IN THE MATTER OF
AN ARBITRATION UNDER THE 2021 RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW
and
THE ASEAN-AUSTRALIA-NEW ZEALAND FREE TRADE AGREEMENT (AANZFTA)

ZEPH INVESTMENTS PTE LIMITED

Claimant

vs.

THE COMMONWEALTH OF AUSTRALIA

RESPONDENT

ADDENDUM TO CLAIMANT'S NOTICE OF ARBITRATION – LEGAL PRINCIPLES – OPERATION OF AANZFTA

---

28 March 2023

(Amended 30 September 2023)

I. INTRODUCTION

1 This addendum to the Claimant's Arbitration Notice addresses various provisions of the AANZFTA and their application to the Claimant's claims.

2 Unless otherwise indicated, defined terms in this addendum have the same meanings as those given in the Arbitration Notice, including the Notice of Intent which it incorporates by reference.

3 Unless otherwise stated, references to an "Article" in this addendum are references to Articles of Chapter 11 of AANZFTA.

4 Some important general points need to be made at the outset regarding Chapter 11 of AANZFTA and treaty interpretation generally.

5 *First*, AANZFTA is a treaty governed by public international law. As such, it falls to be interpreted in accordance with Articles 31-32 of the Vienna Convention on the Law of Treaties (**VCLT**). Of particular importance is Article 31(1) of the VCLT, which provides that:

> *"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."*

6 It should therefore be borne in mind at all times that AANZFTA must be interpreted:

(a) in good faith;

(b) in accordance with the ordinary meaning of the words contained in AANZFTA;

(c) by construing those terms in their proper context;

(d) by applying a purposive approach to the interpretation of those terms, such that the terms of AANZFTA shall be construed in the light of its object and purpose which is, of course, investor protection.

7 *Secondly*, it follows that a technical or restrictive approach to the interpretation of AANZFTA is to be eschewed. Although the provisions of AANZFTA should be interpreted in accordance with the ordinary meaning of its words, those words should be given a fair, large and liberal interpretation that best reflects the object and purpose of AANZFTA, namely investor protection.

8 *Thirdly*, primacy must always be given to the language of AANZFTA and, accordingly, appropriate caution must always be exercised if asked to consider matters decided under different treaties in different terms.

II. THE CLAIMANT'S STANDING UNDER AANZFTA

A. The Claimant is an Investor under the AANZFTA and thus has standing

9 Article 1 defines the scope of Chapter 11 of AANZFTA. Relevantly, it provides that Chapter 11 applies to measures adopted or maintained by a Party relating to "investors of any other Party" and "covered investments". Each of those terms will be considered further below.

10 The fundamental object and purpose of AANZFTA is to protect a juridical person, which is a national of one contracting State party to AANZFTA, in relation to a "covered investment" made by that juridical person in the territory of another contracting State party to AANZFTA.

11 Next, it is important to have regard to the provisions of Article 2, which sets out a series of definitions which are of fundamental importance. To establish its standing to advance its claims, the Claimant must demonstrate that it is "an investor of a Party" within the meaning of Article 2.

12 Article 2(d) defines "investor of a Party", *inter alia*, as:

> *"... a juridical person of a Party that seeks to make, is making, or has made an investment in the territory of another Party."*

13 "Juridical person" is defined in Article 2(e) as:

> *"... any entity duly constituted or otherwise organised under applicable law, whether for profit or otherwise, and whether privately-owned or governmentally owned, including any corporation, trust, partnership, joint venture, sole proprietorship, association or similar organisation."*

14 It is plain that Article 2(e) has been deliberately drafted in the widest possible terms, so as to secure the fundamental object and purpose of AANZFTA, namely investor protection.

15 Article 2(f) then defines "juridical person of a Party" as:

> *"... a juridical person constituted or organised under the law of that Party."*

16 The evidence inter alia set out in the Notice of Intent inter alia including Annexure A and in the statement of [redacted] dated 22 March 2023 comprehensively demonstrates that the Claimant is a corporation duly constituted, incorporated and organised under and in accordance with the laws of Singapore, which is a party to AANZFTA.

17 The Claimant is, accordingly, "a juridical person of a Party", namely Singapore.

18 The Claimant, therefore, qualifies for the protection of AANZFTA and has the requisite standing to bring its claims in this Arbitration, subject only to demonstrating that it is also *"an investor of a Party"* within the meaning of Article 2(d), as referred to above. That element is satisfied by reason of the matters referred to in the next section.

B. The Claimant is "an investor of a Party" within the meaning of AANZFTA

19 In accordance with Article 2(d), having demonstrated that it is "a juridical person of a Party", the Claimant must go on to demonstrate that it *"seeks to make, is making, or has made an investment in the territory of another Party."*

20 Accordingly, the next step is to consider the meaning of "investment".

21 Article 2(c) defines "investment" as follows:

> *"**investment** means every kind of asset owned or controlled by an investor, including but not limited to the following:*
>
> *(i) movable and immovable property and other property rights such as mortgages, liens or pledges;*
>
> *(ii) shares, stocks, bonds and debentures and any other forms of participation in a juridical person and rights derived therefrom;*
>
> *(iii) intellectual property rights which are recognised pursuant to the laws and regulations of each Party and goodwill;*
>
> *(iv) claims to money or to any contractual performance related to a business and having financial value;*
>
> *(iv) rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts; and*

(v) business concessions required to conduct economic activity and having financial value conferred by law or under a contract, including any concession to search for, cultivate, extract or exploit natural resources.

For the purpose of the definition of investment in this Article, returns that are invested shall be treated as investments and any alteration of the form in which assets are invested or reinvested shall not affect their character as investments."

22 Again, it is plain that Article 2(c) has been drafted in the widest possible terms, so as to secure the fundamental object and purpose of AANZFTA, namely investor protection, by ensuring that the widest possible set of categories of investment is protected by AANZFTA.

23 Reference is also made to Article 2(a) as it defines "covered investment" (which is of some relevance as it is a term later used in, *inter alia*, Articles 6 and 9) as follows:

> *"**covered investment** means with respect to a Party, an investment in its territory of an investor of another Party, in existence as of the date of entry into force of this Agreement or established, acquired or expanded thereafter, and which, where applicable, has been admitted by the host Party, subject to its relevant laws, regulations and policies."*

24 Of critical importance is that the term "covered investment" includes the term "investment", the definition of which is set out above. Thus, the term "investment" where it appears in Article 2(a) has the same exceptionally broad meaning set out in Article 2(c). This means that "covered investment" is itself a term of very broad scope.

