blending of iron ore concentrates produced from outside the State Agreement areas. This clause does not contemplate the blending of concentrates produced by different Projects within those areas.

<u>The Sino Iron and Korean Steel Proposals</u>

16. Two of the Co-Proponents under the Agreement were Sino Iron and Korean Steel. On 2 May 2008, the Minister gave approval to the Sino Iron Pellet Project proposal under Clause 7 of the State Agreement except in relation to matters mentioned in clause 6(2) (i) of that Agreement – disposal of waste rock and tailings. On 22 April 2009, the first Applicant and Sino Iron submitted a document proposing to produce 7.8 Mt/a of iron ore concentrates for sale as part of the Sino Iron Project and to expand facilities constructed as part of the Sino Iron Project for use not only by the Sino Iron Project but also by the Korean Steel Project referred to below. On 22 June 2009, the Minister gave

approval to the Sino Iron Concentrate proposal as it "contains provision for all of the matters mentioned in sub-clause 6 (2) of the Agreement relating to the proposed Sino Iron Project".

17. On 10 November 2009, the first Applicant and Sino Iron submitted a document proposing to produce further concentrates (Second Sino Iron Concentrate proposal). On 6 January 2010, after receiving additional information from the first Applicant, Sino Iron and Korean Steel, the Minister gave approval to the Second Sino Iron Concentrate proposal.

18. By a document submitted on 22 April 2009, the first Applicant and Korean Steel submitted a document proposing to produce and export 6 Mt/a of iron ore concentrates using the same facilities as the Sino Iron Project (Korean Steel Concentrate proposal). On 11 June 2009, the Minister gave approval under clause 7 of the State Agreement for the Korean Steel Concentrate proposal. On 10 November 2009, Korean Steel submitted a document proposing to expand the Korean Steel Concentrate proposal to produce and export 13.8 Mt/a of concentrate using the same facilities as the Sino Iron Project (Second Korean Steel Concentrate proposal). On 6 January 2010, the Minister gave approval to the Second Korean Steel Concentrate proposal.

19. The Sino Iron proposal provided for the construction of a causeway to nearby Preston Island, a jetty with a ship loading conveyor and a two berth wharf on the jetty. The Sino Proposal proposed to use port facilities approved in Ministerial Statement 635, as modified and documented in approved Environmental Management Plans. It involved introducing a breakwater extending into deep navigable waters to the northwest of Preston Island and other infrastructure inside the breakwater and

modifying the route of the causeway from the mainland to Preston Island.

20. Before the Applicants submitted the August 2012 submission, Sino Iron had constructed a causeway to Preston Island and a breakwater at Preston Island and associated facilities on and within the protected area of the breakwater. It has not yet constructed the direct shipping berths at the end of the causeway for which its Proposal makes provision. Currently, barges are loaded in the breakwater harbour to transfer low volumes of iron ore concentrate to ships for export.

The August submission

21. The August submission consisted of an Executive Summary, 72 pages of details, 12 voluminous Appendices of which two were removed on instruction by the Department of State Development, 18 Tables and 15 Figures.

22. I set out the Executive Summary which provided as follows:

"Mineralogy Pty Ltd (Mineralogy) and International Minerals Pty Ltd (IM) seek the Minister's approval under the Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002 (as amended) (IOPAA) to construct and operate infrastructure to produce and export 24 million tonnes per annum of iron ore concentrate. This project is called the Balmoral South Iron Ore Project (BSIOP).

The BSIOP will be constructed and operated in accordance with existing approvals under the Environmental Protection Act 1986 and other relevant State and Commonwealth legislation.

The proposed project consists of a magnetite iron ore mine, processing facility and associated infrastructure in the Cape Preston region of the Pilbara, Western Australia, 70 kilometres southwest of Karratha.

The BSIOP will be developed in two phases. Phase 1 is based on a licence granted to IM by Mineralogy to mine one billion tonnes of iron ore from the Mineralogy owned tenements M08/126 and M08/127. These tenements contain an indicated and inferred resource of more than 1.5 billion tonnes of iron ore. Phase 2 is based on a right to mine a further billion tonnes of iron with any shortfall of the extra billion tonnes of ore guaranteed by Mineralogy from adjoining tenement M08/128. The Project lifespan is estimated to be 28 years.

Key elements of the BSIOP are:

- Open pit mine, with Phase 1 mining 42Mtpa of ore and 42Mtpa of rock waste and Phase 2 increasing mining to 84Mtpa ore and 84Mtpa rock waste. Mining to a depth of 300 metres requiring the movement of ore and waste utilising large hydraulic shovels and rear dump trucks.
- Concentrator with a Phase 1 ore feed of approximately 42Mtpa with a total concentrate production of 12Mtpa and Phase 2 to increase ore feed to 84Mtpa and a total concentrate production of 24Mtpa.
- A tailings storage facility (TSF) and a waste rock landform (WRL) which will remain as permanent landforms after closure.
- 31 km slurry pipeline to a filter plant dewatering facility at Cape Preston.
- 2 million tonne stockyard and reclaimer at Cape Preston.
- Conveyor, trestle jetty and ship loading facility capable of loading Capesize vessels.
- Dredged shipping channel.
- Gas fired power station.
- Desalination plant.
- Gas, water and electrical distribution.
- Roads and service corridors.

- Accommodation village for up to 4,000 personnel during construction and 1,500 permanent staff.
- Communications.
- Workshops, support buildings and temporary construction laydown areas across the Project.
- Support infrastructure including an explosives magazine, landfill and fuel storage.

Project Timing

The Project aims to begin in September 2012 and first shipment of ore in 2016. The Project has been conceived in two phases of 12 million tonnes each per annum (Mtpa) each. The timing of the execution of each phase is dependent on Project financing.

Project Approvals

The BSIOP has approval for all parts of the proposed project under Part IV of the Environmental Protection Act 1986 (EP Act) under Ministerial Statements MS635, MS823 and MS827 and Commonwealth Environmental Protection and Biodiversity Conservation Act 1999 (EPBC Act) statement EPBC 2008/4236. The BSIOP will conform to all other relevant legislation and remaining secondary approvals will be in place before construction commences.

Environmental Management

Environmental Management of the BSIOP will be undertaken under an ISO14001 compliant Environmental Management System (EMS). The key document for the management on the BSIOP is the Project Environmental Management Plan (PEMP) submitted as part of the BSIOP Public Environmental Review (PER).

As the BSIOP is being proposed under a State Agreement Act it is not subject to the Mining Act 1978, and IM will not be submitting a Mining Proposal to the DMP for approval.

Project Cost

Updated in February 2012, the capital cost estimated of the BSIOP is:

- Phase 1- AUD$3,916,000,000
- Phase 2 - AUD$1,988,000,000

Geology and Mining

The economic iron mineralisation in the Balmoral South ore body is magnetite. Magnetite is the primary iron mineral present in the banded iron formations (BIF) of the Brockman Iron Formation.

The mining will be by conventional open cut mining with progressive cut back of the pit walls as the pit depth increases. The mine will operate as per industry practice - 24 hours a day, 7 days a week with the crews rostered to give adequate coverage.

The ore that is above the cut-off grade of 15% and is located within the Joffre formation is designated as mill feed will be hauled to the location of the two primary crushers, where it will be fed directly to the crusher or, alternatively, placed onto the run-of-mine (ROM) stockpile from where it will be subsequently recovered and fed to the primary crusher.

Ore Processing

Grind mills will produce a fine ore stream that can be separated by magnetic separators. Using this equipment the ore can be upgraded from approximately 31% Fe to greater than 71% Fe with a final magnetite concentration of 94%.

This concentrate is then pumped as a slurry 31 kilometres to a holding tank at the port. From there the concentrate is dewatered and sent by conveyor to a stockyard.

Port Development

Building on the existing port, a deep water port facility will be constructed entailing:

- The construction of a trestle jetty containing two side-by-side berths capable of accommodating Capesized ships of 150,000DWT;
- A single conveyor, feeding a single ship loader, capable of loading a ship at either berth;
- Dredging of the berth area and shipping channel to accommodate Capesized ships to approximately 150,000DWT, with a dredging volume of approximately 4.5 million m^3.

The initial port stockyard will be constructed to contain up to 1 million tonnes of product. The stockpile area can be expanded to 2 million tonnes as the port is expanded and more stockyard capacity is required.

Waste Rock and Tailings Disposal

Mine waste rock will be disposed of in a waste rock landform (WRL) directly to the west of the mine pit on tenements M08/126 and M08/127. Potentially acid forming waste (PAF), fibrous materials and dispersive materials will be encapsulated in the WRL.
Tailings from the ore concentrator will be disposed of in a tailings storage facility (TSF) located on tenement G08/63 to the east of the mine pit. Tailings will be pumped out at 75% solids in several phases to create an advancing tailings landform. The landform will ultimately solidify and be rehabilitated. A containment wall and a water recovery system will be put in place around the TSF.

Electricity

Phase 1 of the BSIOP requires a power capacity of up to 250 MW and Phase 1 plus Phase 2 requires a power capacity of up to 500 MW. A self-contained natural gas fired turbine power station will generate electrical power for the project. The power station, situated near the concentrator complex will have overhead transmission lines to the desalination plant, port, accommodation and mine areas.

Until the gas supply line can be connected to the gas turbine units that will be constructed, electricity requirements will be met by using bunded portable diesel generators.

Gas

Gas will be supplied from a lateral spur line on the main Dampier to Bunbury trunk line. The BSIOP will have a gas demand of approximately 46 TJ/day of natural gas.

Water

The BSIOP will have an estimated operational water demand of 84 KL/day. Operational water supply requirements for the project will be provided by a desalination plant. Construction water requirements will be met by pit dewatering on M08/126 and M08/127.

To provide water security for the project water may also be sourced from a proposed groundwater borefield to be located on Miscellaneous Licence applications L08/22 and L08/23.

A potable water plant will be constructed at the port to treat a small stream from the desalination plant output to a quality suitable for human consumption.

Services Corridors

Site access will be via a sealed two lane road connecting North West Highway to the common services corridor in the vicinity of the accommodation village on tenement M08/130. The distance from the North West Highway to the village access point is approximately 6 kilometres.

From the accommodation village all facilities will be accessed via a common services corridor which will extend 40 kilometres north to the port located at Cape Preston. The common services corridor includes a two lane all weather road for common use and a separate services corridor for each project. IM will be responsible for building an additional 10 kilometres of common use all weather road to reach the BSIOP. The IM services corridor will be 120 metres wide and contain water lines, gas lines, slurry pipeline and an unsealed service road.

Accommodation and Workforce

The total direct workforce and contractors employed during construction are likely to peak at 4,000. A permanent workforce of up to 1,500 people will be required to operate the project. These people will be housed in the Project accommodation village within Mining Lease M08/130.

Local Procurement, Employment and Training

To date project procurement has been 86% Western Australian with less than 4% overseas sourced. The Project will conform to the local content requirements of the IOPAA and report quarterly. The Project will also seek to employ and train staff from local communities.

Rehabilitation and Closure Planning

The planning and implementation of decommissioning, rehabilitation and closure will be in accordance with the approved Preliminary Decommissioning and Closure Plan (Mineralogy 2006). A Conceptual Rehabilitation and Closure Plan will be prepared using the EPA/DMP guidelines for Closure Plans and submitted to the EPA for approval prior to commencing ground disturbing activities.

Project Proposal Checklist

The following checklist confirms that the considerations required in this Project Proposal under Section 6 of the Iron Ore Processing (Mineralogy Pty. Ltd.) Agreement Act (as amended in 2008) (IOPAA) have been included in this document.

Table 1: Checklist of considerations required in the Project Proposal under the IOPAA

IOPAA clause	IOPAA Clause Requirement	Location in the Project Proposal
6.2(a)(i)	The mining and recovery of iron ore and any other minerals necessary for use in the project, including mining crushing screening concentration handling transport and storage of iron ore and plant facilities	Section 6: Mining, Section 7: Ore Processing, Section 8: Port Development
6.2(a)(ii)	Any portion of Area A that the Project Proponents wish to be included in a mining lease to be issued to the Company pursuant to Clause 10 in respect of the project	*Not applicable to this project proposal*
6.2(a)(iii)	Any existing mining lease or leases, further mining lease or leases or other mining leases comprising part of Area A, or part thereof, from which the Project Proponents proposes iron ore be mined as part of and for the purposes of the project and the amount of iron ore from such mining lease or leases to be assigned to the project	Section 1.11 Project Tenure
6.2(a)(iv)	Any Ancillary Tenement or part thereof which the Project Proponents propose be used for the purposes of the project	Section 1.11 Project Tenure
6.2(b)	The plant or plants comprising the project the subject of the Project proposal for producing iron ore concentrates and for processing or blending of iron ore concentrates and the estimated capital cost of the project	Section 7 Ore Processing, Section 4 Project Cost
6.2(c)	Accommodation and ancillary facilities for the Company's workforce	Section 18.3 Temporary and Permanent Accommodation and Ancillary Facilities Section 13 Water Supply and Disposal

6.2(d)	Temporary accommodation and ancillary facilities for the construction workforce for the project	Section 18.3 Temporary and Permanent Accommodation and Ancillary Facilities Section 13 Water Supply and Disposal
6.2(e)	Water supply for process and other uses including water intake to and discharge from any desalination plant and process plants	Section 13 Water Supply and Disposal
6.2(f)	Electricity and gas supply and transmission	Section 12 Gas Supply, Section 11 Electricity Supply
6.2(g)	Transportation of iron ore concentrates (including as part of a blended product) and/or products of iron ore concentrates	Section 7.4 Concentrate Transport
6.2(h)	Dewatering of slurry and re-use of water	Section 7.5 Filtration Plant
6.2(i)	Disposal of waste rock and tailings	Section 9 Mine Waste Disposal
6.2(j)	Plant areas and construction lay-down areas	Section 17 Plant areas and Construction Laydown areas, Figures 2,3,4
6.2(k)	Common Use Land	Section 1.10 Common Use Land
6.2(l)	Production of iron ore concentrates (including for sale within Australia or for export to overseas purchasers) and final products from iron ore concentrates by pelletising and/or direct reduction and/or steel making or, subject to subclause (7) of Clause 11, by blending and disposal of residues.	Section 7.6 Pelletising Plant not considered here, Section 7.7 Direct Reduced Iron (DRI) not considered here
6.2(m)	Port development works including wharf, jetty and causeway works, dredging and dredge spoil disposal and storage and ship	Section 8 Port Development

	loading.	
6.2(n)	Proposed infrastructure including causeways and corridors for roads, railway (if applicable), pipelines, transmission lines and conveyors	Section 10 Access and Service Corridors
6.2(o)	Any other works, services or facilities desired by the Project Proponents	*Not applicable to this project proposal*
6.2(p)	Use of local labour professional services manufacturers suppliers contractors and materials and measures to be taken with respect to the engagement and training of employees by the Project Proponents and their agents and contractors;	Section 19 Local Procurement, Employee Engagement and Training
6.2(q)	Any leases, licences or other tenures of land in favour of the Company required from the State in respect of the project or for Common Use Land	Section 1.11 Project Tenure

23. I also set out the Table of Contents, which shows the matters dealt with in the 72 page submission and the subject matters of the Appendices, Tables and Figures in that submission.

