



Western Australia

Poseidon Nickel Agreement Amendment (Termination) Act 2022

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No. 3 of 2022

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Poseidon Nickel Agreement Amendment (Termination) Act 2022

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Western Australia

Poseidon Nickel Agreement Amendment (Termination) Act 2022

No. 3 of 2022

An Act to amend the *Poseidon Nickel Agreement Act 1971* to provide for the ratification of an agreement for the termination of the Poseidon Nickel Agreement and for related purposes.

[Assented to 1 March 2022]

The Parliament of Western Australia enacts as follows:

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1. Short title

This is the *Poseidon Nickel Agreement Amendment (Termination) Act 2022*.

2. Commencement

This Act comes into operation as follows —

- (a) sections 1 and 2 — on the day on which this Act receives the Royal Assent;
- (b) the rest of the Act — on the day after that day.

3. Act amended

This Act amends the *Poseidon Nickel Agreement Act 1971*.

4. Long title amended

In the long title delete “**thereto.**” and insert:

thereto and to ratify a further agreement for the termination of that agreement.

5. Section 2 amended

In section 2 insert in alphabetical order:

the termination agreement means the agreement a copy of which is set out in Schedule 3 to this Act;

6. Section 3B inserted

After section 3A insert:

3B. Termination agreement ratified

- (1) The termination agreement is ratified.
- (2) Without limiting or otherwise affecting the application of the *Government Agreements Act 1979*, the termination agreement shall operate and take effect notwithstanding any other Act or law.

7. Schedule 3 inserted

After Schedule 2 insert:

Schedule 3 — Termination agreement

[s. 2]

2021

**THE HONOURABLE MARK McGOWAN
PREMIER OF THE STATE OF WESTERN AUSTRALIA**

AND

**POSEIDON NICKEL LIMITED
ACN 060 525 206**

s. 7

**POSEIDON NICKEL AGREEMENT 1971
TERMINATION AGREEMENT**

[Solicitor's details]

THIS AGREEMENT is made this 4th day of August 2021

BETWEEN

THE HONOURABLE MARK McGOWAN, BA LLB, M.L.A., Premier of the State of Western Australia, acting for and on behalf of the said State and its instrumentalities from time to time (**State**) of the one part,

AND

POSEIDON NICKEL LIMITED ACN 060 525 206 of Level 1, 3 Ord Street, West Perth, Western Australia (**Company** in which term shall be included its successors and permitted assigns) of the other part.

WHEREAS:

- A.** The State and the Company are now the parties to the agreement dated 27 July 1971 which agreement was ratified by the *Poseidon Nickel Agreement Limited Act 1971 (WA)* and as varied by agreements dated 9 April 1973, 8 March 1985, 15 September 2005 and 22 January 2007 is referred to in this Agreement as the **Principal Agreement**.
- B.** The State and the Company wish to terminate the Principal Agreement in the manner and on the terms set out in this Agreement.

NOW THIS AGREEMENT WITNESSES:

1. Definitions

In this Agreement subject to the context:

Bank Guarantee means the bank guarantee dated 2 November 2006 given by the Commonwealth Bank of Australia, at the request of the Company, to the State as security for the performance by the Company of its obligations under the Deed of Covenant.

decommission in relation to a mine means the process of ceasing the production of minerals and the removal of infrastructure, plant, equipment and services comprising and associated with the mine.

Deed of Covenant means the Deed of Covenant made on 3 October 2006 between The Honourable Alan John Carpenter the then Premier of the State of Western Australia acting for and on behalf of the said State and its instrumentalities from time to time, The Honourable John Bowler the then Principal Agreement Minister and the Company (then called Niagara Mining Limited) in relation to the assignment to the Company of all rights (including as holder of the Mining Lease) and obligations of BHP Billiton Nickel West Pty Ltd ACN 004 184 598 (then called WMC Resources Ltd) under the Principal Agreement and the decommissioning of mines within the area of, and the rehabilitation of, the Mine Rehabilitation Sites.

Mine Rehabilitation Sites means the mine sites at Mount Windarra and South Windarra being, at the date of this Agreement, the subject of the plan entitled "WMC Windarra Nickel Project – Closure Finalisation

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Plan – Final Version 2005" initialled by or on behalf of the parties to this Agreement for the purpose of identification.

Mining Act means the *Mining Act 1978* (WA).

Mining Act Minister means the Minister in the Government of the State of Western Australia for the time being responsible for the administration of the Mining Act.

Mining Lease means Mining Lease No. 261SA and if renewed includes such renewal thereof and according to the requirements of the context describes the area of land from time to time the subject of that lease.