25 On the basis of the evidence submitted in this arbitration, it is plain that the Claimant is a juridical person of Singapore that *"seeks to make, is making, or has made an investment in the territory of another Party."*

26 The evidence demonstrates that, having regard to the very broad definition of "investment", there are a number of investments owned or controlled by the Claimant that are entitled to the protection of AANZFTA. This includes those assets of the Claimant's subsidiaries which are owned and controlled by the Claimant, by virtue of its 100% ownership and control of those subsidiaries and in turn their subsidiaries.

27 As the evidence shows, the Claimant has (or, prior to the enactment of the Amendment Act, which stripped them away, had) a number of "investments" in Australia meeting the definitions of "investment" and "covered investment". That is because, in the period prior to the enactment of the Amendment Act, the Claimant indirectly owned and controlled (through the subsidiaries mentioned below) a range of assets including claims to money, claims to contractual performance, other rights under contracts, business concessions to exploit natural resources, and shares. These assets were directly or indirectly acquired by the Claimant in or about January 2019, in the manner referred to below.

28 In or about January 2019, the Claimant acquired its shares in Mineralogy and consequently also became the indirect owner of IM. This represented one form of investment, as a result of which the Claimant also became the owner and controller of the present and future assets of those subsidiaries while they remain under its ownership and control.

29 One such asset class is represented by the contractual rights and entitlements of Mineralogy and IM under the State Agreement. Those assets qualify as an "investment", as do Mineralogy's business concessions to exploit its mining resources pursuant to the State Agreement. Another such asset is represented by the valuable contractual rights to the determination of a damages entitlement pursuant to the 2020 Arbitration Agreement.

30 The Claimant's interest in these various contractual rights and entitlements, and business concessions, qualifies as investments under the definition of "investment" in Article 2(c).

31 As explained below, an indirect interest in such assets is sufficient to constitute a covered investment under AANZFTA, having regard to the very broad nature of the definition of "investment" in that treaty.

32 The definition of "investment" in Article 2(c), consistently with its breadth and with the object and purpose of the AANZFTA (namely, investor protection) does not make any distinction between investments held by the Claimant or its wholly owned subsidiaries. The main test is that an investment is an " *asset owned or controlled by an investor*", It was plainly intended to include both. The Claimant clearly controls investments and assets of its wholly owned subsidiaries.

33 There would be no warrant for interpreting Article 2(c) in a manner that did not extend to the assets of its subsidiaries Mineralogy Pty Ltd and IM Pty Ltd which are controlled by the Claimant. Any suggestion otherwise would be contrary to Article 31(1) of the VCLT,

which is referred to above. It is obvious that an investment may be made and held either directly or indirectly. Further, it is commonplace for a juridical person of one jurisdiction, when making an investment in another jurisdiction, to make and hold that investment through an entity or entities incorporated in the second jurisdiction.

34 Moreover, AANZFTA expressly excludes certain types of investment from its coverage. One must infer that, had the Parties wished to limit the coverage of AANZFTA to investments owned or controlled directly by an "investor of a Party", they would have made that intention plain in the text of AANZFTA. They did not. On the contrary, it is plain from the text of AANZFTA, interpreted in the manner required by Article 31(1) of the VCLT, that the Parties intended the term "investment" (and thus the term "covered investment") to have the broadest possible scope. It would fly in the face of the object and purpose of AANZFTA (investor protection) to interpret Article 2(c) in a manner that did not cover both direct and indirect investments. Such an interpretation is therefore not open.

35 In each case, the Claimant's investments in Australia were made and held after commencement of the AANZFTA and prior to the enactment of the Amendment Act on 13 August 2020.

36 In relation to the nature of the Claimant's investments in Australia, reference is also made generally to sections 2, 3 and 6 of the Notice of Intent.

C. Consent

37 Before detailing the Respondent's breaches of AANZFTA, it is important to record that, by and through its ratification of AANZFTA, the Respondent committed to abide by the terms of AANZFTA, including by consenting to arbitration under Chapter 11 thereof.

38 In accordance with Article 21(5), the Claimant hereby consents to UNCITRAL arbitration of the dispute described in the Arbitration Notice.

39 It is also important to record that the Claimant has satisfied the consultation requirements of Article 19 by sending a consultation letter dated 14 October 2020. The Respondent acknowledged receipt of the consultation letter on 24 November 2020. The Parties subsequently agreed to consult on 21 December 2020. Consultations took place by phone at that time, but no resolution was achieved. Further consultations took place on 10 May 2021 but, again, no resolution was achieved.

40 Subsequently, the Claimant notified the Respondent of its intention to commence arbitration by issuing a Notice of Intent, in satisfaction of the requirements of Article 22(1). It did so on 20 October 2022.

III. AUSTRALIA'S BREACHES OF THE AANZFTA

41 The Respondent, through the acts and omissions of Western Australia, has violated the following provisions of the AANZFTA in relation to the Claimant and its covered investments:

(a) Article 6(1): *"Each Party shall accord to covered investments fair and equitable treatment and full protection and security"*.

(b) Article 9(1): *"A Party shall not expropriate or nationalise a covered investment either directly or through measures equivalent to expropriation or nationalisation (expropriation), except: (a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation; and (d) in accordance with due process of law"*.

42 Article 4(1) of the *Articles on Responsibility of States for Internationally Wrongful Acts* confirms that:[1]

> *"[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State."*

A. Breach of Fair and Equitable Treatment

43 By any fair and objective assessment, Australia's conduct in passing the Amendment Act violated the fair and equitable treatment (**FET**) obligations contained in Article 6. Western Australia's conduct represents an unmitigated departure from the rule of law that shocks the conscience. Its use and abuse of the legislative process to reverse the course of legal history, strip away valuable rights without providing any form of compensation, and

[1] The International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts (2001) (**Exh. CLA-10**).

dishonourably avoid a legitimate damages claim deserves to be condemned in the strongest terms.

44 The FET obligation in AANZFTA is linked to the Minimum Standard of Treatment (**MST**) under customary international law. MST under customary international law includes denial of justice, a failure to accord due process or natural justice, a complete lack of transparency, and treatment that is manifestly arbitrary, unjust or discriminatory. Although modern jurisprudence suggests that a State's conduct need not be malicious, wilfully negligent or in bad faith, there must be some aggravating factor such that it is deemed unacceptable from an international perspective.