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Appendix A Project Implementation Schedule Appendix B State Agreement Act (for information only)

- Iron Ore Processing (Mineralogy Pty. Ltd.) Agreement Act 2002
- Iron Ore Processing (Mineralogy Pty. Ltd.) Agreement Amendment Act 2008 Appendix C Environmental Approvals (for information only)
- Ministerial Statement 823
- Ministerial Statement 827 Amendment to MS823
- Ministerial Statement 635
- EPBC Statement 2008/4236 Appendix D Environmental Impact Assessments (for information only)
- Balmoral South Iron Ore Project Public Environmental Review
- Austeel Public Environmental Review
-

Appendix E Project Environmental Management Plan

Appendix F Decommissioning and Closure Plan Appendix G Aboriginal Heritage Management Plan

Appendix H Conceptual Waste Rock Landform Appendix I Conceptual Tailings Storage Facility

Appendix J Technical Drawings

Appendix K Bankable Feasibility Study (removed on instruction by the Department of State Development)

Appendix L James King Independent Financial Analysis (removed on instruction by the Department of State Development)

24. If this matter had to be decided by applying the ordinary meaning of "a proposal", there could be no doubt whatever that the August 2012 submission was a "proposal". In the context of a project, a proposal is a document or statement submitted to a person or group, describing, often in detail, the project and the methods or plan to be used to achieve the completion or performance of the project. The August submission states that it seeks the Minister's approval "to construct and operate infrastructure to produce and export 24 million tonnes per annum of iron ore concentrate." It sets out the key elements of the proposal in considerable detail including how it proposes to produce that tonnage of iron ore concentrate for export. However, the issue in this arbitration is not whether the August 2012 submission was a proposal within the ordinary meaning of that term but whether it is a proposal within the meaning of the State Agreement.

The construction of the State Agreement

25. In many common law jurisdictions today, courts recognise that the correct interpretation of contractual terms is best achieved by applying the statement of Lord Hoffman in *Investors' Compensation Scheme Limited v West Bromwich Building Society* [1998] 1 WLR 896 at 913 where His Lordship said:

> *"Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."*

26. Lord Hoffman went on to say (at 913):

> *"The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as*

the meaning of its words. The meaning of words is a matter of dictionaries and grammar; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable a reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax."

27. This passage was quoted with approval by Gleeson CJ, Gummow and Hayne JJ in *Maggbury Pty Limited v Hafele Australia Pty Limited* (2001) 210 CLR 181 at 188.

28. These well-known statements of Lord Hoffman followed on from what Lord Wilberforce had said more than a decade earlier in *Reardon Smith Line Limited v Yngvar Hansen-Tangen* [1976] 1 WLR 989 at 997 where Lord Wilberforce said:

"No contracts are made in a vacuum; there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as the 'the surrounding circumstances' but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the Court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating."

29. In *Bank of Credit and Commerce International SA (In Liquidation) v Ali* [2002] 1 AC 251 at [8], Lord Bingham said:

"To ascertain the intention of the parties the Court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties relationship and all the relevant facts surrounding the transaction so far as known to the

parties. To ascertain the parties' intention the Court does not of course enquire into the parties' subjective states of mind but makes an objective judgment based on the materials already identified."

30. Hence, the law of contract gives effect to the common intention of the parties to the contract. But the test is objective and impersonal: *Wilson v Anderson* (2002) 213 CLR 401 at [8] per Gleeson CJ. The common intention is ascertained by what a reasonable person would understand by the language used by the parties to express their agreement. As Lord Reid pointed out in *McCutcheon v David Mac Byrne Limited* [1964] 1 WLR 125 at 128;

> *"The judicial task is not to discover the actual intention of each party; it is to decide what each is reasonably entitled to conclude from the attitude of the other."*

31. In two cases - *Pacific Carriers Limited v BNP Paribas* (2004) 218 CLR 451 and *Toll (FGCT) Pty Limited v Alphapharm Pty Limited* (2004) 219 CLR 165 - the High Court of Australia has affirmed that the rights and liabilities of the parties to a contract are determined objectively and not by reference to the subjective beliefs or understanding of the parties about their rights and liabilities arising from their contractual relations. As the High Court pointed out in *Toll (FGCT) Pty Limited* at 179 [40]:-

> *"References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement."*

32. Accordingly, the settled doctrine of the Australian common law, like that of the English common law, is that the rights and liabilities of the parties to a written contract are determined objectively by reference to what their "words and conduct would have led a reasonable person in the position of

the other party to believe": *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004)* 219 CLR 165 at p.179 [40]. Consequently, as the High Court also pointed out in *Toll (FGCT) Pty Ltd* at p.179 [40], "[t]hat, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction."

33. Both parties accepted that the State Agreement is a commercial contract. As the High Court said in *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579 at [22], it "should be given a businesslike interpretation. Interpreting a commercial document requires attention to the language used by the parties, the commercial circumstances which the document addresses, and the objects which it is intended to secure". See also (*Hillas & Co Ltd v Arcos Ltd* [1932] All ER 494 at 499 and 503-4; *Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd* (1968) 118 CLR 429 at 437; *Di Dio Nominees Pty Ltd, v Brian Mark Real Estate Pty Ltd* [1992] 2 VR 732 at 740; *MLW Technology Pty Ltd v May* [2005] VSCA 29 at [76]-[81].

34. Because the present case concerns a commercial document, what Lord Steyn said in *Mannai Investment Co Limited v Eagle Star Life Assurance Co Limited* [1997] AC 749 at 771 is also relevant in determining its meaning. His Lordship said:

> *"In determining the meaning of the language of the commercial contract, and unilateral contractual notices, the law therefore generally favours a commercially sensible construction. The reason for this approach is that the commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them. And the standard of the reasonable*

commercial person is hostile to technical interpretations and undue emphasis on niceties of language."

35. To the same effect is the recent statement of the High Court of Australia in *Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7; (2014) 88 ALJR 447 at [35]:

> *"The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean. That approach is not unfamiliar. As reaffirmed, it will require consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract. Appreciation of the commercial purpose or objects is facilitated by an understanding 'of the genesis of the transaction, the background, the context [and] the market in which the parties are operating". As Arden LJ observed in Re Golden Key Ltd, unless a contrary intention is indicated, the court is entitled to approach the task of giving a commercial contract a businesslike interpretation on the assumption 'that the parties... intended to produce a commercial result". A commercial contract is to be construed so as to avoid it 'making commercial nonsense or working commercial inconvenience." (Citations omitted)*

36. In construing an agreement, its words should be given a meaning that "render[s] them all harmonious" (*ABC v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109) and a meaning that ensures the congruent operation of the various components of the agreement as a whole. (*Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522 at [16].)

37. And as Lord Hoffman pointed out, while sitting as a Judge of the Court of Final Appeal for Hong Kong, in *Jumbo King Limited v Faithful Properties Limited* (1999) 3 HKLRD 757 at 773-774:

> *"The construction of a document is not a game with words. It is an attempt to discover what a reasonable man would*

have understood the parties to mean. This involves having regard, not merely to the individual words they have used, but to the agreement as a whole, the factual and legal background against which it was concluded and the practical objects which it was intended to achieve. Quite often this exercise will lead to the conclusion that although there is no reasonable doubt about what the parties meant, they have not expressed themselves very well. Their language may sometimes be careless and they may have said things which, if taken literally, means something different from what they obviously intended. In ordinary life people often express themselves infelicitously without leaving any doubt about what they meant. Of course in serious utterances such as legal documents, in which people may be supposed to have chosen their words with care, one does not readily accept that they have used the wrong words. If the ordinary meaning of the words make sense in relation to the rest of the document and the factual background, then the Court will give effect to that language, even though the consequences may appear hard on one side or the other. The Court is not privy to the negotiations of the agreement – evidence of such negotiations is inadmissible – and has no way of knowing whether a clause which appears to have an onerous effect was a quid quo pro for some other concession. Or one of the parties may simply have made a bad bargain. The only escape from the language is an action for rectification, in which the previous negotiations can be examined. But the overriding objective in construction is to give effect to what a reasonable person rather than a pedantic lawyer would have understood the parties to mean. Therefore, if in spite of linguistic problems the meaning is clear, it is that meaning which must prevail."

38. These authorities require that the common intention of the parties in the present case be objectively ascertained from the terms of the State Agreement when read in the light of the surrounding circumstances: *Toll (FGCT) Pty Limited v Alphapharm Pty Limited; GR Securities Pty Limited v Baulkham Hills Hospital Pty Limited* (1986) 40 NSWLR 631 at 635. To determine the meaning of the State Agreement, therefore, the background

and purpose of the Agreement is as relevant as the words of the Agreement.

39. Until recently, it could be said with confidence, as the result of what the High Court said in *Toll (FGCT) Pty Ltd* at p.179 [40], that the construction of a contract "normally, requires consideration not only of the text, *but also of the surrounding circumstances known to the parties,* and the purpose and object of the transaction." (my emphasis). However, in recently dismissing a Special Leave Application, three Justices of the High Court (Gummow, Heydon and Bell JJ) stated that the "true rule" was stated in *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 352 and that resort can be had to the surrounding circumstances known to the parties only in the case of ambiguity: *Western Export Services Inc v Jireh International Pty Ltd* (2011) 282 ALR 604.

40. Given what has been said in a number of cases subsequent to *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337, it was surprising indeed that their Honours should declare that the statements of the Justices in that case (at 352) still represented the law concerning the construction of contracts. Even more surprising is that their Honours should so declare in dismissing an application for special leave to appeal. A Special Leave Application is merely an application for leave to commence proceedings in the High Court: *Collins v Regina* (1975) 133 CLR 210. As the Court pointed out in *Collins,* the application for special leave is not made in the ordinary course of litigation and there are no "parties" involved in the application. The dismissal of a Special Leave Application is therefore not a decision of the High Court. Nor are the reasons for doing so binding on anyone although they may be a guide as to what is the law on a particular subject. What was said in cases subsequent to *Codelfa* – statements that were part of the *ratio decidendi* of those cases

- are more authoritative than what was said in *Codelfa* or in *Western Export Services Inc v Jireh International Pty Ltd.* If I had to decide whether to follow the later cases or the statements in *Codelfa*, I would prefer to follow the statements in the later cases, particularly since in the recent *Electricity Generation Corporation v Woodside Energy* [2014] HCA 7; [2014] ALJR 447 at [35], the High Court has again stated that "the surrounding circumstances known to" the parties is a matter that must be considered in construing a contract.

41. However, the present case does not require any choice to be made concerning these alternatives. First, the Respondent maintained that the State Agreement contained an implied term to the effect that a Proposal must not be inconsistent with Project Proposals already approved. The Applicants denied that the Agreement contained any implied term to that effect and pointed to a number of matters that they contended showed that no such term was implied. These rival contentions, based as they are on the text of the Agreement, show sufficient ambiguity in the Agreement to admit evidence of surrounding circumstances. However, although the surrounding circumstances are a legitimate aid to construing the State Agreement, I found no assistance from the material tendered by the Applicants in determining whether the August 2012 submission was a proposal for the purpose of the State Agreement. Even if it was proper – which I doubt – to use post 2001 material to determine the meaning of the term "proposal" in that Agreement, it showed no more than what had been done on previous occasions. It could throw no light on what objectively the parties intended when they used the term "proposal" in the State Agreement.

The Respondent's contentions

42. The Respondent contended that the State Agreement contains a significant requirement for detail in a Project proposal. It pointed out that the limb of clause 6(1) which the Applicants sought to engage with the August 2012 Submission allowed for the Company and a Co-proponent, subject to the *Environmental Protection Act 1986* (WA) and the provisions of the State Agreement, to "make further such detailed proposals for new projects" of the relevant type. The reference to "such detailed proposals" was to proposals of the kind provided for in the first limb of clause 6(1), being:

> *"to the fullest extent reasonably practicable its detailed proposals (including plans where practicable and specifications where reasonably required by the Minister and any other details normally required by the local government in which area any of the works are to be situated) for a project [of the relevant type]".*

43. The Respondent pointed out that each Project proposal had to address the location, area, lay-out, design, quantities, materials and time programme for the commencement and completion of the construction or provision of each of the matters specified in clause 6(2)(a)-(q) if and as they are applicable to the Project. It said that the purpose of this requirement for detail was evident from the context in which the requirement was imposed. An approved Project proposal defined the implementation obligations of the Project Proponents. It had to be sufficiently detailed to define the content of the implementation obligation which would arise under clause 7(6) of the State Agreement. Moreover, said the Respondent, the precise identification of the "land the subject of approved proposals" was also required for the purposes of the operation of other parts of the State Agreement. For example:

(a) Clause 20(7) of the State Agreement deems Mineralogy to be the owner of "any land the subject of approved proposals" for the purposes of the *Aboriginal Heritage Act 1972* (WA), s. 18 of which enables the owner of land to seek consent to engage in certain conduct which would otherwise constitute an offence.

(b) Whether a mining lease held by the Company becomes one of the "Mining Leases" defined in clause 1 of the State Agreement turns on whether the mining of ore on that lease is "authorised by an approved proposal". This requires a Project proposal to clearly identify on which mining leases mining for iron ore will occur. The answer to that question determines whether the lease is subject to the extended term provided for in clause 10(2) of the State Agreement.

