



INVESTING IN THE AUSTRALIAN MINING INDUSTRY

A FOCUS ON COAL AND IRON ORE

WWW.CORRS.COM.AU

CORRS
CHAMBERS
WESTGARTH
lawyers

The information contained in this publication is intended as an introduction only, and should not be relied upon in place of detailed legal advice. Some information has been obtained from external sources, and Corrs cannot guarantee the accuracy or currency of any such information.

The information contained in this publication was current as at Q1, 2015.

CONTENTS

Foreword.....	1
Overview.....	2
Introducing Corrs Chambers Westgarth	5
The Australian Economy, Legal System and Government.....	12
The Australian Coal Industry.....	14
The Australian Iron Ore Industry	29
Rail and Port Infrastructure and Services.....	35
Investment Structures	43
Current Hot Topics.....	47
Key Legal Considerations when Buying or Developing Australian Mining Projects	52
Taxation and Royalties.....	71
Employment Relations and Skilled Labour	78
Due Diligence on Australian Mining Projects.....	82
Glossary of terms.....	85
Key Corrs Contacts.....	91



FOREWARD

Australia is a country with enormous mineral resources and is home to a vibrant mining industry. Despite the recent economic headwinds faced by the mining sector, Australia continues to be well positioned to meet the expected growing global demand for the world's vital mineral and energy commodities.

For organisations with an international footprint, understanding the different regulatory environments of countries in which they operate or are looking to invest is a necessity.

Corrs Chambers Westgarth offers a deep understanding of the resources sector and the wider international and political issues affecting cross-border business. As a premium independent law firm, we are able to leverage our global connections with policy makers, government and trade agencies to help our clients manage complex environments. I am proud to be able to say that Corrs is known for its strong international alliances and is widely represented in national and global business affairs. We are part of the debate on the country's position on and approach to topics such as trade and investment, global governance and anti-corruption.

This publication provides background information in relation to the Australian mining industry generally - and the coal and iron ore sectors in particular - and explores some of the key legal considerations for investing in mining projects in Australia. Our Energy, Resources and Projects team has produced this fourth edition of *Investing in the Australian Mining Industry* as a useful source of information for those interested or considering strategic investment in this important Australian industry.

If you would like any further information in relation to the Australian mining industry, please feel free to contact any of our partners listed at the end of this publication.

We wish you all the best with your endeavours.

Regards,



JOHN W.H. DENTON

John W. H. Denton is a Partner and Chief Executive Officer of Corrs Chambers Westgarth. John is Chair of the Business Council of Australia's Global Engagement Taskforce; board member of Asialink and Asia Society; Chairman (emeritus) of the Experts Group on Trade and Investment in Indonesia and a founding member of the Australia China CEO Roundtable meetings. He is a member of the B20, the business reference group of the G20 and the Australian B20 leadership group. He was also an external adviser on the Federal Government advisory panel that oversaw the development of the "Australia in the Asian Century" White Paper. John recently became the first ever Australian to be elected to the Executive Board of the International Chamber of Commerce.

**Partner and CEO
Corrs Chambers Westgarth**

OVERVIEW







CORRS CHAMBERS WESTGARTH *lawyers*

INTRODUCING CORRS CHAMBERS WESTGARTH

Corrs Chambers Westgarth (Corrs) is a world class law firm based in Australia and a firm of choice for foreign companies investing in the mining industry in Australia.

Our strong partnering relationships throughout the Asia-Pacific region and globally means we are ideally placed to support clients whose businesses extend across national and international borders.

We advise major organisations on the matters most important to them, bridging the gap between business issues and legal practice.

Corrs is consistently involved in high profile work for both domestic and international clients. A number of the ASX top 100 listed companies, numerous Fortune 500 companies and some of the world's largest organisations choose Corrs as a legal service provider.

Corrs' lawyers are considered to be world class in their fields. We are proud of our reputation for delivering results by providing innovative, multi-disciplinary teams who understand clients' objectives and execute legal services in a competitive and commercial manner.

For further information about Corrs please visit our website at www.corrs.com.au.

CORRS AND THE MINING INDUSTRY

Corrs' Energy, Resources and Projects team is made up of more than 65 lawyers located in Brisbane, Perth, Sydney and Melbourne who specialise in this area. Between them, our experts have an unsurpassed depth of experience in the mining industry.

OUR CLIENTS

Our experience has been gained from many years of close involvement with leading Australian companies, as well as private and Government-owned foreign companies, in relation to their interests in the Australian mining sector.

In addition to partnering with mining companies, Corrs is a firm of choice for foreign companies investing in the Australian mining industry. We are proud of our strong track record advising on major investments in Australian mining projects by foreign investors.

SERVICES TO THE MINING INDUSTRY

The Corrs team is nationally recognised as a leading provider of a complete range of services in all areas of law relevant to the mining industry.

Our team can advise on:

- mergers and acquisitions
- joint ventures
- acquisitions and project financings
- mine development / construction
- exploration activities
- environmental and other approvals
- native title and cultural heritage
- land access, acquisition and compensation
- port, rail, road, water and power infrastructure
- mining services contracts
- procurement and supply contracts
- operations and marketing
- commodity sale agreements
- occupational health and safety
- industrial relations
- contract disputes

PROVEN RESULTS IN THE MINING INDUSTRY

Hancock Prospecting

A\$7.2 billion mine development

Advised Hancock Prospecting on the A\$7.2 billion Roy Hill iron ore mine development project in Western Australia in relation to the Engineering, Procurement and Construction (EPC) phase of the project including the railway line, mine development, port (landside) facilities and port (marine) infrastructure.