45 In the present case, all these elements exist.

46 The Amendment Act unjustly deprived the Claimant's subsidiaries of a wide range of legal and due process rights, rendering the Claimant's subsidiaries unable to access justice for breaches of the State Agreement. The Amendment Act was prepared in secret and passed under great urgency, preventing any meaningful Parliamentary debate or scrutiny. Worse, the secret preparation of the Amendment Act was undertaken while the State of Western Australia engaged in a dishonest sham by pretending to continue to participate in the 2020 Arbitration. The Amendment Act directly targets the Claimant's subsidiaries (and Mr Palmer, a director of the Claimant) while protecting the State of Western Australia against all and any liability (including, quite incredibly, criminal liability). The Amendment Act is "weaponised" legislation that holds the threat of draconian, punitive and potentially crippling indemnities over the heads of named persons and transferees, lest they dare pursue their legitimate rights and entitlements. The Amendment Act annuls, quashes and extinguishes any order or ruling adverse to the State of Western Australia and provides wide powers to Government officials to make further amendments without any Parliamentary oversight.

47 By any measure, the Amendment Act is a gross abuse of power – indeed, it is precisely the type of conduct that the rule of law is designed to protect citizens and other individuals against. The Amendment Act is unprecedented and extreme. Nothing like it has ever been seen before in Australia or (so far as the Claimant is aware) in any democratic society. It is an attack on the rule of law itself and is a clear violation of the FET obligations under the AANZFTA.

(i) The Amendment Act constitutes a denial of justice and breaches due process rights

48 The Amendment Act is targeted, "weaponised" legislation of an unprecedented nature. It is an unapologetically draconian statute, designed specifically to prevent the Claimant and its subsidiaries from accessing justice for Western Australia's established breach of the State Agreement, by exercising their contractual entitlement to have damages assessed pursuant to the 2020 Arbitration Agreement.

49 Through the Amendment Act, the executive branch of the Government of Western Australia effectively "tore up" the 2020 Arbitration Agreement as though it had never existed and revoked the appointment of a highly distinguished arbitrator. It legislatively obliterated a hearing which was scheduled to commence on 30 November 2020. The outcome of that hearing would have determined the quantum of damages payable to the Claimant's subsidiaries in the light of Western Australia's established breaches of the State Agreement. In this way, the executive branch of the Western Australian Government denied the Claimant and its subsidiaries access to justice and stripped away their rights of access to a court or arbitral tribunal. This is the stuff of a banana republic, ruled with an iron fist by an authoritarian regime with an utter disdain for basic rule of law precepts.

50 In a functioning democracy, a fundamental purpose of the courts and tribunals is to stand between individuals and government and protect individuals from abuses of governmental power. This is a key plank of the Westminster system of government first developed in England and subsequently adopted in other jurisdictions, including Australia. When the rights of individuals to access courts and tribunals to determine their rights and obligations vis-à-vis the government are stripped away, in the manner of the Amendment Act, those individuals are exposed to abject tyranny.

51 The unilateral amendment of the State Agreement was a further denial of justice. Although the High Court of Australia has confirmed that an Australian State Parliament has the capacity under Australian domestic law to amend legislation in the usual manner (including a State Agreement Act), actually doing so in relation to a State Agreement was entirely contrary to the convention in Western Australia, where State Agreements have been in use for some 60 years. Amendment to a State Agreement (except by mutual consent and subsequent Parliamentary ratification) is diametrically opposed to the legitimate

expectation created by express statements and representations of the Government of Western Australia to the effect that no such thing could ever happen.

52 Here, the Western Australian Government misused and abused the legislative process, and defied the well-established conventions surrounding State Agreements, by amendment to the State Agreement unilaterally and to the detriment of the other contracting parties. It did so discriminately, cynically and dishonourably, seeking to avoid liability for its own established breaches of the State Agreement and leaving the Claimant and its subsidiaries without any recourse under Australian domestic law. This was an appalling denial of justice.

53 The clear denial of justice that has occurred in this case is compounded yet further by the way the Amendment Act was prepared and passed – in great secrecy and with unseemly haste, deliberately calculated to avoid any form of proper scrutiny. In the brief debate before the Amendment Act was passed, several members of the Western Australian legislature urged caution in passing such draconian legislation under urgency and without proper debate. They suggested that the Bill should be subject to judicial and administrative review processes before being passed into law.[2] In a statement that was extraordinary for someone holding the office of Attorney-General, Mr Quigley responded that Western Australia did not have time for what he called "*namby-pamby inquiries*".[3] Indeed, it is apparent that the deliberate and calculated intention of the Western Australian Government was precisely to ensure that the Amendment Act was passed without any proper scrutiny by Parliament or any possibility of review by the courts.

54 The denial of justice in this case was compounded by the Amendment Act's express removal of all natural justice rights and of any right to review or appeal. Even more shocking is that Western Australia had no qualms about revoking such core rights. Indeed, when asked by a journalist about natural justice rights, Mr Quigley appeared flummoxed as to their relevance.[4] The Premier, Mr McGowan, went even further, showing a visceral hatred and outright contempt for natural justice rights when telling a local newspaper

[2] Legislative Assembly Hansard, 12-13 August 2020, p. 4783 (**Exh. C-429**).
[3] Transcript of hearing in defamation case between Mr Palmer and Mr McGowan, 9 March 2022, p.419 **(Exh. C-136).** Transcript of Mr Quigley's ABC Radio Interview, 13 August 2020, p.4 (**Exh. C-127**).
[4] Transcript of Press Conference, 12 August 2020, p.6 (**Exh. C-465**).

proprietor that "*[a]ll the meally mouth* [sic] *tut tutting by some people about Palmers* [sic] *'rights' makes me sick*."[5]

55 Mr McGowan went even further by purporting to subvert democracy, eliminate the importance of the judicial branch of government and impose his own view, as the head of the executive branch, of what "justice" was. Thus, Mr McGowan said at a press conference on 12 August 2020 (the day before the Amendment Act was passed): "*I'll tell you what justice is here. Justice is Western Australians not giving Clive Palmer $30 billion. That's justice.*"[6]

56 The manifest impropriety of the Respondent's actions in this case is obvious. Those actions constitute a denial of justice and, consequently, a breach of the Respondent's fair and equitable treatment obligations, in violation of Article 6.

(ii) The Respondent acted in bad faith and with a complete lack of transparency

57 Australia also breached its FET obligations under AANZFTA by engaging in substantively improper conduct, including acting dishonestly and in bad faith, with a lack of transparency and deceptively.