44. As the Respondent contended, the Minister is entitled to know exactly what it is that the Project Proponents propose to do, so that he can understand what the parties' respective obligations will be, be satisfied that the requirements of the EP Act and other State laws are satisfied and consider whether any changes should be required to be made to the Project proposal before it is approved. The Minister is entitled to know what he is approving, and for that purpose a Project proposal is required to descend to the detail of what is being proposed.

45. The Respondent examined the August 2012 Submission in considerable detail. Omitting footnotes, a verbatim account of its criticisms concerning the lack of or inadequate detail in that Submission was as follows:

> *"72. The August 2012 Submission does not expressly indicate what type of Project it proposes. The Executive Summary indicates that it is a proposal "to construct and operate infrastructure to produce and export 24 million tonnes per*

annum of iron ore concentrate". That is a description of the infrastructure which is to be provided and the purpose for which it is to be provided. It indicates that iron ore concentrates will be produced and exported, however that is not a feature of only a Project 4. The production and export of concentrates may also be an element of a Project 1, Project 2 or Project 3 or a combination thereof.

73. *The August 2012 Submission does not itself propose the production of pellets, DRI or steel at the "stage" of the project its describes. However, page 39 of the August 2012 Submission indicates, under headings "Pelletising Plant/ Direct Reduced Iron not Considered Here", that the section "describes the production of final products from iron ore concentrates for the BSIOP". It is then said that a pelletising/DRI plant "is not being considered at this stage of the project. An additional proposal will be submitted under Section 8 of the [State Agreement] if this aspect of the proposal changes".*

74. *An additional proposal for production of pellets or DRI could only be submitted if the project described in the August 2012 Submission was a Project 1 (in the case of pellets) or Project 2 (in the case of DRI), or a combination including Project 1 or Project 2.*

75. *It may also be noted that the process flow diagram shown on page 2-9 of Appendix D to the August 2012 Submission includes a Pelletising Plant. This Appendix, however, is said to be included "for information only". The proposal which is subject to the EP Act approval relied on by the Applicants is a project for the construction and operation of pellet plants (see Ministerial Statement 823 at Appendix C to the August 2012 Submission).*

Failure to comply with clause 6(1) of the State Agreement

76.. *Therefore, it is not clear from the terms of the August 2012 Submission whether what is being proposed is:*

(a) a Project 4 only (in which case the Applicants could not submit additional proposals for pellet or DRI production); or

(b) the first stage of a Project 1, a Project 2 or a combination thereof, which first stage would comprise the production and export of concentrate, to be followed by additional proposals for pellet and DRI production (in which case the August 2012 Submission would not propose a complete Project).

77. *This ambiguity means that the August 2012 Submission does not propose a Project of a type referred to in clause 6(1) of the State Agreement.*

ISSUE 2(E): INSUFFICIENT DETAIL

78. *The August 2012 Submission fails to satisfy the fundamental requirement of a detailed proposal contemplated by clause 6(1) and (2) of the State Agreement, which is to identify exactly what it is that the Project Proponents propose to do, when they propose to do it and where the Project Facilities are to be located. That requirement exists irrespective of the type of proposal described in the Submission.*

What is Proposed

79. *The August 2012 Submission identifies a number of different options as to what the Project Proponents might do, but fails to propose pursuing any option. The August 2012*

Submission if approved would not define, by reference to clause 7(6) of the State Agreement, an obligation of the Project Proponents to do anything to implement the proposal.

80. *The August 2012 Submission identifies two "Phases", each of which involves the production of sufficient iron ore to produce 12 Mtpa of concentrate. It identifies, in very broad terms, three "possible implementation strategies" which"IM" is considering. Those strategies involve implementing phase 1 only, phases 1 and 2 together and phases 1 and 2 consecutively. Each option, which is only an option being considered by IM, is said to depend on "market conditions, project funding and operational factors".*

81. *Therefore, the August 2012 Submission does not indicate whether what is being proposed is a Project for the production of 12 Mtpa of concentrate or 24 Mtpa of concentrate. As each implementation strategy is only identified as an option being considered by IM as a possible scenario depending on market conditions, project funding and operational factors, it is far from clear that the August 2012 Submission commits the Applicants to do anything at all. The confusion is compounded by the fact that some parts of the August 2012 Submission make proposals which would accommodate phase 1 only, and other parts of the Submission make proposals for both phase 1 and phase 2.*

82. *Internal inconsistencies also mean that the August 2012 Submission fails to describe what is proposed. For example, the main text of the Submission indicates that what is proposed is a 2 berth wharf, while Figure 4 indicates that a further 4 berths are proposed for phase 2 of the B SIOP. It is not apparent whether the August 2012*

Submission proposed the construction of a 2 berth or 6 berth wharf.

When Implementation will Occur

83. *If, contrary to the above submission, the August 2012 Submission does propose any particular programme of work at all, it does not, so far as reasonably practicable, provide a detailed time programme for the commencement and construction of that work, for the reasons explained in item 9 of Annexure B to the Response.*

Where Facilities will be Located

84. *The proposals for the location of the various components of the project sought to be identified by the August 2012 Submission are almost entirely "indicative". The use of the term "indicative" is inconsistent with there being a proposal to construct the identified components of the Project at any particular location. That the "indicative" locations are not consistently described confirms that the August 2012 Submission does not propose that the project Facilities be constructed at any particular location.*

85. *The location of other Facilities proposed by the August 2012 Submission is not indicated even on an "indicative" plan.*

86. *Further, the August 2012 Submission does not make clear which mining leases iron ore is to be obtained from. The Submission indicates that mining is proposed on M08/126 and M08/128, which mining leases will be "Mining Leases" for the purposes of the State Agreement. However, the proposal also notes that an agreement with Mineralogy which "provides access to M08/1 27 should there be insufficient*

ore within the bounds of M08/126 and M08/127 to mine 2 billion tonnes of ore". M08/128 is shown as an area for "potential expansion" in table 3 to the August 2012 Submission. There is no commitment or proposal to mine 08/128, and it appears that the Applicants are seeking to have mining lease 08/128 gain the status of a "Mining Lease" under the State Agreement (with the consequent extension of its term) based only on the potentiality of mining for iron ore occurring on that lease.

87. *The location of the Facilities for the proposal in the August 2012 Submission fails to accord with the requirements of the State Agreement in other respects. For example, the accommodation for the Company's workforce is proposed to be constructed on mining lease M08/130. That accommodation is required by clause 18(1) of the State Agreement to be on "the Mining Leases"; ie on mining leases on which mining for iron ore is authorised by an approved proposal. No mining of iron ore is proposed on M08/130 by the August 2012 Submission or any approved proposal.*

Other Matters

88. *Other matters of more particular detail which are omitted from the August 2012 Submission, and which the State says were required by clause 6(1) and 6(2) of the State Agreement, are identified in item 11 of Annexure B to the Response. Those matters are subsidiary to the matters addressed above, and the deficiencies are of a lesser order of magnitude than those identified above. In these circumstances it is unnecessary to deal with those more particular issues in these submissions.*

ISSUE 2(F): CLAUSE 6(6)(A) SUBMISSION

89. *Clause 6(6)(a) of the State Agreement requires that when Project Proponents submit a Project proposal pursuant to clause 6, they must also submit to the Minister details of any services and works etc that they propose to consider obtaining from etc outside Australia, together with their reasons therefor. No such submission was provided with the August 2012 Submission.*

90. *The August 2012 Submission expressly contemplates obtaining works and services for the BSIOP from outside Australia. For example, Part 19.2.2 of the Submission (pages 65-6) indicates that capital equipment used in mining operations will be "mainly" overseas manufactured. Part 19.2.3 (page 66) of the Submission refers to metallurgical test work being conducted in Germany and China, and to the manufacturers of High Pressure Grinding Rolls being based overseas. Part 19.4.2 (page 66) indicates that major port construction and operation facilities (eg dredger and shiploader) will be sourced from overseas.*

91. *It is therefore clear from the terms of the August 2012 Submission that the Applicants were contemplating obtaining services and works etc from outside Australia for the purposes of the BSIOP. However, no details of the services and works etc are provided, and in some cases there is not even a very general description of what is to be obtained from outside Australia. For example:*

    (a) Part 19.2.1 (page 65) indicates that Geological testing work is "predominantly been done in Australia", implying that some work has been done outside Australia without indicated what work, or kind of work, is involved.

(b) Part 19.2.5 indicates that the desalination plant uses offshore technology, without indicating what technology this is and whether the Applicants propose to procure services for the design of the plant or components of the plant, or both, from outside Australia.

(c) Part 19.2.7 indicates that most infrastructure etc "are being bid by companies based in Western Australia", implying that some are not but without any indication of which are not and to what extent the companies based outside Western Australia may provide services from outside Australia.

92. *There is no indication in Part 19 of the August 2012 Submission of the reasons why the Applicants are considering obtaining services and works etc from outside Australia.*

93. *In these circumstances, the August 2012 Submission failed to comply with clause 6(6)(a) of the State Agreement, as it neither contained nor was accompanied by any submission of the kind required by that clause.*

ISSUE 2(G): CLAUSE 17 CONFERRAL

94. *The August 2012 Submission included proposals for accommodation and ancillary facilities for the "Company's workforce" and temporary accommodation and ancillary facilities for the construction workforce for the BSIOP. (Part 18 of the Submission, pages 61-64).*

95. *Clause 17 of the State Agreement requires that, prior to submitting proposals of that kind relating to the accommodation of the Company's workforce, the Project Proponents shall confer with the Minister and the relevant local authorities with a view to ensuring that appropriate planning is being made for housing and accommodation to*

service the project. There is no evidence that this was done.

ISSUE 2(H): CLAUSE 29 WARRANTY

96. *The August 2012 Submission proposes that the mine pit, from which ore for the BSIOP will be obtained, will be located on mining leases M08/126 and M08/127. Those mining leases are held by Mineralogy.*

97. *In those circumstances, clause 29 of the State Agreement required Mineralogy to warrant to the State, at the time of submission of the August 2012 Submission, that an agreement of the kind referred to in that clause had been reached between the Company and the Project Proponents. No such warranty was made at the time the August 2012 Submission was submitted to the Minister.*

ISSUE 3: EFFECT OF FAILURE TO COMPLY WITH THE STATE AGREEMENT

98. *The fact that the submission of a Project proposal creates a right in the Project Proponents to have the Project proposal approved, subject only to permitted reasonable requirements for variation or the imposition of conditions, indicates that the requirements of the State Agreement for the submission of a Project proposal must be strictly complied with before the right accrues.*

99. *That is reflected in the fact that the right of the Company and Co-Proponents to submit proposals under s. 6(1) is expressly made "subject to the provisions of this Agreement".*

100. *As a consequence of the each of the above failures by the August 2012 Submission to comply with the requirements of the State*

Agreement, or alternatively the combination of failures, the August 2012 Submission was not a Project proposal with which the Minister was required to deal under clause 7(1) of the State Agreement."

46. The matters relied on by the Respondent make a case for concluding that the August 2012 submission was defective in many respects and did not comply strictly with the terms of the State Agreement and particularly with the provisions of Clause 6. But it is another matter altogether as to whether the Respondent's criticism of the August Submission requires a conclusion that the Submission was not a proposal for the purposes of the State Agreement. No doubt, the criticisms provide reasons for the Minister to exercise his power under Clause 7 (1) (b) or (c), but they did not entitle him to reject the August 2012 submission.

47. In my view, the highest that the case for the Respondent can be put is that the August 2012 submission was a defective proposal. Despite the defects of a proposal and its failure to comply with the terms of the State Agreement, it may still be a proposal for the purposes of that Agreement, as the Agreement makes clear. Clause 7 (1) (b) expressly provides that:

"in respect of each proposal submitted pursuant to Clause 6 the Minister shall-

defer consideration of or decision upon the same until such time as the Project Proponents submit a further proposal or further proposals in respect of some other matters mentioned in subclause (2) of Clause 6 not covered by the said proposal".

48. Thus, Clause 7(1)(b) expressly recognises that a document may be a proposal for the purposes of the State Agreement although it fails to deal

with all matters mentioned in Clause 6(2)(a)-(q). That is, since 2008, as long as the document submitted to the Minister can be characterized as a proposal for a new project of the type of Project 1, 2, 3 or 4 or a combination of Projects 1, 2 or 3, it is a proposal for the purpose of the State Agreement although it does not strictly comply with the requirements of Clause 6(2) and other provisions. Indeed, if the argument of the Respondent was correct, there would seem little, if any, scope for the operation of Clause 7 (1) (b). On the Respondent's argument, no opportunity to defer consideration of or decision upon a proposal would arise because, *ex hypothesi,* all the matters mentioned in Clause 6 (2) would be "covered by the said proposal".

49. It follows that, when Project Proponents tender a proposal that does not deal with all the matters mentioned in Clause 6(2), the Minister has no power to reject the proposal. He may in fact approve the proposal with or without qualification or reservation despite its defects. Or he may defer consideration of or decision upon the proposal until the Proponents submit a further proposal or proposals. Or he may require the Proponents to make such alteration to the proposal or impose such conditions as he thinks reasonable before approving the proposal. If he chooses either of the latter courses, he must consult with the Project Proponents in accordance with Clause 7(3). Clause 7(3) provides:

> *"If the decision of Minister is as mentioned in either of paragraphs (b) or (c) of subclause (1) the Minister shall afford the Project Proponents full opportunity to consult with him and should they so desire to submit new or revised proposals either generally or in respect to some particular matter."*

50. The provisions of Clause 7(3), like those of Clause 7(1)(b), indicate that a document submitted to the Minister may be a proposal even though it fails

to comply with the provisions of Clause 6(2) or other provisions of the State Agreement. It shows that, where a proposal is defective or ambiguous, consultation, not rejection, is the remedy propounded by the State Agreement. Indeed, as the Applicants strongly emphasised consultation has been the practice in the past.

51. It is true that the terms of Clause 6(1) and Clause 6(2) in particular are expressed in obligatory terms. But, given the terms of Clause 7(1)(b) and Clause 7(3), the inevitable conclusion is that a failure to comply strictly with the State Agreement does not mean that a document submitted to the Minister is not a proposal for the purpose of the Agreement.

52. In so far as there is any tension between the terms of subclauses 6(1) and (2) and subclauses 7(1)(b) and 7(3), the commercial consequences of the Respondent's contention point in favour of giving preferential effect to the latter subclauses and not ignoring them. A proposal may run into hundreds of pages and have been created at considerable expense. It is hardly to be supposed that, given the denial of a right in the Minister to reject a proposal, the parties intended that the Minister could nonetheless reject a proposal in the ordinary sense of that word without reasons and without any consultation concerning any defects or problems that the Minister believes are inherent in the proposal submitted.