Mining Lease Instrument means the instrument of lease issued for the Mining Lease.

Mining Proposal means the mining proposal (including mine closure plan) of the Company in respect of its proposed activities upon the Mining Lease on and after the Operative Date as contained in the document marked "A" initialled by or on behalf of the parties to this Agreement for the purpose of identification.

Operative Date has the meaning given in clause 3(2).

Principal Agreement Minister means the Minister as defined in the Principal Agreement.

Ratifying Act means the Act of the Parliament of Western Australia to ratify this Agreement referred to in clause 3.

this Agreement, hereof and hereunder refer to this Agreement, whether in its original form or as from time to time added to, varied or amended.

2. Interpretation

In this Agreement:

- (a) clause headings do not affect interpretation or construction;
- (b) words in the singular shall include the plural and words in the plural shall include the singular according to the requirements of the context;
- (c) a reference to one gender includes the other genders;

- (d) a covenant or agreement by more than one person binds, and is enforceable against, those persons jointly and each of them severally;
- (e) a reference to a "person" includes a body corporate;
- (f) a reference to an Act includes the amendments to that Act for the time being in force and also any Act passed in substitution therefor or in lieu thereof and the regulations for the time being in force thereunder;
- (g) a reference to any document includes that document as from time to time added to, varied or amended and notwithstanding any change in the identity of the parties;
- (h) a reference to a clause or schedule is a reference to a clause in or schedule to this Agreement, and a reference to a subclause or paragraph is a reference to the subclause of the clause or paragraph of the clause or subclause as the case may be in, or in relation to, which the reference is made;
- (i) a reference to this Agreement includes all recitals, schedules and annexures; and
- (j) "including" means "including, but not limited to".

3. Ratification and operation

- (1) This Agreement, other than this clause and clauses 1, 2 and 5(2), does not come into operation except in accordance with subclause (2).
- (2) This Agreement, other than this clause and clauses 1, 2 and 5(2), comes into operation on the day after the date on which it is ratified by an Act of the Parliament of Western Australia (**Operative Date**) unless, before that day, it terminates under subclauses (4), (5) or (6).
- (3) The State must introduce in the Parliament of Western Australia before 31 December 2021, or a later date agreed between the parties to this Agreement, a Bill to ratify this Agreement and must endeavour to secure its passage as an Act.
- (4) If by 30 April 2022 or such later date agreed between the parties to this Agreement, this Agreement has not been ratified by an Act of the Parliament of Western Australia then, unless the parties to this Agreement otherwise agree, this Agreement terminates on that day and no party hereto will have any claim against any other party hereto with

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respect to any matter or thing arising out of, done, performed, or omitted to be done or performed under this Agreement.

- (5) The parties agree that if the Principal Agreement is otherwise determined in accordance with its provisions on a day prior to the Operative Date, then this Agreement shall also terminate on and from that day and no party hereto will have any claim against any other party hereto with respect to any matter or thing arising out of, done, performed, or omitted to be done or performed under this Agreement.
- (6) The parties agrees that if after the date of this Agreement the Company submits pursuant to the Principal Agreement, while it remains in force, any proposal or proposals for approval by the Principal Agreement Minister, then this Agreement terminates on and from that date of submission and no party hereto will have any claim against any other party hereto with respect to any matter or thing arising out of, done, performed or omitted to be done or performed under this Agreement.

4. Termination of Principal Agreement

- (1) Subject to subclauses (3) and (4)(a), the Principal Agreement is hereby terminated with effect on and from the Operative Date and, except as otherwise provided in this Agreement, neither the State nor the Company shall have any claim against the other with respect to any matter or thing in or arising out of the Principal Agreement.
- (2) With effect on and from the Operative Date the Company is released from its obligations under clauses 3.2(a) and 3.2(b) of the Deed of Covenant and, except as otherwise provided in this Agreement, the State shall not have any claim against the Company in respect of the performance of those obligations by the Company under the Deed of Covenant.
- (3) Notwithstanding subclauses (1) and (2) the Company shall remain liable for any antecedent breach or default under the Principal Agreement or under the Deed of Covenant and in respect of any indemnity given under the Principal Agreement.
- (4) On and from the Operative Date:
 - (a) the Mining Lease shall continue in force only under and, except as provided in this Agreement, subject to the provisions of the Mining Act and, for the avoidance of doubt, shall cease to have