58 Western Australia committed contractually, by entering into the 2020 Arbitration Agreement, to participate in the arbitration of particular disputes arising under the State Agreement. The Claimant and its subsidiaries (and their respective directors and other officers, including Mr Palmer who signed the 2020 Arbitration Agreement on their behalf) naturally expected Western Australia to comply in good faith with its obligations under the 2020 Arbitration Agreement and applicable Western Australian legislation, so as to allow the dispute to proceed to hearing on 30 November 2020, with an award to be given by 12 February 2021. This was also consistent with the domestic obligation on Western Australia to act at all times as a "model litigant".[7]

59 The 2020 Arbitration Agreement had been meticulously negotiated over a number of weeks before the parties reached agreement on its terms. No fewer than ten drafts of the 2020 Arbitration Agreement were exchanged between the parties during that period of

[5] SMS exchange with Kerry Stokes, 14 August 2020, (**Exh. C-52**).
[6] Transcript of Press Conference, 12 August 2020, p.11 (**Exh. C-465**).
[7] State Solicitor's Office, "The Office Breifing and Engagement" 2018, commencing on stamped p.2523A, with relevant reference at p.2523DD (**Exh. C-135**).

negotiation.[8] All the while, however, Western Australia was furtively preparing the Amendment Act and had no intention whatsoever of performing its obligations under the 2020 Arbitration Agreement, its obligations under the legislation referred to in the 2020 Arbitration Agreement or its obligations as a model litigant. The evidence shows that Western Australia was drafting the Act from around the end of June 2020, or at the latest from around the start of July 2020, and that, even prior to that, it had begun planning to enact legislation in the nature of the Amendment Act from as early as late May 2020.[9]

60 Entering into the 2020 Arbitration Agreement while drafting the Amendment Act to terminate that agreement and destroy its entire subject matter was a gross breach of the Respondent's good faith obligations – not just to the Claimant and its subsidiaries, but also to the Hon. Michael McHugh AC, KC (a former Justice of the High Court of Australia) who was also induced by Western Australia's deception to sign the 2020 Arbitration Agreement as arbitrator. As is now known, Western Australia never had any intention of performing the 2020 Arbitration Agreement. Its express and implied representations to the contrary (made to the Claimant's representative and to a distinguished arbitrator) involved a dishonest sham.

61 Moreover, just eight days before the Amendment Act was passed, Western Australia entered into the Mediation Agreement pursuant to which the Hon. Wayne Martin AC, KC (a former Chief Justice of Western Australia) was appointed as mediator for a mediation scheduled to occur in October 2020. By this time, the passing of the Amendment Act was imminent. Once again, Western Australia signed the Mediation Agreement in the utmost bad faith, having (unbeknownst to the Claimant, its subsidiaries and their respective directors and officers and to the mediator) no intention whatsoever of performing it or participating in any mediation. Again, Western Australia kept up this dishonest charade in order to avoid raising any suspicion or alarm about its real intentions.

62 As is clear from the evidence, the Respondent's campaign of deception was deliberate and systematic. Mr Quigley and Mr McGowan's text message exchange on 23 May 2020 shows the two men considered that "*secrecy was of the essence*."[10]

[8] [redacted] Statement, paras 53-71 (see **Exhs**. **C-221, C-222, C-225, C-230, C-232** to **C-237** and **C-239**).
[9] SMS messages between Mr Quigley and Mr McGowan, 23 May 2020 (**Exh. C-432**); Transcript of Mr Quigley's ABC Radio Interview, 13 August 2020, p.4 (**Exh. C-127**).
[10] SMS messages between Mr Quigley and Mr McGowan, 23 May 2020 (**Exh. C-432**).

63 A vainglorious Mr Quigley later had the temerity to boast of this secrecy in an interview on ABC Radio in Perth given on the morning of 13 August 2020 (the day the Act was passed), where he said:[11]

> *"This legislation has been drafted over the last six weeks in secret by the best legal minds in this city. The Solicitor-General of Western Australia, Mr Joshua Thomson SC, our incredible State Solicitor Mr Nick Egan and his legal team at the State Solicitor's office. Mr Egan even left the office and worked at home ... to keep the job secret so that people in ... his own office wouldn't know."*

64 Although the Claimant does not know the extent to which any of these "best legal minds" questioned the propriety of this extraordinary legislation, the need for such secrecy demonstrates that Western Australia was well aware that its actions were highly improper and considered that those actions should be shielded from review by the courts. This is reinforced by the fact that Mr Quigley explained that the Amendment Act was deliberately introduced into the Legislative Assembly for debate at 5.00 p.m. on Tuesday, 11 August 2020, "*after every court in the land was closed and the doors were locked*" so that the Claimant and its subsidiaries could do nothing to prevent it passing.[12] Mr Quigley went on to acknowledge that:[13]

> *"Had [Mr Palmer] got a whisper of [the Amendment Act] ... Monday or even Tuesday morning, Tuesday afternoon, had he got a whisper and made his move to the court then we would have been in all sorts of difficulty ...".*

65 The conduct of the Western Australian Government in ensuring that the Claimant and its subsidiaries would have no opportunity to enforce their rights and no recourse whatsoever to the courts is deplorable. This alone should be sufficient for the Tribunal to find a breach of the Respondent's FET obligation, in violation of AANZFTA.

66 The lack of transparency created by the Respondent's campaign of trickery and deception, throughout the period of secret preparation of the Amendment Act, is further compounded by its shifting position in relation to the sanctity of State Agreements. The FET standard

[11] Transcript of Mr Quigley's ABC Radio Interview, 13 August 2020, p.4 (**Exh. C-127**).
[12] Transcript of Mr Quigley's ABC Radio Interview, 13 August 2020, p.1-2 (**Exh. C-127**).
[13] Transcript of Mr Quigley's ABC Radio Interview, 13 August 2020, p.3 (**Exh. C-127**).

requires that a host State act transparently toward investors and maintain a transparent legal environment, free from ambiguity, uncertainty, or inconsistency. This is entirely contrary to what Western Australia did in the present case.