53. The parties have intentionally deprived the Minister of the power to reject a proposal. Instead, they have used the mechanism of consultation to iron out defects or problems in proposals submitted to the Minister. Instead of granting a power of rejection, the parties have given the Minister two limited powers, both of which involve consultation with the Proponents before they are exercised. This compulsory obligation of consultation imposed on the Minister points strongly against a document being denied

the character of a proposal merely because it fails to meet the requirements of Clause 6 or other provisions of the State Agreement.

54. As I have already pointed out, in construing an agreement, its words should be given a meaning that "render[s] them all harmonious" (*ABC v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109). That meaning should always ensure that the various components of the agreement as a whole have a congruent operation. (*Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522 at [16].) The terms of subclauses 6(1) and (2) are expressed in obligatory language and indicate that in general terms a proposal should deal with each of the specified matters. As the Respondent submitted, their purpose is to enable the Minister to know what exactly is proposed and what obligations the Proponents will impose on themselves. But as subclauses 7(1)(b) and 7(3) show, the Agreement provides the mechanisms to iron out defects in a proposal. And it should be noted that there is nothing to stop the Minister approving a proposal even though it does not strictly comply with Clause 6 and other clauses.

55. A harmonious interaction between the various subclauses requires that the term "proposal" in the State Agreement bear its ordinary meaning. It follows that a document that is a proposal within the ordinary meaning of that term does not cease to be a proposal for the purpose of that Agreement because it does not comply with all the stipulations in the various provisions of the Agreement.

56. What Lord Hoffman pointed out, in *Jumbo King Limited v Faithful Properties Limited* (1999) 3 HKLRD 757 at 773-774 seems applicable to this Agreement in so far as it deals with proposals::

> *"The construction of a document is not a game with words. It is an attempt to discover what a reasonable man would*

have understood the parties to mean. This involves having regard, not merely to the individual words they have used, but to the agreement as a whole, the factual and legal background against which it was concluded and the practical objects which it was intended to achieve. Quite often this exercise will lead to the conclusion that although there is no reasonable doubt about what the parties meant, they have not expressed themselves very well. Their language may sometimes be careless and they may have said things which, if taken literally, means something different from what they obviously intended."

57. It is difficult to escape the conclusion that the attempt to categorise the August 2012 submission as not being a proposal is an attempt to circumvent the Court of Appeal's ruling that the Minister has no power to reject a proposal: *Mineralogy Pty Ltd v Western Australia* [2005] WASCA 69 at [58].

58. The Responded also contended that the August 2012 submission was not a proposal for the purposes of the State Agreement because it breached an implied term that a proposal could not interfere with the use of facilities in another project without the consent of that Project Proponent. The Respondent pointed out that the State Agreement provided for the implementation of multiple Projects with the consequence that Project Proponents may have divergent commercial interests. It was therefore implicit in the Agreement that the only proposals which could be submitted to and approved by the Minister are those that are not inconsistent with Project proposals which have already been approved. It followed, contended the Respondent, that it was an implied term of the State Agreement that a Project proposal must not propose to establish, construct or provide any facilities which would interfere with the use and enjoyment of any facilities under approved proposals for another Project.

59. It may be that the State Agreement made between the various parties including the Minister contains an implied term that the Minister cannot approve a proposal that might interfere with the use and enjoyment of facilities under an approved proposal for another Project without the consent of the Proponents of the approved proposal. But it does not follow that a proposal cannot contain a provision which may result in interference with the use and enjoyment of facilities under an existing agreement.

60. Clause 6 (4) provides that each Project proposal may with the consent of the Minister and that of any other parties concerned provide for the use by the Project proponents of any existing facilities or services. Despite clause 29 of the State Agreement, it does not follow that the proposal is not a proposal because the consent of the parties to the existing facilities was not obtained **before** the proposal was submitted. It means that the proposal is defective not that it is a nullity. The Minister has power to require as a condition precedent to the giving of his approval that the consent of the other party be obtained. Or he can defer a decision on the proposal until the Project Proponents submits a further proposal deleting the proposed use of existing facilities. It is a matter for consultation concerning, not rejection of, the proposal.

61. For these reasons, the Respondent's contention that the failure to comply with Clause 6 (2) and other provisions of the State Agreement means that it was not a proposal for the purposes of the State Agreement is rejected.

62. It remains then to consider whether the August 2012 submission was not a proposal for the purposes of the Agreement because it did not propose a project of one of the defined types. The August 2012 submission did not expressly indicate the type of Project it proposed. The Executive Summary stated that it was a proposal "to construct and operate infrastructure to

produce and export 24 million tonnes per annum of iron ore concentrate". Although this indicated that iron ore concentrates would be produced and exported, the Respondent argued that was not a feature of only a Project 4. The production and export of concentrates might also be an element of a Project 1, Project 2 or Project 3 or combination thereof. The Respondent contended that an examination of the August 2012 submission was ambiguous in that it was not clear whether it was a Project 4 project or the first stage of a Project 1, a Project 2 or a combination thereof.

63. However, it seems reasonably clear that the proposal contained in the August 2012 submission was for a project of the Project 4 type. Under the heading, Scope of the Project, the proposal stated that the project was:

> *"based on the Balmoral South Mining Tenements...of the Susan Palmer deposit...*
>
> *The resources of the Susan Palmer deposit are well-suited to produce high-grade iron ore concentrate which can be exported as is or further processed to produce pellets and direct reduced iron (DRI).*
>
> *In this Project Proposal IM is proposing to upgrade magnetite using low intensity magnetic separation. Once the concentrate is produced as a filter cake it will be stockpiled for export.* ***Production of pellets or DRI is not part of this Project Proposal.*** *"*

64. The emphasised words indicate that this is neither a Project 1 nor a Project 2 project. Project 1 is defined to mean "a project or projects for the production of high-grade iron ore pellets". Project 2 is defined to mean "a project or projects for the production of DRI". Project 4 is defined to mean "a project or projects for the production of iron ore concentrates within Western Australia...and an iron ore concentrates production facility...and may include...necessary facilities to enable iron ore concentrates to be

produced transported and shipped the sale within Australia or for export to overseas purchasers". It follows that the proposal is for a Project 4 type of project.

65. If the Minister was in any doubt, it would be open to him under Clause 7 (1) (c) in combination with Clause 7 (3) to require the Applicants to make such alteration of the proposal as he thinks reasonable to clarify the nature of the Project.

66. It follows then that the August 2012 submission was a proposal for the purposes of the State Agreement. The Minister was required to deal with it under Clause 7 of that Agreement, which he has failed to do.

67. The Applicants submitted that, because Clause 7 (2) required the Minister within two months after receipt of the August 2012 submission to give notice of his decision in respect of the proposal, he must be deemed to have given his consent. However, nothing in the State Agreement provides any foundation for holding that the failure of the Minister to give a decision within two months of receipt of the proposal is to constitute a deemed consent to the proposal. The failure of the Minister to give a decision within that time means that he is in breach of the State Agreement and is liable in damages for any damage that the Applicants may have suffered as the result of the breach. But it does not follow in logic or in law that, by reason of the failure, the proposal is approved without qualification or reservation.

Costs

68. The Applicants, having succeeded in the arbitration, would normally be entitled to a general order for costs. However, despite the State seeking

costs if it were successful, the Applicants eschewed any claim for costs other than that the State should be ordered to pay the Arbitrator's costs. I will therefore make an order that the State pay the costs of the Arbitrator including expenses.

Issues

69. According to the agreed Statement of Facts and Issues "the issue for determination is: was the August 2012 Submission a proposal submitted pursuant to clause 6 of the Agreement with which the Minister was required to deal under clause 7(1) of the Agreement?" I answer that question, Yes.

70. The Applicants foreshadowed a potential claim for damages by reason the Minister's breach in failing to deal with the August 2012 submission under clause 7(1). However, the Applicants tendered no evidence in support of such a claim for damages, and it is not appropriate for me to make any Order in respect of it. The Orders I will make in the Arbitration are:

AWARD

1. Declare that the August 2012 Submission was a proposal submitted pursuant to clause 6 of the State Agreement with which the Minister was required to deal under clause 7(1) of the Agreement.

2. Order the State of Western Australia to pay the Arbitrator's costs and expenses.

Perth
20 May, 2014

Michael McHugh
Arbitrator

Annexure Certificate

No. NSD 912 of 2020

Federal Court of Australia

District Registry: New South Wales

Division: General

Clive Frederick Palmer

Applicant

Mark McGowan

Respondent

Annexure Certificate – "CFP30"

The following 41 pages are the annexure "CFP30" to the affidavit of Clive Frederick Palmer sworn before me on 27 January 2021.

.....

Name: Daniel Jacobson

Address:

Solicitor Solicitor

Filed on behalf of	Clive Frederick Palmer, Applicant
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IN THE MATTER OF THE COMMERCIAL ARBITRATION ACT (1985) (WA) AND THE COMMERCIAL ARBITRATION ACT 2012 (WA)

AND

IN THE MATTER OF AN ARBITRATION

BETWEEN

MINERALOGY PTY LTD ACN 101 582 680 and INTERNATIONAL MINERALS PTY LTD ACN 058 341 638

Applicants

-and-

THE STATE OF WESTERN AUSTRALIA

Respondent

AWARD

1. By an Award made on 20 May 2014 in an arbitration between the above parties (the First Arbitration), I held that a document described as a Proposal to develop the Belmont South Iron Ore Project was a Proposal (the BSIOP Proposal) for the purposes of the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement* (the State Agreement) made between those parties. I further held that the Premier of Western Australia, as Minister for State Development, had failed to give a decision within the time limit required by clause 7(2) of that Agreement and noted that this failure was a breach of the Agreement.

2. The parties have now referred to me a further arbitration to determine three preliminary issues concerning whether the Applicants have a right to damages for the breach of the State Agreement. At the time of referral, those issues were:

(a) whether the Applicants' right to recover damages (the First Damages Claim) was heard and determined in the May 2014 Award and whether they are now precluded from pursuing that claim (the Finality Issue);

(b) alternatively, if the First Damages claim was not determined in that Award and remains to be determined in that arbitration, whether I should adjourn those proceedings to allow the Respondent to apply to the Supreme Court of Western Australia under section 46 of the C*ommercial Arbitration Act* (WA) 1985 to terminate the arbitration (the Section 46 Issue);

(c) whether there has been inordinate and inexcusable delay on the part of the Applicants in conducting another or alternative damages claim and in conducting a claim that the Minister had erred in subsequently making the carrying out of the Proposal subject to 46 conditions. If there had been such delay, whether those claims should be dismissed under section 25(2) of the *Commercial Arbitration Act* (WA) 2012 (the Section 25 Issue).

3. By letters to the Applicants dated 22 July 2014, that is, after the publication of the May Award, the Minister exercised his power under clause 7(1)(c) of the State Agreement to impose conditions precedent to the giving of his approval to the BSIOP Proposal.

4. The Applicants claim that the conditions precedent were so unreasonable that the Minister's decision constituted a breach of the State Agreement, and the Applicants seek damages in respect of that breach (the Second Damages Claim).

5. Alternatively, in the event that the conditions precedent imposed in respect of the BSIOP Proposal are not found to be so unreasonable as to give rise to

a breach of the State Agreement, the Applicants claim that they have referred to arbitration the reasonableness of the Minister's decision pursuant to clause 7 of the State Agreement (the Clause 7 Claim).

6. The Applicants have not particularised the nature of the damages they claim in respect of either the First Damages Claim or the Second Damages Claim. However, as the Respondent pointed out, the act of the Minister on 22 July in imposing conditions on carrying out the BSIOP Proposal was an acceptance that the Proposal was valid. His breach in refusing to accept the Proposal was valid did not continue after that date. It follows then that:

   (a) the First Damages Claim must be a claim for damage sustained by the Applicants between the submission of the BSIOP Proposal in August 2012 and the Minister's decision on 22 July 2014; and

   (b) the Second Damages Claim must be a claim for damage sustained by the Applicants after the Minister's decision on 22 July 2014.

7. The parties now agree that I am *functus officio*, in respect of the First Arbitration which was the subject of the 20 May 2014 Award and that I have no continuing jurisdiction in respect of that arbitration. As a result, the section 46 issue which was originally referred to me can no longer be an issue.

8. Although the parties do not dispute that I am *functus officio* in respect of the First Arbitration, they disagree as to what was determined by the Award in that arbitration. The Respondent contends that in those proceedings the Applicants sought to have determined a limited claim for damages for the Minister’s breach of the Agreement and are now precluded from claiming any further damages for that breach. The Applicants contend that they are entitled to pursue a general claim for damages (*the First Damages Claim)* in

respect of the Minister's breach. Their contention is based on the assertion that, in the earlier arbitration, the only claim in respect of damages was for a Declaration that the Applicants were entitled to damages for any costs that they would incur in connection with any further environmental approvals that were required as a result of being unable to substantially commence the project by 22 December 2014.

9. The First Damages Claim arose in an arbitration, which was commenced before the commencement of the *Commercial Arbitration Act 2012* (WA) (**CAA (2012)**). However, s. 43(2) of the CAA (2012) provides that the law governing that arbitration is that which would have been applicable if the CAA (2012) had not been enacted. This means that the *Commercial Arbitration Act 1985* (WA) (**CAA (1985)**) governs the First Damages Claim.

10. Accordingly, the First Damages Claim involving what the Respondent called the 'Finality Issue' has to be determined by reference to the CAA (1985). In contrast, the Second Damages Claim and the Clause 7 Claim were disputes that arose in 2014 after the CAA (2012) had commenced and have to be determined under that Act.

The Factual Background

11. Given the State's claim that the First Damages Claim was finalised by the First Arbitration the subject of the May 2014 Award and that the Applicants have been guilty of inordinate and inexcusable delay in making their claim for general damages, it is necessary to refer to the history of the matter in some detail. What follows is largely drawn from the Respondent's submissions but was not challenged by the Applicants.