- the benefit of the rights and privileges conferred by the Principal Agreement;
- (b) the Mining Lease may only be renewed under section 78(2) of the Mining Act for one further term of 21 years;
 - (c) the Mining Proposal shall be deemed to be:
 - (i) a mining proposal within the meaning given to that term in section 70O(1) of the Mining Act;
 - (ii) a mining proposal lodged and approved, and in respect of which any prescribed assessment fee has been paid, in accordance with section 82A(2) of the Mining Act; and
 - (iii) for the avoidance of doubt, a relevant mining proposal within the meaning given to that term in section 70O of the Mining Act;
 - (d) the mine closure plan contained in the Mining Proposal shall be deemed to be a mine closure plan within the meaning given to that term in section 70O(1) of the Mining Act;
 - (e) for the avoidance of doubt, condition 2 as set out in the Sixth Schedule of the Mining Lease Instrument (amended as set out in paragraph (g) of this subclause (4)) shall be deemed to be a reasonable condition imposed by the Minister for Mines under section 84 of the Mining Act;
 - (f) for the purposes only of this Agreement the application of the Mining Act is specifically modified as follows:
 - (i) in section 82 (Covenants and conditions of lease) by deleting subsection (1b) and substituting the following new subsection:

"(1b) Paragraph (ca) of subsection (1) shall apply to Mining Lease No. 261SA."; and
 - (ii) in section 82A (Condition to be included in certain mining leases) by:
 - (A) inserting after subsection (1) the following new subsection:

"(1a) This section applies to Mining Lease No. 261SA.";
- and

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- (B) in subsection (2) by deleting "to be granted" and substituting ", upon this section commencing to apply to it, to be";
 - (iii) in section 95 (Surrender of mining tenement) by inserting after subsection (1) the following new subsection:
 - "(1a) The holder from time to time of Mining Lease No. 261SA may not surrender that mining tenement in whole or in part without the prior consent of the Minister.";
 - (g) the provisions of the Mining Lease Instrument shall be deemed amended as set out in the Schedule;
 - (h) for the avoidance of doubt, the Mining Lease shall be deemed to be a mining authorisation for the purposes of the *Mining Rehabilitation Fund Act 2012* (WA) and regulations made under that Act; and
 - (i) operations and other activities upon or at the Mining Lease shall cease to have the benefit of the rights and privileges conferred by the Principal Agreement and shall, subject to this subclause (4), be governed by the laws from time to time in force in Western Australia.
- (5) The Mining Act Minister is hereby authorised to endorse on the Mining Lease Instrument (including any duplicate) notice of the amendments referred to in paragraph (g) of subclause (4) above.
- (6) On and from the Operative Date the Company will indemnify and keep indemnified the State and the State's employees, agents and contractors in respect of all actions, suits, claims, demands or costs of third parties arising out of or in connection with any work carried out by the Company pursuant to the Principal Agreement or relating to its operations under the Principal Agreement (including de-watering operations and the decommissioning of mines within the area of, and the rehabilitation of, the Mine Rehabilitation Sites) or arising out of or in connection with the construction, maintenance or use by the Company or its employees, agents, contractors, assignees or sublessees of the Company's works or services the subject of the Principal Agreement or the plant, apparatus or equipment installed in connection with the Principal Agreement.

This indemnity shall remain in force for a period ending on the date which is 20 years after:

- (a) the date agreed between the State and the Company; or
 - (b) if the parties fail to agree a date under paragraph (a), the date determined by the State as being the date of cessation of all operations (including as expanded or otherwise modified) originally established under and pursuant to the Principal Agreement.
- (7) The Company will indemnify and keep indemnified the State and the State's employees, agents and contractors in respect of all actions, suits, claims, demands or costs of third parties arising out of or in connection with any works or activities of the Company or its employees, agents, contractors, assignees or sublessees on and subsequent to the Operative Date relating to operations (including as expanded or otherwise modified) that were originally established under or pursuant to the Principal Agreement (including de-watering operations and the decommissioning of mines within the area of, and the rehabilitation of, the Mine Rehabilitation Sites). This indemnity remains in force for a period ending on the same date as the indemnity in subclause (6).

5. Cessation of Bank Guarantee and provision of Security under Mining Act

- (1) Subject to subclauses (2) and (3), the Bank Guarantee shall cease to have effect on the Operative Date.
- (2) Upon execution of this Agreement the Company shall deliver to the department of the State responsible for the administration of the Mining Act an executed security in a form according with section 84A(2) and section 126 of the Mining Act and in the amount of \$3.5 million for compliance with conditions imposed from time to time in relation to the Mining Lease under section 84 of the Mining Act and the department shall hold such bond in escrow pending the Operative Date.
- (3) From and including the Operative Date the security referred to in subclause (2) shall be deemed to be lodged under section 84A(2) and in accordance with section 126 of the Mining Act and, for the avoidance of doubt, shall also operate as security for the Company's compliance with condition 2 as set out in the Sixth Schedule of the Mining Lease Instrument (amended as set out in paragraph (g) of clause 4(4)).