67 Mr Barnett made it clear in his 1996 paper on State Agreements that statutes ratifying State Agreements could not (and would not) be amended unilaterally by the State. He said then:[14]

> *"Whereas other statutes are able to be changed at will, the provisions of State Agreements are only able to be changed by mutual agreement in writing between the parties to each State Agreement. State Agreements therefore provide certainty that ground rules for the life of each agreement project cannot be changed unilaterally."*
>
> *"Unlike other statutes of Western Australia that can be changed by Parliament, State Agreement provisions can only be amended by mutual agreement by the parties thereto".*

68 Never before (or since) has the Government of Western Australia reneged on a State Agreement, or unilaterally amended it.[15] The sudden and unexpected shift by the State was well noted by the Western Australia Law Society in a media release which said:[16]

> *"The law unilaterally amended a state agreement for the first time in some sixty years. It exempted the State from defined liabilities, removed potential appeal and review rights and excluded principles of natural justice.*
>
> *The law also excluded the Freedom of Information Act, which ordinarily allows media and the public greater transparency into government action and the capacity for informed scrutiny."*

69 The complete lack of transparency and good faith is further amplified by statements made by Mr McGowan in 2014 when he was the leader of the opposition in the Western Australian Parliament. Mr McGowan was then capable of recognising the fundamental importance of fairness and transparency in the treatment of investors and criticised Mr

[14] Barnett Paper, 1996, p.317 (see also p. 321), (**Exh. C-104**).
[15] See statement of Mr Colin Barnett on 16 May 2002 that "*since the 1960s the State has not reneged on a state agreement*", Legislative Assembly Hansard, 16 May 2002, p.10567 (**Exh. C-108**).
[16] Western Australia Law Society Statement on the Amendment Act (**Exh. C-129**).

Barnett's refusal to approve the BSIOP Proposal. Mr McGowan said in Parliament on 10 June 2014 that:[17]

> *"Any person in Western Australia who wishes to make an investment and receive an approval should have the right to the understanding that the processes are transparent and fair—transparent and fair for all applicants—and that approvals are not based on favouritism or prejudice. That is the way the business environment in this state should operate."*

70 Based on these and similar statements made on behalf of governments of Western Australia over many years, the Claimant was entitled to rely with confidence on Mr McGowan's Government adhering to its obligations to participate in good faith in the process stipulated in the 2020 Arbitration Agreement.

71 It is ironic that Mr McGowan, who spoke strongly in support of the importance of State Agreements in 2014, then went on to be instrumental in what is likely the most egregious abuse of power and transparency ever perpetrated by the Western Australian Parliament, striking at the heart of a system of State Agreements which had been in use in that State for some 60 years.

(iii) The Amendment Act is arbitrary and discriminatory

72 The Amendment Act is manifestly arbitrary and discriminatory, improperly targeting the Claimant, its subsidiaries, a director of the Claimant and of its subsidiaries (Mr Palmer) and the State Agreement, while leaving all other State Agreements untouched. The Respondent's conduct in passing the Amendment Act was manifestly unreasonable, arbitrary and discriminatory in every sense of those words.

73 The Amendment Act specifically targeted the Claimant's subsidiaries and associated persons, including a director of the Claimant (Mr Palmer), depriving them of their legal rights (including the right to due process) and absolving Western Australia of all potential liability. The Amendment Act is the very type of instrument that investment treaty protections are designed to prevent and is a clear violation of FET.

[17] Legislative Assembly, 10 June 2014, p.3585 (**Exh. C-444**).

74 The Amendment Act imposes a draconian "punishment", by way of the imposition of potentially crippling indemnities, on the Claimant's subsidiaries and others (including Mr Palmer personally) if they attempt to enforce their rights. These indemnities may be enforced by Western Australia even if Western Australia has not actually suffered a loss (i.e., by making a payment) and even if the Claimant's subsidiaries or another relevant person has simply stated an intention to enforce their rights, but not yet commenced proceedings. To the Claimant's knowledge, no other persons have been subjected to this kind of measure by the Western Australian Government (or any other polity in Australia) before.

75 Indeed, although these provisions deserve at least to be described as "draconian", they are even worse than that term, in its historical meaning, would suggest. The philosophy of Draco (the Ancient Greek drafter of the Athenian law code, written in blood rather than ink and regarded even by contemporaries as intolerably harsh and repressive) was encapsulated in his response to the question of why he prescribed the punishment of death for most criminal offences in Athens, namely that he considered lesser crimes to deserve the death penalty and could not devise any greater punishment for more serious offences. Here, of course, the Claimant's subsidiaries have not committed <u>any</u> offence or other wrong whatsoever. Their only supposed "offences" (in the warped view of the Western Australian Government) were:

(a) exercising legal remedies legitimately available to them under the State Agreement;

(b) being repeatedly successful in arbitration proceedings legitimately brought against Western Australia, conducted before an esteemed arbitrator in the person of a former Justice of the High Court who found that the State had breached the State Agreement and was therefore liable in damages; and

(c) seeking, pursuant to the 2020 Arbitration Agreement, to have those damages quantified and awarded, in order to obtain compensation for Western Australia's established breach of the State Agreement.

76 All of these actions were completely and properly open to the Claimant's subsidiaries. Further, the directors of those companies, who have an affirmative statutory duty under Australian corporations laws to act in good faith in the best interests of those companies,

were doing nothing more than discharging that duty by seeking appropriate compensation pursuant to the 2020 Arbitration Agreement.

77 The indemnities, potentially for billions of dollars, are plainly punitive in nature and designed to deter the Claimant's subsidiaries and their directors from even attempting to assert their otherwise legitimate rights. Even now, the Claimant's subsidiaries (and at least one director of the Claimant) are at risk of being subject to the imposition of these indemnities as a result of the Claimant commencing this arbitration.

78 Personal animosity and vitriol directed towards Mr Palmer (a director both of the Claimant and of its subsidiaries) was a striking feature of much of the Parliamentary debate and related commentary surrounding the Amendment Act.

79 Members of Parliament seemed unable to separate Mr Palmer personally from the Claimant's subsidiaries – constantly conflating them as though they were a single legal personality. The various comments below are illustrative of the animosity and vitriol towards Mr Palmer that seemed to be the driving force behind the Amendment Act:

(a) In the Parliamentary debate prior to passing the Amendment Act, various Members of Parliament said:

i Mr Palmer *"exposes himself to be the liar and fraudster that he is"*;[18]

ii "*What a liar he has exposed himself to be!*";[19]

iii "*He has a visceral hatred for Western Australia. That is self-evident*."[20] and

iv Mr Palmer "*is a blackmailer*."[21]

(b) Mr Quigley said in a radio interview on 13 August 2020, "*Clive Palmer is a lunatic and he's attacking the whole economy of Western Australia,*"[22] saying that the arbitration involved a "*rapacious claim by this ... by this Palmer man*."[23]

(c) Mr McGowan called Mr Palmer "*the worst Australian whose* [sic] *not in jail*".[24]

[18] Legislative Assembly Hansard, 12-13 August 2020, p.4784, (**Exh. C-429**).
[19] Legislative Assembly Hansard, 12-13 August 2020, p.4785, (**Exh. C-429**).
[20] Legislative Assembly Hansard, 12-13 August 2020, p.4785, (**Exh. C-429**).
[21] Legislative Assembly Hansard, 12-13 August 2020, p.4822, (**Exh. C-429**).
[22] Transcript of Mr Quigley's ABC Radio Interview, 13 August 2020, p.5 (**Exh. C-127**).
[23] Transcript of Mr Quigley's ABC Radio Interview, 13 August 2020, p.1 (**Exh. C-127**).
[24] SMS from Mr McGowan to Mr Quigley, 16 August 2020, p.2582A (**Exh. C-135**).