12. On 5 December 2001, Mineralogy Pty Ltd (**Mineralogy**), the State of Western Australia (**State**) and a number of other companies, including

International Minerals Pty Ltd (**International Minerals**), signed the State Agreement.[1]

13. The State Agreement was ratified by the Parliament of Western Australia by the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2001* (WA).[2] Subsequently, there was a variation of the Agreement which was ratified by the Parliament and came into operation on 11 December 2008.[3]

14. On 8 August 2012, Mineralogy and International Minerals submitted the BSIOP Proposal (also referred to as the "August 2012 Submission") as a project proposal under the State Agreement.[4]

15. By letters dated 4 September 2012, the then Premier, the Hon. Mr Colin Barnett, as Minister for State Development, effectively rejected the BSIOP Proposal as a Project proposal for the purposes of the State Agreement.[5]

16. By letter dated 12 September 2012, Mr Sharma and Mr Dio Wang (a director of International Minerals) wrote to the then Premier to confirm that the Applicants' position remained that the BSIOP Proposal was a valid proposal.[6]

17. By letter dated 12 September 2012, Mr Steve Wood, the then Director General of the Department of State Development, wrote to Mr Vimal Sharma, the Managing Director of Mineralogy, providing the Department's preliminary assessment of the BSIOP Proposal (as if that document had been submitted as a draft proposal).[7]

18. On 19 October 2012, Mr Wang responded to Mr Wood's letter of

[1] Application Book (Document 37), p. 1160.
[2] Application Book (Document 37), pp. 1160-1161.
[3] Application Book (Document 37), pp. 1162-1163.
[4] Application Book (Documents 1 and 2), pp. 1-93.
[5] Application Book (Documents 3 and 4), pp. 94-95.
[6] Application Book (Document 7), pp.103-104.
[7] Application Book (Documents 5 and 6), pp. 96-102.

12 September 2012, and in particular to issues regarding port infrastructure and facilities and noted that he looked forward to resolving the matter as soon as possible.[8]

19. By letters dated 6 November 2012 and 7 November 2012 respectively, International Minerals and Mineralogy provided notices of dispute to the then Premier.[9] Those notices stated:

> *…The dispute involves the Minister's refusal to consider a proposal for the development of a project under the Agreement in the Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002, as amended (State Agreement). A valid proposal has been submitted to you, by Mineralogy Pty Ltd (Mineralogy) and International Minerals Pty Ltd, in your capacity as Minister for State Development, you gave notification that you were not going to consider the agreement [sic]…*

20. By letters dated 16 November 2012 to Mineralogy and International Minerals respectively, the then Premier responded to their letter of 12 September 2012, and maintained that the BSIOP Proposal was not a valid proposal under the State Agreement.[10]

21. By November 2012, therefore, a dispute had arisen between the Applicants and the Respondent as to whether the BSIOP Proposal was a proposal submitted in accord with clause 6 of the State Agreement which the Minister was required to deal with under clause 7(1) of the State Agreement. By an email dated 25 January 2013, described as a "brief note of the dispute for the arbitrator" Mr Michael Dunham, Legal Counsel for Mineralogy, wrote to the solicitor for the Respondent stating:

> *The Proponents allege that their proposal should now be deemed approved and that they be entitled to damages (to be assessed if not agreed) suffered as a consequence of delay arising from the Ministers [sic] wrongful refusal to consider the Proponents' proposal.*[11]

[8] Application Book (Document 8), pp.105-106.
[9] Application Book (Documents 9 and 10), pp. 107-108.
[10] Application Book (Documents 11 and 12), pp. 109-112.
[11] Application Book (Document 13), p. 113.

22. In that same email, Mr Dunham noted:

> *It should be understood that the proponents do not intend to seek particular damages at arbitration since the extent of damages could depend on subsequent events.*[12]

23. In July 2013, the Respondent brought an Application to dismiss the arbitration under section 46 of the CAA (1985) for want of the Applicants' prosecution of the arbitration.[13]

24. That Application was supported by the affidavit of William Albert Preston, sworn 12 July 2013, which calculated on a hypothetical basis the damages sought by the Applicants for the losses incurred in developing the Balmoral South Iron Ore Project as the result of the Minister's alleged breach of contract.[14]

25. The Respondent's Submissions in support of the Application to dismiss the arbitration outlined the likely prejudice to the Respondent because of the Applicants' delay in pursuing its claim.[15]

26. Mr Vimal Sharma affirmed an affidavit dated 26 July 2013 in opposition to the Respondent's Application to dismiss the arbitration. In that affidavit, Mr Sharma noted:

> *[33] I have seen the affidavit of William Albert Preston, sworn on 12 July 2013 and do not agree with his calculation of damages. The BSIOP development will proceed, at some stage. At that stage the income predicted by Mr Preston will be realised. Therefore, it is not a question of income foregone but merely delayed. Hence we are only talking about the time value of money. I do not believe that there is any validity in saying that the damages increase by any more than the time value of money, with the passage of time.*
>
> *[34] In the letter attached as VKS12 Mr Dunham, on behalf of Mineralogy and International Minerals Pty Ltd, stated that Mineralogy was prepared to waive interest on damages for the period of delay caused by Mineralogy's*

[12] Application Book (Document 13) p. 113.
[13] Application Book (Document 14), pp.114-119.
[14] Application Book (Document 15), pp.120-422.
[15] Application Book (Document 17), pp. 449, 455-456.

proposal.

[35] The only other potential I see for damages is that Mineralogy's environmental approval expires in December 2014. If, due to the Minister's refusal to consider the August 2012 submission, it is not possible to significantly commence the development of the BSIOP project by December 2014, then Mineralogy may be put to the additional expense involved in obtaining further environmental approvals. I believe that the State has the power to extend these approvals and so even these damages could be avoided. In any event, the time taken for the arbitration will not impact on this potential for damages. This potential will only be impacted by the time taken to recover this stage of project development after the Minister's refusal.[16]

27. Mr Sharma affirmed a further affidavit dated 2 August 2013 effectively repeating paragraphs [33] and [35] of his previous affidavit dated 26 July 2013.[17] His affidavit also relevantly stated:

[14] IM and Mineralogy have spent considerable time and money negotiating with rating agencies, commercial banks, export credit agencies, investors and investment banks prior to submitting the BSIOP Proposal. It now appears that it may be possible to reinstate all of the arrangements that arose from these discussions. In that event the only damages suffered by IM and Mineralogy would be the time value of money. This may further be affected by market perceptions and be exceedingly difficult for the applicants to quantify…[18]

28. The Applicants' Submissions dated 29 July 2013 filed in opposition to the Respondent's application relevantly stated:

[27] Any damages that have been incurred are not increasing on a daily basis other than in accordance with the time value of money.

…

[30] A primary element of damages may be the cost of conducting a new environmental review if the delay means that the Applicants are unable to significantly commence their project before the expiry of the current environmental approval.

29. On 30 July 2013, the Respondent's Application to dismiss the arbitration was heard by the Supreme Court. The Application was part heard and then

[16] Application Book (Document 18), pp.466-467.
[17] Application Book (Document 21), p. 553-554.
[18] Application Book (Document 21), p. 552.

adjourned with the Applicants being ordered to take steps within the next 7 days to progress the arbitration.

30. The Applicants then brought the matter back before me and sought an adjournment until after a final decision in a matter before the Federal Court dealing with the ownership of the port and related facilities at Cape Preston.[19]

31. The Applicants' submissions filed in support of their application for me to adjourn the First Arbitration were substantially the same as the submissions filed before the Supreme Court.[20]

32. In response, the Respondent again noted the prejudice that it was likely to suffer due to the Applicants' delay in progressing their damages claim.[21]

33. The Applicants' reply submissions dated 8 August 2013 then noted that:

> *[6] In the event that the arbitration is adjourned until after the Federal Court's decision the [State] will suffer no prejudice or hardship because:*
> *...*
> *(d) there would be no prejudice to the [State] since damages cannot be increasing with time.*[22]

34. On 12 August 2013, I made orders including an order that the Applicants were to file and serve *"their points of claim and submissions, including the identification of all issues relating to the liability of the Respondent proposed for determination by the arbitrator, by 27 August 2013"*.[23]

35. The Applicants' submission dated 26 August 2013 stated:

> *[28]…by the Minister's wrongful refusal to consider the IM proposal, IM and Mineralogy have suffered a detriment to their reputations, in the marketplace with a perception that they have no right to access to a port for the export of*

[19] Application Book (Document 22), p. 566.
[20] Application Book (Document 22), pp.558-590.
[21] Application Book (Document 24), pp. 946-947.
[22] Application Book (Document 26), pp. 953-954.
[23] Application Book (Document 27), p. 955.

> *the IM Project products. Furthermore, by its terms, at clause 3.1 the environmental approval in Ministerial Statement 823 will expire on 22nd December 2014 unless the project has been substantially commenced. IM and Mineralogy have now been forced to recommence financing and it may not be possible that a substantial commencement, of the project, can be made by December 2014. Despite the above and due to the uncertain nature of general delay costs, Mineralogy and IM restrict their claim to any additional costs incurred in renewing the environmental approvals in the event that it is not possible to significantly commence the IM Project before the expiry of approvals in Ministerial Statement 823.]*[24]

36. The order sought by the Applicants, relevant to the question of loss, was that the Arbitrator:

> *Declare that the State is liable for any costs that the Applicants incur in connection with any further environmental approvals that are required as a result of being unable to substantially commence the project by 22nd December 2014.*[25]

37. In response to the Applicants' Submissions, the Respondent made submission in the Respondent's Amended Responsive Statement of Facts Issues and Submissions dated 13 September 2013 regarding the availability of certain categories of loss and the mitigation of the Applicants' losses.[26] The Applicants did not reply to those submissions in their Submissions in Reply dated 17 September 2013.[27]

38. The Respondent's Statement of Issues dated 7 April 2014 listed the questions which the Respondent submitted required determination by the Arbitrator, which relevantly included:

> *[5] If the August 2012 Submission was a valid Project proposal with which the Minister was obliged to deal in accordance with Clause 7(2) of the State Agreement, is the State liable for any costs that the Applicants incur in connection with any further environmental approvals that are required as a result of being unable to substantially commence the BSIOP by 22 December 2014? (Applicant [28], [29(c)]; Response [28]).*[28]

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[24] Application Book (Document 30), p. 979.
[25] Application Book (Document 30), p. 980.
[26] Application Book (Document 31), pp. 1018-1020.
[27] Application Book (Document 32), pp. 1056-1077.
[28] Application Book (Document 33), p. 1082.

39. In addition, in its submissions dated 7 April 2014, the Respondent made the following submissions regarding the Applicants' damages claim:

> ***ISSUE 5: DAMAGES***
> *[108] This is also an issue which only arises if (contrary to the above submissions) the August 2012 Submission was a Project proposal with which the Minister was required to deal under clause 7(1) of the State Agreement. In that event, the Applicants seek damages for breach of clause 7(2) of the State Agreement. The claim is confined to the additional costs of "renewing" the environmental approval in Ministerial Statement 823 if the Project is not substantially commenced before 22 December 2014 (which condition 3 of the approval requires).*
> *[109] The costs involved have not been quantified, and are not quantifiable at this stage. The Applicants' right to claim those damages requires them to show that any relevant delay by the Minister caused their failure to substantially commence the BSIOP by December 2014. Involved in that contention is the proposition that the Applicants would have been in a position to substantially commence implementation of the proposal if the Minister had complied with clause 7(1) of the State Agreement. Evidence adduced to date does not establish that proposition.*[29][Emphasis added].

40. The Applicants' Statement of Issues and Contentions dated 9 April 2014 identified issue 4(b) relating to damages as follows:

> *Is the Respondent liable for any costs that the Applicants incur in connection with any further environmental approvals that are required as a result of being unable to substantially commence the BSIOP by 22 December 2014?*
> *The Applicants contend yes.*
> *The Respondent contends no.*[30]

41. The Applicants' Submissions dated 10 April 2014 stated:

> *[16] Further, the Respondent is liable for any costs that the Applicants incur in connection with any further environmental approvals that are required as a result of being unable to substantially commence the Project by 22 December 2014.*[31]

42. The Applicants' Minute of Proposed Award dated 11 April 2014 sought the following declaration in respect of damages:

> *(d) The Respondent is liable to pay for:*

[29] Application Book (Document 34), p. 1117.
[30] Application Book (Document 39), p. 1194.
[31] Application Book (Document 41), p. 1208.

> *(i) any costs that the Applicants incur in connection with seeking any further environmental approvals that are required as a result of being unable to substantially commence the Project the subject of the IM Proposal by 22 December 2014;*
> *(ii) any costs of dealing with compliance matters to obtain or comply with any further environmental approval; and*
> *(iii) any damages sustained if the further environmental approvals are not forthcoming.*[32]

43. The only witness statement of the Applicants which dealt with the issue of damages was that of Zhenya Wang dated 10 April 2014 in which he stated:

> *[42] In August 2012 our environmental approval still had 27 months before expiry. That situation no longer exists. The environmental approval will expire in December 2014. Whilst the State has the power to extend the validity there is no guarantee that it will do so and, there will be costs associated with an application for it to do so.*
> *[43] Should the environmental approval not be extended it will be necessary for the project to go through a further Public Environmental Review. That PER may impose obligations that were not part of the original environmental approval. IM would be put to the additional expense of a long PER (perhaps a three year period) and additional expense of complying with any conditions contained in the subsequent environmental approval that were not contained in the existing environmental approval.*
> *[44] It is not possible to estimate how long it will take us to be in a position of having the same degree of financial interest as previous. However, it can be said that with an environmental approval due to expire in December 2014 there will be no prospect of obtaining financial interest until after the situation with the environmental approval has been resolved by extension or new grant.*[33]

44. Mr Wang was not called as a witness to develop or support these claims.[34]

45. At the Arbitration, and after the Applicants had given their evidence, the following exchange occurred between counsel for the Respondent and myself:

> *MR MITCHELL: … Issue 5 we've identified as damages. All I would say about that - and this is on the hypothesis that there was a breach of the obligation in clause 7 to deal with the project proposal - - -*
> *THE ARBITRATOR: I will be asking Ms Lee what's the situation there because there's just no evidence before me. What do I do? Even if I make*

[32] Application Book (Document 42), p. 1220.
[33] Application Book (Document 40), pp. 1203-1204.
[34] Application Book (Document 45), pp.1241 & 1270.