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6. Applicable law

This Agreement is to be interpreted according to the law for the time being in force in the State of Western Australia.

SCHEDULE

Variation of the Mining Lease Instrument

The variations of the Mining Lease Instrument referred to in clause 4(4)(g) are as follows:

- (a) in the heading to the Mining Lease the deletion of "POSEIDON NICKEL AGREEMENT ACT 1971";
- (b) the deletion of all of the words after "Sixth Schedule to this lease" and before "In this lease –" and the substitution of the words:

"or otherwise from time to time imposed on the Lessee by the Mining Act 1978 the Lessee paying the rents and the royalties for the time being and from time to time respectively prescribed pursuant to the provisions of the Mining Act 1978 at the times and in the manner so prescribed with the right to renew the term of this lease pursuant to the provisions of the Mining Act 1978 as modified by the Agreement AND it is hereby agreed and declared that unless the Lessee shall at all times duly and punctually perform and observe the covenants and conditions hereinafter contained or implied herein this lease shall be liable to forfeiture and may be forfeited by the Minister pursuant to the powers in that behalf conferred by the Mining Act 1978 provided that the Minister may as he thinks fit impose on the Lessee a penalty as an alternative to forfeiture of this lease.";

- (c) the insertion before the definition of "Lessee" of the following new definition:
 - "decommission" in relation to a mine means the process of ceasing the production of minerals and the removal of infrastructure, plant, equipment and services comprising and associated with the mine.
- (d) the insertion after the definition of "Lessee" of the following new definitions:
 - "Mine Rehabilitation Sites" means the mine sites at Mount Windarra and South Windarra being, at the date of the Termination Agreement, the subject of the plan entitled "WMC Windarra Nickel Project – Closure Finalisation Plan – Final

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Version 2005" initialled by or on behalf of the parties to the Termination Agreement for the purpose of identification.

- "Operative Date" means the day after the date on which the Termination Agreement is ratified by an Act of the Parliament of Western Australia.

- "Relevant Mine Closure Plan" means at any time, the then current mine closure plan or plans approved under the Mining Act 1978 for the decommissioning of mines from time to time (including mines established after the Operative Date) within the area of, and the rehabilitation of, the Mine Rehabilitation Sites. At the Operative Date the mine closure plan contained in the Mining Proposal (as defined in the Termination Agreement) is the Relevant Mine Closure Plan.

- "Termination Agreement" means the agreement, to terminate the agreement described in paragraph (a) of the Second Schedule to this lease, made on or about 4 August 2021 between The Honourable Mark McGowan, Premier of the State of Western Australia, acting for and on behalf of the said State and its instrumentalities from time to time and Poseidon Nickel Limited ACN 060 525 206.

- (e) the deletion of the provisions of the Second Schedule and the substitution of the following provisions:
- "(a) From and including the date set out in the Fifth Schedule to this lease up to and including the date occurring immediately before the Operative Date, the agreement dated 27 July 1971 ratified by the *Poseidon Nickel Agreement Act 1971* (WA) as that agreement has from time to time been added to, varied or amended.
- (b) From and including the Operative Date, the Termination Agreement as that agreement may from time to time be added to, varied or amended.";
- (f) the deletion of condition 2 of the Sixth Schedule and the substitution of the following new condition:
- "2. The Lessee must, without prejudice to its other obligations under the Mining Act 1978, decommission

all mines from time to time (including mines established after the Operative Date) within the area of, and rehabilitate, the Mine Rehabilitation Sites in accordance with the Relevant Mine Closure Plan."; and

- (g) the insertion of the following note immediately after the Sixth Schedule:

"NOTE

In addition to any specific conditions that are endorsed on this instrument, the holder in exercising the rights granted herein must first ensure that the necessary consents and permission have been obtained and compensation has been agreed to or determined in respect to certain Crown Land, Public Reserves, etc. private land and where the lawful rights of other land users are concerned."

EXECUTED as a deed.

SIGNED by **THE HONOURABLE**)
MARK McGOWAN) [Signature]
in the presence of:)

[Signature]

Signature of witness

NADEEN LYN ROBERTS

Name of witness

Poseidon Nickel Agreement Amendment (Termination) Act 2022

s. 7

EXECUTED by POSEIDON)
NICKEL LIMITED)
ACN 060 525 206 in accordance with)
section 127(1) of the *Corporations*)
Act 2001 (Cth))

[Signature]

[Signature]

Signature of Director

Signature of Secretary

PETER J. HAROLD

BRENDAN E. SHALDERS

Full name

Full name

=====

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