(d) In numerous of their text exchanges, Mr McGowan and Mr Quigley refer to Mr Palmer as a "*fat liar*" or "*big fat liar*" or "*BFL*".[25]

80 This was followed by coverage in the Press that was highly denigrating to Mr Palmer.[26]

81 The astonishing language referred to above was not merely "unparliamentary". It was hyperbolic, manipulative discourse reminiscent of Orwell's *Animal Farm*. It involved the use of hyperbolic rhetoric by Messrs McGowan and Quigley in an attempt to justify their appalling behaviour.

82 It is difficult to escape the conclusion that the enactment of the Amendment Act was (at least in part) motivated by an animus towards the Claimant's subsidiaries and one of their directors (Mr Palmer), whose previous success in bringing legitimate legal claims against Western Australia (and likely further success in obtaining substantial damages pursuant to the 2020 Arbitration Agreement) was deeply resented by Western Australia. As such, the Amendment Act represented a gross abuse of political power to inflict retribution on parties who were doing nothing more than legitimately seeking compensation for a grievous wrong inflicted upon them by Western Australia.

83 The abuse of the legislative process not only involved an unjustifiable and improper infliction of revenge and retribution on entirely innocent parties; Western Australia also appears to have viewed the secret preparation and hurried enactment of the Amendment Act, to obliterate valuable assets of the Claimant, as some sort of game or sport. Mr Quigley referred to this as a "*game of chess*" or a "*game of tactics*" with the ultimate enactment of the Amendment Act as the knock-out "*punch*" he'd been holding "*in the bag*" to win the "*fight*".[27] Justice, the rule of law, fairness, equality under the law and good faith appear not to have even featured in his thinking – it was all about thwarting "Mr Palmer" and the companies of which he was a director, regardless of the methods required to do so. Mr Quigley said, in a decidedly bellicose fashion, that:[28]

> *"academics and the other people can write about it afterwards, can analyse it afterwards all they like for months to come and criticise us*

[25] Various SMS messages between Mr Quigley, Mr McGowan and others, August 2020, pp.2582A, 2584A, 2584D (**Exh. C-135**).
[26] Cover pages, West Australian Newspaper (**Exh**. **C-54**).
[27] Transcript of Mr Quigley's ABC Radio Interview, 13 August 2020, pp.1-3 (**Exh. C-127**).
[28] Transcript of Mr Quigley's ABC Radio Interview, 13 August 2020, p.3 (**Exh. C-127**).

whatever, I don't care, but we've got to unleash the left hook today. We've got to knock him down ... and knock him down today."

84 It seems that the Western Australian Government was prepared to use these "*tactics*", even though the Claimant's subsidiaries had at all times followed established legal processes and procedures to pursue perfectly legitimate claims. There was clearly great substance to the Claimant's subsidiaries' damages claims; otherwise Western Australia would presumably have expected the arbitral process to award only modest damages. Plainly, Western Australia considered that there was a huge risk of a very substantial award of damages to compensate the Claimant's subsidiaries for Western Australia's cynical breach of the State Agreement. Western Australia's obsession with beating "Mr Palmer", by fair means or foul, appears to have clouded its judgment and its ability to act reasonably.

85 It was not just Mr Palmer who was targeted. Employees of the Claimant's subsidiaries also suffered persecution.[29]

86 It is difficult to imagine a worse breach of the fair and equitable treatment obligation than one that involved the singling out of particular parties for bespoke adverse governmental action (including in this case targeted, draconian legislation), including by harassing, intimidating and retaliating against "an investor of a Party", wholly owned subsidiaries of that Party and individual officers and employees of those entities. Likewise, the improper pursuit of criminal charges against Mr Palmer following the First and Second Awards is repugnant to justice.

(iv) The Amendment Act represents a frenzied attack on the rule of law

87 The above analysis culminates in the inevitable conclusion that Western Australia has acted perversely, in clear breach of the rule of law – the bedrock of Australia as a democratic society with a historical tradition of adherence to the rule of law.

88 After the Amendment Act was passed, the Attorney-General wrote an article attempting to defend (or justify) the Act.[30] In this article, Mr Quigley mounted an astonishing argument. Seeking impermissibly to pull himself up by his own bootstraps, he argued that no "rule of law" issue arises from the Amendment Act, because it is an act of Parliament and therefore

[29] See [redacted] Statement, paras 257-262; [redacted] Statement, paras 68-71.
[30] J Quigley, "Extraordinary But Not Without Foundation: The WA Government's Response to an Unprecedented Threat" (**Exh. C-128**).

it is the law.[31] Clearly, this simplistic, self-serving argument woefully misconstrues the concept of the rule of law. It demonstrates an astonishing lack of understanding of the values on which the Australian legal system is based. It beggars belief that such a view could ever be expressed by someone holding the high office of Attorney-General. That office has been in existence in various jurisdictions since as far back as the 13th century in England and one of the core functions of an Attorney-General since that time has been to provide advice and guidance to governments that is consistent with protecting, preserving and promoting the fundamental principle of the rule of law.