> *a declaration, I can't make a consequential order saying that, "Send this out at some stage to a referee or something if you feel like you've got a case."*
> *MR MITCHELL: No.*
> *THE ARBITRATOR: Saying, "Send this out at some stage to a referee or something if you feel like you've got a case."*
> *MR MITCHELL: Yes, sir, and the damages claim must depend on the proposition, which we've identified in paragraph 109, that the applicants would have been in a position to proceed within the environmental approval time but for the minister's failure to act, and there's just no evidence about that.*
> *THE ARBITRATOR: No.*
> *MR MITCHELL: So there's no basis on the material before you for making any either declaration, much less an award, about damages.*
> *THE ARBITRATOR: No, although the applicant would be entitled to nominal damages, wouldn't it, at least, for breaching, I think.* [35]

46. During the First Arbitration, counsel for the Applicants did not make specific oral submissions on damages, other than noting that the Minister's actions had "*put the project behind and caused delay and caused damages to the Applicants.*"[36]

47. On 20 May 2014, as I have noted , I delivered the Award[37] and determined that the BSIOP Proposal (referred to as the 'August 2012 Submission') was a proposal submitted in accord with clause 6 of the State Agreement with which the Minister was required to deal under clause 7(1) of the State Agreement.[38]

48. At [66] to [67] of the Award, I said:

> *66. It follows then that the August 2012 submission was a proposal for the purposes of the State Agreement. The Minister was required to deal with it under Clause 7 of that Agreement, which he has failed to do.*
> *67. The Applicants submitted that, because Clause 7(2) required the Minister within two months after receipt of the August 2012 submission to give notice of his decision in respect of the proposal, he must be deemed to have given his consent. However, nothing in the State Agreement provides any foundation for holding that the failure of the Minister to give a decision within*

[35] Application Book (Document 45), p. 1311.
[36] Application Book (Document 45), p. 1330-1331.
[37] Application Book (Document 46), pp.1338-1388.
[38] Application Book (Document 46), p1387.

> *two months of receipt of the proposal is to constitute a deemed consent to the proposal. The failure of the Minister to give a decision within that time means that he is in breach of the State Agreement and is liable in damages for any damage that the Applicants may have suffered as a result of the breach. But it does not follow in logic or in law that, by reason of the failure, the proposal is approved without qualification or reservation.*[39]

49. In addition, I said at [70] of the Award:

> *70. The Applicants foreshadowed a potential claim for damages by reason [sic] the Minister's breach in failing to deal with the August 2012 submission under clause 7(1). However, the Applicants tendered no evidence in support of such a claim for damages, and it is not appropriate for me to make any Order in respect of it. The Orders I make in the Arbitration are:*
> ***AWARD***
> *1. Declare that the August 2012 Submission was a proposal submitted pursuant to clause 6 of the State Agreement with which the Minister was required to deal under clause 7(1) of the Agreement.*
> *2. Order the State of Western Australia to pay the Arbitrator's costs and expenses.*[40]

50. By letter dated 11 June 2014, Mineralogy's in-house counsel wrote to the Respondent's solicitor suggesting a without prejudice meeting to discuss the damages suffered by International Minerals and Mineralogy.[41]

51. By letter dated 17 June 2014, the Respondent's solicitor wrote to Mineralogy advising that the Respondent agreed to meet with representatives of Mineralogy and International Minerals, while noting that the Respondent's position was as follows:

> *1. The Arbitrator finally decided the question of damages expressly noting that the Applicants failed to bring any evidence to support their claim such that no order was made in the Applicants' favour. It is therefore final in respect of damages;*
> *2. Further or alternatively, the Award is a res judicata which prevents the Applicants re-litigating of the damages issue;*
> *3. Further or alternatively, the issues as to the damage or loss suffered and causation between the Minister's action and any damage suffered were considered in the Award. No evidence was led as to either of these issues. The effect of this is that the Applicants are issue estopped from re-litigating these*

[39] Application Book (Document 46), p1387.
[40] Application Book (Document 46), p1388.
[41] Affidavit of Caitlyn Marie Pilot sworn 28 March 2019, (**Pilot Affidavit**), [4(a)] & p.9.

issues; and
4. Further to all of the above, the Applicants are estopped from attempting to claim all the categories of loss claimed in the Applicants' letter dated 29 May 2014, save for potentially the category (or parts of the category) relating to environmental approvals. By 26 August 2013 (if not earlier), the Applicants had expressly restricted their damages claim to the additional costs to be incurred in renewing the environmental approvals in the event that it could not substantially commence before the expiry of Ministerial Statement 823. No other losses were claimed. That was made clear in the Applicants' Submissions dated 26 August 2013 and confirmed in numerous documents filed by the Applicants thereafter.[42]

52. The Respondent also reserved all its rights in respect of the question of damages arising from the Award.[43]

53. By letter dated 8 July 2014, Mineralogy's in-house counsel responded to the Respondent's solicitor, noting that Mineralogy's legal representatives were prepared to meet with the Respondent's solicitors, and that it was expected that International Minerals would also be agreeable to this course.[44] The letter identified Mineralogy's response to the Respondent's position as follows:

1. The Arbitrator did not decide the question of damages, save that at [67] of the Award the Arbitrator expressly found:
"The failure of the Minister to give a decision within [two months] means that he is in breach of the State Agreement and is liable in damages for any damage that the Applicants may have suffered as the result of the breach." The potential claim for damages for breach foreshadowed by the Applicants was not the subject of any order. It follows that the award is not "final" in respect of the quantum of damages to which the Applicants are entitled.
2. For the same reasons, the Award does not prevent the Applicants pursuing their claim for damages.
3. For the same reasons, the quantum of the loss or damage suffered by the Applicants as a result of the State's breach were not considered by the Award and the Applicants are not estopped from pursuing those matters in proceedings against the State.
4. The facts, matters and circumstances necessary for the State to contend that the Applicants are estopped from pursuing a claim for loss and damage in proceedings against the State are not present. It follows that this element of the State's position is not made out.[45]

[42] Pilot Affidavit, [4(b)] & pp.10-11.
[43] Pilot Affidavit, p.11.
[44] Pilot Affidavit, [4(c)] & pp.12-13.
[45] Pilot Affidavit, pp.12-13.

54. By letters dated 22 July 2014, the then Premier of Western Australia, as Minister for State Development, wrote again to Mineralogy and International Minerals respectively regarding the BSIOP Proposal.[46] Those letters:

    (a) notified Mineralogy and International Minerals that the Premier had determined to exercise his power under cl 7(1)(c) of the State Agreement and required the Project Proponents to make alterations to the BSIOP Proposal and to comply with conditions precedent;

    (b) enclosed a table comprising 46 conditions precedent and the reasons for each of those conditions being imposed; and

    (c) repeated the Premier's invitation for Mineralogy and International Minerals to consult with the Department of State Development in respect of the BSIOP Proposal and as contemplated by cl 7(3) of the State Agreement.[47]

55. By letter dated 12 August 2014, the CEO of International Minerals wrote to the then Premier, in his capacity as Minister for State Development, noting clause 7(3) of the State Agreement and requesting a meeting with the Premier as soon as possible.[48]

56. By letter dated 18 August 2014, the Respondent's solicitor responded on behalf of the Premier to International Minerals' letter of 12 August 2014.[49] The Respondent's solicitor informed International Minerals that the Premier agreed to meet but requested a list of the names of the attendees and noted that Mineralogy, as co-proponent, should be involved in any consultation.

[46] Pilot Affidavit, [7(a)] & pp.25-62.
[47] Pilot Affidavit, pp.25-62.
[48] Pilot Affidavit, [4(d)] & p.14.
[49] Pilot Affidavit, [4(e)] & p.15.

The letter also noted that the Premier wished to be informed, in writing, of the specific items to be discussed in advance of the meeting.

57. By letter dated 26 September 2014, Mineralogy's in-house counsel wrote to me regarding Mineralogy and International Minerals' damages claim.[50] That letter:

(a) noted that there had been some correspondence between the parties in respect of damages following the Award;

(b) noted that the Premier, in his capacity as Minister for State Development, had written to Mineralogy and International Minerals "purporting to approve the [BSIOP Proposal] subject to 46 conditions precedent";

(c) noted that, "in light of current economic conditions", it was likely that the conditions precedent matter fell "for determination together with the claim for damages by Mineralogy and International Minerals as a result of the [Award]";

(d) reserved Mineralogy's "right to plead that it was totally unreasonable to purport to impose any conditions at this time and that such behaviour is simply going to exacerbate damages";

(e) maintained that Mineralogy and International Minerals were entitled to damages and would "progress arbitration in respect of the same unless a commercial agreement [could] be made with the State"; and

(f) noted that "…if Mineralogy [was] found to be wrong in respect of the fact that the Minister [was] not entitled to impose any conditions at this time, Mineralogy submits for arbitration pursuant to clauses 7(4) and

[50] Pilot Affidavit, [4(f)] & pp.16-17.

42(1) of the State Agreement the Minister's decision, advised by letter to International Minerals dated 22 July 2014, to impose a total of 46 conditions precedent to approval of [the BSIOP proposal]".

58. By letter dated 9 October 2014, the Respondent's solicitors wrote to Mineralogy regarding Mineralogy's letter to the Arbitrator dated 26 September 2014.[51] The Respondent's solicitors noted that:

    (a) in relation to the damages claim:

        i. Mineralogy's letter dated 8 July 2014 had indicated that Mineralogy's legal representatives were agreeable to meeting with the State's legal representatives and would contact the State Solicitor's Office to arrange a meeting; and

        ii. no such contact had been made; and

    (b) in relation to the conditions precedent issue:

        i. International Minerals had requested a meeting with the Premier,

        ii. the Respondent's solicitor had responded to the request on behalf of the Premier indicating the Premier's willingness to meet but requesting certain information in advance of any meeting; and

        iii. that information had not been provided by Mineralogy or International Minerals.

59. On 13 February 2015, Mineralogy wrote to the Respondent's solicitors stating that Mineralogy and International Minerals were still considering the extent of their damages claim and the mitigation of those damages.[52]

[51] Pilot Affidavit, [4(g)] & pp.18-19.
[52] Pilot Affidavit, [4(h)] & p.20.

Mineralogy and International Minerals expressly reserved all of their rights in respect of the damages claim.[53]

60. On 29 December 2016, Alexander Law, a law firm acting for Mineralogy and Australasian Resources Limited[54] wrote to the Respondent's solicitors.[55] That letter:

    (a) noted that their clients had foreshadowed a damages claim in the Arbitration;

    (b) noted that their clients had "been seeking to mitigate their losses", but the task had been "difficult" due to factors such as "the state of the iron ore market" and "the actions of the Minister for State Development in failing to approve the project proposals";

    (c) noted that their clients' damages claim was worth "many hundreds of millions of dollars" because of a substantial alteration in the commercial prospects of the project;

    (d) noted that there were "currently proceedings in respect of Sino Iron Pty Ltd and Korean Steel Pty Ltd and one of [their] clients before the Supreme Court of Western Australia" and that "[c]onsequently, the proper assessment of [their] clients' damages [was] currently under consideration as [was] the physical aspects of its project in light of recent developments"; and

    (e) advised the Respondent that their clients had decided to await the outcome of the Supreme Court proceedings before finally deciding whether to pursue their damages claim against the Respondent and, if

[53] Pilot Affidavit, p.20.
[54] It appears that the reference to Australasian Resources Limited was in error, and intended to be a reference to International Minerals.
[55] Pilot Affidavit, [4(i)] & pp.21-22.

so, for what amount.

61. On 16 August 2017, the Premier, as Minister for State Development, wrote to Mineralogy and International Minerals regarding the BSIOP Proposal.[56] Those letters:

    (a) noted the then Minister's decision of 22 July 2014 imposing conditions precedent with respect to the BSIOP Proposal;

    (b) noted that since that time the Project Proponents had failed to submit, within a reasonable time of that decision and in any event by 20 January 2016 (being the timeframe for approval and financial sanction required by condition precedent no. 3) an amended proposal for the project in discharge of the stipulated conditions precedent;

    (c) advised Mineralogy and International Minerals that the BSIOP Proposal was accordingly being treated by the State Government as having lapsed; and

    (d) noted that in any event the relevant condition precedent (being condition precedent no. 3) could no longer be satisfied, nor had it been waived by the Respondent.

62. There was no further correspondence between the Applicants and the Respondent regarding the Applicants' First Damages Claim from 29 December 2016 until the matter was raised by the Applicants on 2 July 2018.[57]

63. There was no further correspondence between the Applicants and the Respondent in relation to the Second Damages Claim and the Clause 7

[56] Pilot Affidavit, [7(b)] & pp.63-64.
[57] Pilot Affidavit, [5]-[6] and pp. 23-24.

Claim until those claims were raised by the Applicants in correspondence with the Respondent's solicitors on 30 October 2018 concerning the hearing of the preliminary issues.[58]

FINALITY ISSUE

64. The Finality Issue raises the following issues:

(a) whether the Award was final with respect to the First Damages Claim or that claim is subject to the principles of res judicata;

(b) alternatively, whether the Applicants are subject to an issue estoppel which prevents re-litigation of the First Damages Claim; and

(c) additionally, whether the Applicants are estopped upon the principles in *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 from claiming all categories of loss save for the losses relating to environmental approvals.

Finality of the Award, Res Judicata & Issue Estoppel

65. The Respondent contends that:

(a) the Applicants referred the issue of damages to arbitration even though they noted that the quantification of those damages might not be calculable and limited their damages claim to a declaration that the Respondent was liable for certain costs;[59]

(b) the Applicants tendered no evidence in support of a claim for damages."[60]

[58] Pilot Affidavit, [8]-[10] and pp. 65-67.
[59] See [25] to [50] above.
[60] See [53] above.

(c) I declined to make an order in respect of damages and did not make any declaration of the Respondent being liable in damages;[61]

(d) my refusal to make an order in respect of damages should also be read in the light of my comment during the Arbitration that I was not sure what I could do with the Applicants' damages claim[62] and did not think I could refer the matter to another forum for determination of the loss;[63] and

(e) I did not specify whether the Award was a final award, a partial award or something else.

66. Based on these factors, the Respondent contends that the Award was final with respect to the First Damages Claim, or that claim is subject to the principles of res judicata, because:

(a) the Applicants' entitlement to damages resulting from the Minister's breach of the State Agreement in failing to consider the BSIOP Proposal as a project proposal was an issue referred to the Arbitration by the Applicants;

(b) in the Arbitration, the Applicants brought an action in respect of the Applicants' entitlement to damages resulting from the Minister's breach of the State Agreement in failing to consider the BSIOP Proposal as a project proposal;

(c) the Applicants later expressly limited their damages claim to the costs of a new environmental approval. They sought declarations that the Respondent was liable for any costs to be incurred in seeking further

[61] See [52] above.
[62] See [49] above.
[63] See [49] above.

environmental approvals and damages associated with such approvals;

(d) the Applicants failed to lead the relevant evidence to support that claim, such that they cannot be allowed to re-litigate that issue now;

(e) the failure of the Applicants to bring any evidence in support of the declarations which they sought in respect of damages cannot alter the legal consequences of their failure to do so;

(f) although I accepted that the Minister's breach would sound in damages, I declined to make any order; and

(g) my decision not to make a specific order as to the declarations relating to damages did not alter the fact that the issue was before me and considered.

67. Alternatively, the Respondent says that the Applicants are subject to an issue estoppel which prevents re-litigation of the First Damages Claim because:

(a) the issue as to the Applicants' entitlement to damages resulting from the Minister's breach of the State Agreement in failing to consider the BSIOP Proposal as a project proposal was determined against the Applicants in the Arbitration;

(b) the Award was final in respect of that claim; and

(c) the Applicants are now attempting to re-litigate the same issue against the Respondent.

68. However, I have concluded that the Respondent cannot rely on the doctrines of res judicata or issue estoppel to preclude the Applicants from pursuing their First Claim for damages.

69. As Dixon J pointed out in *Blair v Curran* (1939) 62 CLR 464 at 531 – 532,

the doctrine of res judicata arises where a court or tribunal, with jurisdiction over a cause of action and the parties, pronounces a final decision which disposes of the dispute giving rise to the cause of action. The parties to the action are thereafter estopped from litigating that question in later litigation except by way of an appeal or other process to set aside the decision. Furthermore, an issue estoppel arises in respect of any question of fact or law that was necessarily decided by the prior decision.

70. As the Respondent pointed out, the Applicants have not identified, let alone particularised, the losses that are the subject of the First Damages Claim. Initially, the Applicants' damages claim was made in general terms but from at least 26 August 2013 the Applicants expressly limited their damages claim to the cost of seeking environmental approvals if they could not substantially commence the project by 22 December 2014 in accordance with Ministerial Statement 823 (and related environmental approval costs).[64] Subsequent correspondence and documents confirmed that the claim for damages was so limited[65] except for the Minute of Proposed Award dated 11 April 2014 which also sought to extend the loss claim to "any damages sustained if the further environmental approvals [were] not forthcoming".[66]

71. Put at its highest, therefore, the only claim for damages that was before me in the 2014 arbitration was a claim for a Declaration that the Respondent would be liable for any *costs* incurred in seeking further environmental approvals as the result of the Minister's breach in dealing with the BSIOP Proposal that was submitted to him. In substance, the Applicants were seeking a Declaration that they were entitled to recover any special damages (costs) that they might suffer in getting further environmental approvals

[64] See [38] to [50] above.
[65] Ibid.
[66] See [46] above.

because of the Minister's breach.

72. It is obvious however that the claim for damages now sought by the Applicants will go beyond the limited claim involved in the First Arbitration in 2014. It will almost certainly be a claim for general damages and perhaps a claim for some form of special damages. The Applicants' submission dated 26 August 2013 contains an indication as to the general nature of the claim for damages that the Applicants now wish to pursue:

> *[28]…by the Minister's wrongful refusal to consider the IM proposal, IM and Mineralogy have suffered a detriment to their reputations, in the marketplace with a perception that they have no right to access to a port for the export of the IM Project products. Furthermore, by its terms, at clause 3.1 the environmental approval in Ministerial Statement 823 will expire on 22nd December 2014 unless the project has been substantially commenced. IM and Mineralogy have now been forced to recommence financing and it may not be possible that a substantial commencement, of the project, can be made by December 2014.]*[67]

73. Two affidavits of Mr Vimal Sharma also give an indication of the likely nature of the present claim for damages in an affidavit dated 26 July 2013 in opposition to the Respondent's application to dismiss the arbitration. In that affidavit, Mr Sharma noted:

> *[33] I have seen the affidavit of William Albert Preston, sworn on 12 July 2013 and do not agree with his calculation of damages. The BSIOP development will proceed, at some stage. At that stage the income predicted by Mr Preston will be realised. Therefore, it is not a question of income foregone but merely delayed. Hence we are only talking about the time value of money. I do not believe that there is any validity in saying that the damages increase by any more than the time value of money, with the passage of time.*
>
> *[34] In the letter attached as VKS12 Mr Dunham, on behalf of Mineralogy and International Minerals Pty Ltd, stated that Mineralogy was prepared to waive interest on damages for the period of delay caused by Mineralogy's proposal.*
>
> *[35] The only other potential I see for damages is that Mineralogy's environmental approval expires in December 2014. If, due to the Minister's refusal to consider the August 2012 submission, it is not possible to*

[67] Application Book (Document 30), p. 979.

> *significantly commence the development of the BSIOP project by December 2014, then Mineralogy may be put to the additional expense involved in obtaining further environmental approvals. I believe that the State has the power to extend these approvals and so even these damages could be avoided. In any event, the time taken for the arbitration will not impact on this potential for damages. This potential will only be impacted by the time taken to recover this stage of project development after the Minister's refusal.*[68]

74. Mr Sharma affirmed a further affidavit dated 2 August 2013 which relevantly stated:

> *[14] IM and Mineralogy have spent considerable time and money negotiating with rating agencies, commercial banks, export credit agencies, investors and investment banks prior to submitting the BSIOP Proposal. It now appears that it may be possible to reinstate all of the arrangements that arose from these discussions. In that event the only damages suffered by IM and Mineralogy would be the time value of money. This may further be affected by market perceptions and be exceedingly difficult for the applicants to quantify…*[69]

75. The letter from Alexander Law dated 29 December 2016 also noted that the Applicants' damages claim was worth "many hundreds of million dollars" because of a substantial alteration in the commercial prospects of the project.

76. The Applicants' Submissions dated 29 July 2013 filed in opposition to the Respondent's application to dismiss the proceedings also stated:

> *[27] Any damages that have been incurred are not increasing on a daily basis other than in accordance with the time value of money.*
>
> *…*
>
> *[30] A primary element of damages may be the cost of conducting a new environmental review if the delay means that the Applicants are unable to significantly commence their project before the expiry of the current environmental approval. It is inevitable that that aspect will not be known until December 2014. However, the Applicants are aware that they will need to show that they attempted to mitigate, or avoid such loss by promoting the project.*[70]

77. These contentions of the Applicants indicate that they intend to claim

[68] Application Book (Document 18), pp.466-467.
[69] Application Book (Document 21), p. 552.
[70] Application Book (Document 19), p. 490.

general damages for the damage they have allegedly suffered as the result of the Minister's breach.

78. The cause of action for damages that the Applicants now wish to pursue is a different cause of action for damages from that which was involved in the 2014 First Arbitration. Although it is based on the Respondent's breach of contract, the issues and the evidence to support the First Damages claim are different from the cause of action that was the basis of the claim for a Declaration in the First Arbitration.

79. It has been settled law since the decision of the United Kingdom Court of Appeal in *Brunsden v Humphrey* (1884) 14 QBD 141 that, where a plaintiff suffers two heads of damage, distinct in kind, from a wrongful act, two separate causes of action arise. Consequently, the doctrines of *res judicata* or issue estoppel do not preclude the plaintiff from commencing an action for one head of damage after recovering damages for the other head of damage in an earlier action. In *Brunsden*, the plaintiff recovered damages for property damage to his cab as the result of the defendant's negligence and then commenced an action for the personal injury he had suffered as a result of that negligence. The Court of Appeal held that they were two different cause of action giving rise to two different rights. Lord Esher, MR, said (at 145): "The collision with the defendant's van did not give rise to only one cause of action: the plaintiff sustained bodily injuries, he was injured in a distinct right, and he became entitled to sue for a cause of action distinct from the cause of action in respect of the damage to his goods…"

80. Until insurance companies entered into so-called "knock-for-knock" agreements agreeing not to sue other indemnified defendants on behalf of insured persons who had suffered property damage arising out of motor vehicle accidents, the decision in *Brunsden* was applied in thousands of

cases in Australia and probably elsewhere. Before the making of those agreements, the property damage insurer would exercise its right of subrogation and sue the defendant (who would usually be indemnified by another insurer) in the name of the plaintiff for the property damage suffered while the plaintiff would commence his or her own action for personal injury suffered in the accident. In the long run, the benefits that insurers obtained by exercising their subrogations rights were likely to be off-set by the damages they paid in indemnifying insured defendants in other actions. In addition, legal costs incurred in suing or defending property damage claims, arising from motor accidents, imposed a heavy burden on insurers. It made economic sense therefore for insurers to allow their losses to lie where they fell and refrain from suing each other.

81. In the present case, the Declaration sought by the Applicants in the 2014 First Arbitration was a claim that they had a cause of action in respect of costs that might be incurred in seeking further environmental approvals. The claim for damages now pursued appears to be one for general damages in respect of loss of reputation and loss of income by reason of delay. It is a different cause of action from the cause of action foreshadowed in the 2014 arbitration.

82. The 2014 Award was undoubtedly a Final Award. Whether or not it now precludes the Applicants from pursuing any claim for costs incurred in obtaining further environmental approvals, it does not preclude them from pursuing the general damages claim they now wish to litigate.

83. A further ground for finding that the claim for a Declaration did not give rise to a *res judicata* issue estoppel is that the claim for a Declaration was not determined on the merits. Cause of action estoppel – which is the relevant category – like other estoppels requires a determination on the merits: *Carl*

Zeiss Stiftung v Rayner & Keeler Lt (No.2) [1967] 1 AC 853 at 918, 927, 933, 935, 948 and 969. The Award in the First Arbitration made no determination on the merits concerning the claim for a Declaration.

Anshun Estoppel – Categories of Loss

84. The Respondent contends that, to the extent that the Applicants now seek to recover damages for categories of loss other than the cost of seeking environmental approvals, the Applicants are precluded from seeking such damages by reason of an *Anshun* estoppel, a form of estoppel based on, but narrower than, the doctrine of abuse of process: *Reichel v Magrath* (1889) 14 App Cas 665 at 668; *Greenhalgh v Mallard* [1947] 2 All E R 255 at 259.

85. In *Yah Tung Investment Co-Ltd v Dao Heng Bank Ltd* [1975] AC 581, the Judicial Committee of the Privy Council held that, although the doctrine of *res judicata* "in its narrower sense" was not available to the defendant, it would be an abuse of process of the court for the plaintiff in that case to raise in subsequent proceedings matters which could and should have been litigated in earlier proceedings. In giving the Advice of the Judicial Committee, Lord Kilbrandon said (at 590) "*[b]ut there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings.*"

86. In *Port of Melbourne Authority v Anshun Pty Ltd* (1981) (147 CLR 589, the High Court of Australia rejected the proposition that there is always an abuse of process when a party raises in subsequent proceedings matters which could have been litigated in earlier proceedings. Gibbs CJ, Mason and Aickin JJ said (at 602):

> *"there will be no estoppel unless it appears that the matter relied upon as a defence in the second action was so relevant to the subject matter of the first*

> *action that it would have been unreasonable not to rely on it. Generally speaking, it would be unreasonable not to plead a defence if, having regard to the nature of the plaintiff's claim on its subject matter it would be expected that the defendant would raise the defence and thereby enable the relevant issues to be determined in the one proceeding."*

87. The statement of Lord Kilbrandon in *Yah Tung* was also rejected by Lord Bingham in *Johnson v Gore Wood & Co-(a firm)* [2002] 2 AC 1. In giving the principal speech in the House of Lords in that case, his Lordship said (at 31):

> *"It is, however, wrong to hold that because the matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should… be a broad, merits-based judgement which takes account of the public and private interests involved… One cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not."*

88. As Lord Sumption JSC pointed out in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2014] AC 160 at [25], the focus in *Johnson v Gore Wood & Co-(a firm)* was on abuse of process rather than estoppel because of doubts of the parties' privity of interest. Abuse of process is a wider and more flexible doctrine than *Anshun* estoppel. What was said by Lord Bingham in *Johnson* concerning "a broad, merits-based judgment" is not the test that the High Court has approved in respect of *Anshun* estoppel cases which is that "*there will be no estoppel unless it appears that the matter relied upon …in the second action was so relevant to the subject matter of the first action that it would have been unreasonable not to rely on it.*"

89. In the present Arbitration, the Respondent has not relied on abuse of process to defeat the Applicants' claim but confined itself to claiming that the First Arbitration created an *Anshun* estoppel that precludes the Applicants from now suing for damages for breach of the State Agreement. The Respondent contends that the Applicants reasonably could, and should, have raised any

other categories of loss in respect of the First Damages Claim in the Arbitration. Alternatively, it contends that I ought to exercise my discretion to estop the Applicants from claiming other forms of damages because:

(a) the Applicants could and should have brought such claims in the Arbitration or sought declarations that the Respondent was liable for such losses; and

(b) in the context where the Applicants claimed in their submissions dated 26 August 2013 that they had suffered numerous losses (for example, an adverse impact on their reputation), the decision to limit the losses to the costs of new environmental approvals indicates that the Applicants made a deliberate decision to pursue only certain categories of loss. The Applicants should be held to that position.

90. For these reasons, the Respondent contends that the Applicants should not be allowed to effectively re-run their case in respect of the First Damages Claim. Instead, the Respondent says that the loss which the Applicants may recover as part of the First Damages Claim could only be the cost of seeking environmental approvals if they could not substantially commence the project by 22 December 2014 in accordance with Ministerial Statement 823 (and damages sustained if those approvals were not obtained).

91. The Respondent also argues that no such loss could have been incurred prior to 22 July 2014, given those losses would only have arisen if the Applicants could not have substantially commenced the project by 22 December 2014.

92. Further, the Respondent says that:

(a) It understands the First Damages Claim to necessarily be limited to damages incurred over the period August 2012 to 22 July 2014; and

(b) any losses incurred by the Applicants after 22 July 2014, including in respect of seeking any environmental approvals, would be the subject of the Second Damages Claim (noting that the Respondent does not admit that any such losses were in fact incurred by the Applicants).