89 The Western Australian Bar Association poignantly responded to Mr Quigley's article as follows:[32]

> *"Observance of the rule of law imposes a restraint upon a government doing things that it might otherwise be empowered to do. To define the concept in the way the Attorney does is to effectively define the concept of rule of law out of existence."*

90 Unfortunately, as matters stand, the Amendment Act has set a precedent for any future conduct that the Respondent may wish to take to rid itself of inconvenient problems. Failure to respect the rule of law in one aspect of policy has the potential to spread like a cancer. It has a corrosive effect on the respect for the rule of law more generally.[33]

91 It is troubling that rule of law concerns were raised with the Western Australian Government, but it chose wilfully to ignore them. On the eve of the Amendment Act being passed, when those alarmed about its implications for the rule of law suggested a pause in the legislative process to enable the matter to be considered properly, Mr Quigley said dismissively: *"That's all academic speak. We're in the real world here and protecting all Western Australians from a claim of $30 billion"*.[34]

92 Mr Quigley further attempted to justify the Amendment Act by asserting that:[35]

---

[31] J Quigley, "Extraordinary But Not Without Foundation: The WA Government's Response to an Unprecedented Threat" October 2020, p.14 (**Exh. C-128**).
[32] The Western Australian Bar's response to the Attorney-General's justifications for the Iron Ore Processing (Mineralogy Pty Ltd) Amendment Act 2020, December 2020, pp.6-7 (**Exh. C-130**).
[33] The Western Australian Bar's response to the Attorney-General's justifications for the Iron Ore Processing (Mineralogy Pty Ltd) Amendment Act 2020, December 2020, p.8 (**Exh. C-130**).
[34] Transcript of Mr Quigley's ABC Radio Interview, 13 August 2020, p.2 (**Exh. C-127**).
[35] J Quigley, "Extraordinary But Not Without Foundation: The WA Government's Response to an Unprecedented Threat", October 2020, (**Exh. C-128**).

(a) The damages claimed by the Claimant's subsidiaries were too high. However, Mr Quigley made no attempt to say why Western Australia did not simply defend the claim, if he considered that the claimed damages were not justified. Also, the fact that a large loss has been suffered by a party is not a reason to remove that party's entitlement to recover the loss.

(b) It would have been a waste of taxpayer money to pay lawyers to defend the claim in legal proceedings (i.e., to go through the usual legal process, rather than simply legislating valuable assets of the Claimant out of existence).

(c) Mr Palmer and his companies are "big players" and able to look after themselves. It seems that Mr Quigley is somehow suggesting that those with financial means should not have the same rights before the law as others. Such a position is clearly unsupportable in a jurisdiction that purports to uphold the rule of law.

93 Ironically, those reporting on the Amendment Act appeared to understand the importance of the rule of law better than the Attorney General who held an office with centuries of tradition in protecting, preserving and promoting the rule of law. A leading newspaper, *The Australian*, published an article on 13 August 2020 reporting on the Amendment Act and pointing out the serious implications of the Act for all Australian citizens, saying that:[36]

> *"The audacity of the move to strip Clive Palmer of access to remedies available in the West Australian courts shows that both sides of politics in that state have little real commitment to equality before the law …*
>
> *From a rule-of-law perspective, retrospective legislation imposing a legal detriment on a named individual is an abomination …*
>
> *This narrows the gap between this country and those unfortunate places where the interests of the state take priority over due process and equal protection."*

[36] Chris Merritt "Equality before the law swept under the carpet by both sides", *The Australian*, 13 August 2020 (**Exh. C-137**).

(v) Conclusion

94 For all the reasons set out above, the Respondent has violated its obligations under Article 6 and has failed to accord fair and equitable treatment to the covered investments of the Claimant.

95 In relation to the Respondent's violation of its obligations under Article 6, reference is also made to sections 3, 6.1, 6.2.2 and (particularly) 7.2 of the Notice of Intent.

B. Expropriation

96 The evidence will demonstrate that the Amendment Act has had a devastating impact on the Claimant's assets in Australia. As a result of the Amendment Act, the BSIOP has literally been legislated out of existence and IM has lost the entire value of the BSIOP and the right to obtain compensatory damages pursuant to the 2020 Arbitration Agreement. It is now nothing more than a shell, with an interest in a mining right that it cannot develop.

97 In addition, the State Agreement itself has been rendered effectively worthless by the enactment of the Amendment Act and the irremediable sovereign risk to which that has given rise. The Claimant through its subsidiaries can no longer develop any projects under the State Agreement because the sovereign risk is so great that funders, contractors, purchasers and partners are unwilling to engage with the Claimant and its subsidiaries in relation to projects which could otherwise have been developed pursuant to the State Agreement. Without these partnerships, contractors, funders and purchasers, projects of this scale simply cannot proceed and the mining tenements have lost their economic value because it is not possible to exploit them.

98 For these reasons, by the Amendment Act, Australia has unlawfully expropriated the Claimant's investments in Australia in breach of Article 9.

99 Article 9.1 states that:

> *"A Party shall not expropriate or nationalise a covered investment either directly or through measures equivalent to expropriation or nationalisation (expropriation), except:*
> *(a) for a public purpose;*
> *(b) in a non-discriminatory manner;*
> *(c) on payment of prompt, adequate, and effective compensation; and*

(d) in accordance with due process of law."

100 Article 9(1), like other provisions of AANZFTA, is broad in scope, consistent with the fundamental object and purpose of AANZFTA, being investor protection.

101 As such, Article 9 makes plain that expropriation may be either direct or indirect; it covers not merely "expropriation" but also "measures equivalent to expropriation".

102 This is also reflective of the principle recognised in international law that, if measures taken by a State interfere with the assets of an investor to such an extent that those assets are rendered effectively worthless, then those assets should be taken to have been expropriated, notwithstanding that the State does not purport to have expropriated them and that the legal or beneficial interest in the property formally remains with the investor.

103 The Amendment Act expressly expropriated the rights and entitlements of the Claimant's subsidiaries under the 2020 Arbitration Agreement by legislating that agreement out of existence and deeming it never to have come into existence. This was a measure equivalent to the expropriation (without compensation) of a valuable right to have substantial damages quantified and awarded.

104 The Amendment Act was also a "measure equivalent to expropriation" in relation, *inter alia*, to the contractual rights held by the Claimant, through its subsidiaries, pursuant to the State Agreement and in relation to the Mining Tenements.

A. The Right to Arbitrate

105 The Amendment Act expressly removed all contractual rights in relation to the 2020 Arbitration Agreement. The Amendment Act comprehensively destroyed any possibility of the Claimant's Subsidiaries seeking redress through arbitration (or any other means) for Western Australia's established breach of the State Agreement. Effectively, all rights including contractual rights of the State Agreement and in particular contractual rights associated with the BSIOP, including the ability to enforce the State Agreement and 2020 Arbitration Agreement, were taken away.[37]

106 Additionally, a unilateral amendment was made to the State Agreement by section 27 of the Amendment Act which has the effect that no further breach of the State Agreement in

[37] See *Saipem v. Bangladesh* ICSID Case No. ARB/05/7, Final Award, 30 June 2009, para 122 **(CLA-23)**, confirming unlawfully expropriation of an ICC award.

the future, no matter how egregious, is capable of sounding in damages. One can readily see how this has created an unacceptable level of sovereign risk, which is irremediable.