93. The Respondent therefore says that, if I find that the loss which the Applicants may claim as part of the First Damages Claim is limited to the loss set out above, then the First Damages Claim should be dismissed as it is otiose.

94. Given the decision in *Anshun*, the question for my determination is whether an action for general damages was so relevant to the limited claim in the First Arbitration the subject of the May 2014 Award that it was unreasonable not to rely on it in that Arbitration. I have concluded that it was not so connected with the claim for a Declaration that it was unreasonable for the Applicants not to bring an action for general damages in the First Arbitration.

95. As I have indicated, the damages claim which the Applicants now raise was a separate and distinct cause of action from the claim for a Declaration in the First Arbitration. Furthermore, evidence to support the claim for a Declaration necessarily fell into a very narrow compass while the general damages claim was one that would appear to require a good deal of evidence to support what was a lost opportunity claim based on assumptions and hypotheses. Although both the claim for a Declaration and the general damages claim were based on the same breach, they were not so connected that it was unreasonable for the Applicants not to pursue both causes of action in the First Arbitration.

96. Moreover, the reasonableness of the Applicants' choice not to run the

general damages claim in the First Arbitration must be evaluated in the context of the uncertainties surrounding the claim for general damages.

97. First, it was unclear as late as May 2014 whether the Applicants had suffered or were likely to suffer any pecuniary damage. As I have noted, in one of his affidavits, Mr Sharma said:

> *[35] The only other potential I see for damages is that Mineralogy's environmental approval expires in December 2014. If, due to the Minister's refusal to consider the August 2012 submission, it is not possible to significantly commence the development of the BSIOP project by December 2014, then Mineralogy may be put to the additional expense involved in obtaining further environmental approvals. I believe that the State has the power to extend these approvals and so even these damages could be avoided. In any event, the time taken for the arbitration will not impact on this potential for damages. This potential will only be impacted by the time taken to recover this stage of project development after the Minister's refusal.*[71]

98. A further affidavit of Mr Sharma relevantly stated:

> *[14] IM and Mineralogy have spent considerable time and money negotiating with rating agencies, commercial banks, export credit agencies, investors and investment banks prior to submitting the BSIOP Proposal. It now appears that it may be possible to reinstate all of the arrangements that arose from these discussions. In that event the only damages suffered by IM and Mineralogy would be the time value of money. This may further be affected by market perceptions and be exceedingly difficult for the applicants to quantify…*[72]

99. Second, Mineralogy Pty Ltd had commenced an action against Sino Iron Pty Ltd and Ors on 18 March 2013 claiming sums of money for royalties arising under Mining Right and Site Lease Agreements[73]. This action was not resolved at first instance until 24 November 2017. Between 2013 and 2019, Mineralogy Pty Ltd was involved in other lengthy litigation with Sino Iron Pty Ltd, Korean Steel Pty Ltd, CITIC Pacific Ltd and CITIC Pacific Mining

[71] Application Book (Document 18), pp.466-467.
[72] Application Book (Document 21), p. 552.
[73] Court Book vol 4, 75-76.

Management Pty Ltd.

100. None of these proceedings had any direct connection with any of the Arbitrations between the present parties[74]. However, the Applicants contend that rights involved in these proceedings were "materially relevant to the ability of the [Applicants] to proceed with the Balmoral South Iron Ore Project proposal and therefore to questions of causation and quantification of loss flowing from the Respondent's conduct in response to the Balmoral South Iron Project proposal[75]."

101. In the Applicants' RESPONSE TO RESPONDENT'S STATEMENT OF MATERIAL FACTS, MATTERS AND CIRCUMSTANCES, it contended[76]:

> *"The extent to which the [Applicants'] losses in respect of the BSIOP Proposal were caused by the Respondent's breach of the State Agreement, as opposed to other potential causal factors concerning the above disputes, is a matter that could only be determined once the [Applicants] had exhausted all efforts through that those legal proceedings to protect and enforce its rights under and in relation to the State Agreement and related project agreements, including in support of the BSIOP Proposal. Accordingly, it was reasonable for the [Applicants] to withhold quantification of damages until those proceedings were resolved."*

102. Third, quantification of the Applicants' right to sue for damages was dependent upon a finding in the First Arbitration that the Respondent had breached the State Agreement by refusing to recognise the Proposal as a Proposal for the purposes of that Agreement and upon what, if any, conditions the Respondent then imposed in carrying out the Proposal. Until such conditions were known and accepted by the Applicants, quantification of damages for breach of the State Agreement could not be calculated, even

[74] Affidavit of Caitlyn Marie Pilot, sworn 28 March 2019, paras.16-17, Court Book vol 4, Document 2 at pp.7-8.
[75] Affidavit of Shayne Robert Bosma, sworn 10 May 2019, para.6, Court Book vol 4, Document 4 at p.7.
[76] Court Book, Vol 4, Document 5, para, 67 at p.24.

roughly.

103. Because of these three matters, I have concluded that it was not unreasonable for the Applicants not to pursue a claim for general damages in the First Arbitration even if there was a connection between the two causes of action. Nor having regard to the various uncertainties that existed could it be expected that the Applicants would pursue a claim for general damages in the First Arbitration.

SECTION 46 ISSUE

104. As I have noted, originally the Respondent contended that, if the Finality Issue was decided against the Respondent, then the arbitration proceedings should be adjourned to allow the Respondent to make an application to the Supreme Court of Western Australia for orders terminating the arbitration proceedings (in so far as they relate to the First Damages Claim) pursuant to section 46(2) of the CAA (1985).

105. However, the Award made on 14 May 2014 was a Final Award which terminated the Arbitration the subject of that Award and the parties do not dispute that I am *functus officio* in respect of those proceedings. It follows that I have no power to adjourn that Arbitration; nor are there are any proceedings on foot in the First Arbitration which the Supreme Court of Western Australia could terminate. Section 46, therefore, has no application in respect of the First Arbitration the subject of the 14 May 2014 Award.

SECTION 25 ISSUE

106. The Respondent says that the Applicants should be precluded from pursuing the Second Damages Claim and the Clause 7 Claim pursuant to section 25(2) of the CAA (2012).

107. Relevantly, section 25(2) provides:

> *"Unless otherwise agreed by the parties, if a party fails to do any other thing necessary for the proper and expeditious conduct of the arbitration the arbitral tribunal:*
>
> > *(i) if satisfied that there has been inordinate and inexcusable delay on the part of the claimant in pursuing the claim – may make an award dismissing the claim or may give directions (with or without conditions) for the speedy determination of the claim…"*

108. As the Respondent pointed out, the section 25 Issue raises the following sub-issues for consideration:

(a) whether the Applicants have failed to do "any other thing necessary for the proper and expeditious conduct of the arbitration"; and

(b) whether there has been "inordinate and inexcusable delay" on the part of the Applicants in pursuing the Second Damages Claim and the Clause 7 Claim.

109. The Respondent contends that, assuming the Applicants are correct in claiming that their letter to me dated 26 September 2014 constituted a referral of the Second Damages Claim and the Clause 7 Claim to arbitration for the purposes of clauses 7(4) and 42(1) of the State Agreement, the Applicants have not progressed those claims in any manner since that time. The Respondent argues that the Applicants have failed to do any of the things which would have been necessary for the proper and expeditious conduct of that arbitration, including things such as:

(a) defining the scope of the dispute;

(b) conferring with the Respondent in respect of the dispute; or

(c) progressing the arbitration by seeking orders from the Arbitrator (for example, programming orders for the filing of evidence and pleadings).

110. The Respondent points out that the Applicants did not progress the Second Damages Claim and the Clause 7 Claim in any manner between 26 September 2014 and 30 October 2018, when the claims were raised in correspondence between the parties regarding the hearing of the preliminary issues. That is a period of over four years, which the Respondent says is inordinate.

111. The Respondents also contend that the Applicants have not provided any reason for the delay of over four years in progressing those claims.

112. The Respondent says that, while it is not necessary for it to demonstrate that the Applicants' delay has caused, or may cause, it prejudice:

    (a) there is plainly a public interest in the expeditious progress of litigation, and prejudice to an opponent is suffered in a broad sense where claims are not progressed expeditiously;

    (b) the size of a potential damages award against the Respondent continues to increase for each day that the Applicant has delayed and failed to seek a resolution of these issues; and

    (c) should the Applicants be seeking interest pursuant to section 33E of the CAA (2012), then that interest has been continuing to accrue due to the Applicants' delay.

113. The Respondent contends that its breach of the State Agreement occurred on 26 September 2013. Accepting that that is so, under the Western Australian *Limitation Act* 2005, sections 13 and 29, the Applicants had six years - until 26 September 2019 - to commence an arbitration claiming general damages for the Respondent’s breach of the State Agreement. Consequently, the Application by the Respondent to terminate the First Damages claim was brought while the cause of action was within the

limitation period specified in the *Limitation Act* 2005 (WA). That fact would have been a powerful factor in exercising my discretion to reject the Respondent's Application to terminate the First Arbitration on the ground of delay if I had had to decide the section 46 issue in respect of that arbitration: *Birkett v James* [1978] AC 297.

114. In so far as the Respondent's conduct in imposing conditions constituted a further breach of the State Agreement, that breach occurred on 22 July 2014 when the Premier of Western Australia, as Minister for State Development, wrote to the Managing Director of Mineralogy and the Chief Executive Officer of International Minerals imposing conditions precedent to the approval of the BSIOP Project. Hence, the Respondent's Application to terminate the Second Arbitration in respect of the Second Damages claim was brought while the Second Damages claim was within the limitation period specified in the *Limitation Act*. Indeed, that cause of action is still within the limitation period specified by that Act.

115. The fact that the Second Damages claim is still within the limitation period set by the *Limitation Act* is itself a strong reason for rejecting the Respondent's Application under section 25 (2). The six-year period, set by sections 13 and 29, for bringing a claim in arbitration represents the Legislature's judgment as to the appropriate balance in most cases between protection of Respondents from stale claims and the right of Claimants to pursue just causes of action in an arbitration. Section 25 of the *Arbitration Act* shows, however, that the six-year period is not conclusive as to whether an arbitration should be stayed. Nonetheless, the fact that a claim is still within the six-year limitation period is a strong factor in exercising a discretion not to terminate an arbitration proceeding.

116. I have already referred to the fact that litigation between the Applicants and

other parties played a part in the Applicants' delay in pursuing their general damages claim. The affidavit of Domenico Vincent Martini,[77] sworn 17 April 2015, showed that the BSIOP was dependent upon the use of existing port facilities to export the iron ore concentrate that is to be mined from the Project. In part, the litigation between Mineralogy and Sino Iron, Korean Steel and CITIC concerned who was entitled to possession and control of these port facilities. In his affidavit, Mr Martini said[78] that certainty over access to the Port and the terms of the project agreements were fundamental to the project proceeding and that uncertainty in this area had deterred any possible investment in the project.

117. Given the uncertainty concerning access to the port facilities, its impact on investment in the Project and whether the Project could go ahead, I am not satisfied that the delay on the part of the Applicants in bringing the Second Damages claim can be characterised as inordinate and inexcusable delay. In *John Holland Construction & Engineering Pty Ltd* [1999] 2 Qd R 593, Wilson J refused to characterise delay as inordinate or inexcusable even though there was a delay over various periods that totalled more than six years between the cause of action arising and the application to terminate and even though the delay was largely unexplained. In the present case, the delay was four years and one month. Unlike the situation in *John Holland*, the evidence does show the reason why the delay has occurred.

118. It is true as the Respondent contended that the Applicants could have taken some procedural steps to advance the Second Arbitration such as defining the scope of the dispute and seeking orders from the Arbitrator for the filing of pleadings and evidence. However, given the uncertainty as to the quantification of the Applicants' claim and, indeed, whether it might

[77] Court Book, Document 5, paras 36 – 56, 87 – 91.
[78] Court Book, Document 5, para.90.

proceed at all, these steps would have had few practical advantages and would have involved both parties in further expense.

119. Accordingly, I reject the Respondent's Application to terminate the proceedings in respect of the Second Damages claim.

120. As I have already mentioned, the Applicants claim that, in the event that the conditions precedent imposed in respect of the BSIOP Proposal are not found to be so unreasonable as to give rise to a breach of the State Agreement, they have referred to arbitration the reasonableness of the Minister's decision pursuant to clause 7 of the State Agreement (the Clause 7 Claim). This is a separate and distinct claim, and it does not follow that, because the delay in respect of the Second Damages claim was not inordinate or inexcusable, the same result applies to the Clause 7 Claim. Nonetheless, many of the considerations that compel the conclusion that the Second Damages claim should not be terminated apply to the Clause 7 Claim. In particular, the Clause 7 Claim would have required extensive pleadings, procedural steps, evidence and legal and factual argument that would be futile unless and until the Applicants were able to proceed with the BSIOP Proposal. Until the uncertainty concerning the Applicants' capacity to continue with the Proposal by obtaining access to the Port and financing the project was clarified, arguments concerning the conditions imposed by the Respondent were largely academic. It is true that the nature of the conditions might have an impact on the financing of the Project so it was important that this issue be clarified. However, obtaining access to the Port was, as Mr Martini testified, "fundamental" to the Project. Until the question of access was clarified, the conditions imposed by the Premier were of secondary importance.

121. Accordingly, I reject the Application to terminate the proceedings in respect

of the Clause 7 Claim.

122. Having regard to the issues to be determined by me as minuted in the Proposed Directions dated 20 December 2018, I make the following Declarations and Order.

AWARD

1. **DECLARE** that the Applicants' right to recover damages was not heard and determined in the Award of 20 May 2014.

2. **DECLARE** that the Applicants are not foreclosed from further pursuing claims for damages arising from any breach or breaches of the State Agreement.

3. **DECLARE** that the Award of 20 May 2014 was a Final Award which terminated the First Arbitration and that the Arbitrator has no jurisdiction to adjourn the proceedings to allow time for the Respondent to apply to the Supreme Court under section 46 of the *Commercial Arbitration Act* 1985 (WA) to terminate the First Arbitration.

4. **DECLARE** that there has not been inordinate and inexcusable delay on the part of the Applicants in progressing the Second Damages Claim or the Clause 7 of the State Agreement claim.

5. **LIBERTY TO APPLY** in respect of the above Declarations.

Perth

11 October, 2019

Michael McHugh

Arbitrator