107 There is no doubt that the Amendment Act expressly and unapologetically expropriated all of these rights and assets. The taking did not comply with the lawful expropriation requirements under AANZFTA. No compensation was paid and on the contrary, this was a targeted and discriminatory taking. Due process was entirely denied to the Claimant and its subsidiaries and, far from serving a proper public purpose, the manner of the taking undermined the very foundations of democracy by its blatant disregard for the rule of law and due process.

108 This was a clear violation of Article 9.

B. International Minerals (IM)

109 IM was intended to develop the BSIOP under the State Agreement. This was its only asset and corporate objective. The termination of the 2020 Arbitration Agreement and resultant sovereign risk has now completely wiped out the value of IM, leaving it effectively an empty shell. Immediately prior to the Amendment Act, IM had a valuable chose in action, being the contractual right to have damages assessed and awarded to it pursuant to the 2020 Arbitration Agreement. Following the enactment of the Amendment Act and the termination of the 2020 Arbitration Agreement, all value in IM has been destroyed.

110 The irremediable sovereign risk created by the Amendment Act means that the substantial financial investment needed to develop those tenements (whether under the BSIOP or another project) can never be obtained by the Claimant and its subsidiaries. IM has effectively become "unbankable" as a result of the Respondent's actions because no sensible commercial counterparty would ever deal with IM after the Amendment Act. The shares in IM are effectively worthless.

111 The Claimant's investment in IM has therefore been expropriated by the Respondent through "measures equivalent to expropriation". While the Claimant still retains its shares of IM, that asset has been deprived of all (or substantially all) of its value because it is no longer possible for IM to exercise the contractual right to have damages assessed and awarded to it pursuant to the 2020 Arbitration Agreement.

112 Through the Amendment Act, the Respondent has rendered those assets worthless without paying compensation and without fulfilling any of the other requirements (including

observing due process) of a lawful expropriation, as set out in Article 9. The expropriation was clearly discriminatory, directly targeting IM and mentioning it by name, and was done in contravention of specific commitments made by Western Australia, including in the State Agreement and the 2020 Arbitration Agreement, to arbitrate the dispute.

C. The State Agreement and Mining Leases

113 For the reasons set out above, through the Amendment Act, the Respondent has also expropriated the State Agreement itself and the rights contained therein.

114 While the agreement still technically exists and remains on foot, the Claimant (through Mineralogy) is no longer able to make use of its rights and entitlements under that Agreement to develop any projects using the Mining Leases it owns. Its rights under that Agreement have – practically speaking – been destroyed for the reasons set out below.

115 The Respondent, through the actions of the Western Australian Government, has demonstrated that the State Agreement can never again be relied upon. The certainty that was once the cornerstone of State Agreements has been destroyed. Western Australia has shown that it is willing to amend the State Agreement unilaterally *via* legislation, in a manner entirely adverse to the Claimant and its investments in Australia, whenever it considers the provisions of the Agreement no longer suit the government of the day. The High Court of Australia has found that the Western Australian Government had the legislative power, under Australian domestic law, to do what it did. As a result, parties seeking to fund or assist with the development of projects under the State Agreement can never again rely on its terms being enforced.

116 Indeed, although the mechanism of arbitration remains available under the State Agreement, Western Australia's unilateral amendment of the State Agreement (including by section 27 of the Amendment Act, which has the effect that no further breach of the State Agreement in the future, no matter how egregious, is capable of sounding in damages), in a manner which was arbitrary, discriminatory, vindictive and targeted against the Claimant and its subsidiaries and their respective officers, has created such a level of sovereign risk that it is utterly inconceivable that any project could successfully be developed pursuant to the State Agreement henceforth.

117 The grave uncertainty created by such unilateral amendment, and the prospect of further unilateral amendment, means that the Claimant and its subsidiaries no longer have the

ability to raise funds, sell projects, employ contractors or enter into long term sales agreements to sell products that would be produced by such projects, all of which is required to develop huge projects on the scale required to exploit the Mining Leases. These multi-billion dollar projects require certainty in order to attract billions of dollars in finance from major institutions – indeed, this was the very purpose of the State Agreements and why they were enacted into legislation.

118 Even before the Amendment Act was passed, some level of (temporary) sovereign risk existed as demonstrated by the statement of [redacted],[38] albeit that this risk would have been cured if the distinguished Arbitrator had been allowed to make his award in February 2021. It is clear that, following the Amendment Act, there is no longer any prospect of the Claimant through its subsidiaries undertaking any further projects under the State Agreement.[39]

119 The stability and certainty previously created by the State Agreement that allowed projects like the Sino Iron Project and the Korean Steel Project to succeed have been destroyed by the Amendment Act. The targeted nature of the Amendment Act and the subsequent "narrative" in the media statements by politicians, demonstrates that the group of companies associated with Mr Palmer (including the Claimant and its subsidiaries) no longer has the support of Western Australia and, indeed, that Western Australia's government is unabashedly hostile towards those parties.

120 As a result, the sovereign risk involved in developing any further projects under the State Agreement is much too great for potential funders, purchasers and contractors. No sensible financial institution could ever "bank" a project proposed to be undertaken pursuant to the State Agreement. Such projects have effectively become "unbankable" because the State Agreement can no longer be relied upon to perform the function it was originally intended to perform (namely, to provide a demonstration of governmental support for the Claimant's subsidiaries seeking to develop projects under the State Agreement).[40]

121 Without the financial backing necessary to develop a project of the size and scale required (which would invariably run well into the billions of dollars), the Claimant through its

[38] [redacted] Statement, May 2020 (**Exh. C-183**); [redacted] Declaration, June 2020 (**Exh. C-146**).
[39] [redacted] Statement, pp. 26-28.
[40] [redacted] Statement, p.32.

subsidiaries is simply unable to exploit its contractual rights or proceed with any of the further projects that were originally envisaged.

122 [redacted] Witness Statement explains the many years of groundwork and the millions of dollars expended on exploration, technical development and creating commercial relationships for the projects under the State Agreement.[41] All this work has been rendered useless by the enactment of Amendment Act and the irremediable sovereign risk to which it has given rise.

123 For the reasons stated above, through the enactment of the Amendment Act, the Respondent has expropriated the Claimant's investments in Australia, in breach of Article 9.

124 In relation to the Respondent's violation of its obligations under Article 9, reference is also made to sections 3, 6.1, 6.2.3, 6.2.5 and 7.1 of the Notice of Intent.

[41] [redacted] Statement, para 156 and 192-229.