U&D Coal

MDS Joint Venture

Advised U&D Coal on its agreement with Sojitz Coal Mining for a proposed 50/50 joint venture in respect of the Meteor Downs South Coal Project.

Yanzhou Coal

A\$3.3 billion takeover

Advised Yanzhou Coal on its A\$3.3 billion takeover of ASX listed mining company Felix Resources – the single largest acquisitions by any Chinese company in the Australian mining sector to date.

Whitehaven Coal

A\$6 billion all scrip merger-of-equals

Advised Whitehaven Coal on its A\$6 billion all scrip merger-of-equals with Aston Resources and its simultaneous acquisition of Boardwalk Resources – the largest M&A transaction in the Australian mining sector in 2012.

Whitehaven Coal

A\$171 million takeover bid

Also advised Whitehaven Coal on its A\$171 million takeover bid for Coalworks Limited.

Linc Energy

Acquisition of coal mine

Advised Linc Energy on the acquisition of the Blair Athol Coal Mine, including the mining tenure, on-site assets and infrastructure.

National Mineral Development Corporation

50% equity investment

Advised NMDC, an Indian Government owned corporation, on its 50% equity investment in ASX listed Legacy Iron Ore Limited.

Macarthur Coal

A\$5.2 billion takeover bid

Advised in relation to Peabody Energy's A\$5.2 billion takeover bid, one of the largest Australian inbound merger and acquisition deals in 2011, and the 2012 ALB Energy and Resources Deal of the Year.

Adani Group

A\$1.5 billion acquisition

Advised Adani on its A\$1.5 billion acquisition of the Carmichael Coal Project in the Galilee Basin in Queensland from Linc Energy – reported to be one of the largest acquisitions by any Indian company in the Australian mining sector to date.

China Metallurgical Group Corp

A\$400 million acquisition

Advised CMG in respect of its A\$400 million acquisition of Cape Lambert Iron Ore's key iron ore project. Also handled the Australian component of CMG's US\$5.1 billion IPO, comprising about 20% of the float.

Stanmore Coal

Equity and debt funding arrangements

Advised Stanmore Coal in relation to its participation in the Wiggins Island Coal Export Terminal Expansion Phase 1 and its equity and debt funding arrangements with Sprint Capital and Credit Suisse.

Aurizon

Northern Missing Link design and construction

Advised Aurizon on design and construction of the 69 km rail link between North Goonyella and Newlands rail systems, situated in the Central Queensland Bowen Basin coalfields.

Aurizon

Infrastructure construction and funding

Advised Aurizon in relation to the construction and funding of new project-specific rail infrastructure for the Moorvale, Hail Creek, South Walker Creek, Comalco, Minerva, Millennium / Poitrel, Rolleston, Sonoma, Vermont, Wilkie Creek, New Acland, Drake, Daunia, Norwich Park, Cameby Downs, Carborough Downs, Isaac Plains, Dawson (Moura), Foxleigh, Curragh, Ensham, Drake, Eagle Downs and Toll Partington projects.

Fortescue Metals Group

US\$2.04 billion unsecured note offering

Advised FMG on the US\$2.04 billion senior unsecured note offering, and the follow-on US\$1.5 billion offering. This was the first large-scale unsecured high yield offering by an Australian corporate issuer and one of the largest note offerings by an Australian corporate in 2010.

Glencore Xstrata

Procurement of assets

Advised Xstrata in relation to the procurement of explosives, mining equipment and tyre supply for projects in NSW and Queensland.

Wesfarmers

WICET consortium

Advised Wesfarmers in relation to its participation in the consortium of coal producers progressing the development of the Wiggins Island Coal Export Terminal Expansion, including advice on terminal operation agreements and terminal access policies.

Elemental Minerals

A\$190 million takeover bid

Advising Elemental Minerals, an Australian company listed on both the ASX and TSX owning potash assets located in the Republic of Congo, in relation to a takeover bid by Dingyi Group Investment for all its outstanding shares.

Aspire Mining Limited

Development of Mongolian Coal Project

Advised Aspire Mining, an ASX-listed exploration and development company, on a series of agreements with Noble Group to assist with the development of Aspire's Ovoot coking coal project in Mongolia.

Straits Resources

Demerger and takeover

Advised on the demerger of Straits Resources' metals business from its coal business and the subsequent takeover of Straits Resources (holding the coal business) by a subsidiary of PTT International Company Limited.

Yancoal

A\$203 million acquisition

Advised Yancoal on its A\$203 million acquisition of Syntech Resources (owner of the Cameby Downs coal mine and the Rywung and Sefton Park coal projects).

Yancoal

A\$200 million sale of interest in Minerva JV

Advised Yancoal on its A\$200 million sale to Sojitz of Yancoal's 51% interest in the Minerva Coal joint venture.

Isaac Plains / Eagle Downs

Bid for 50% interest

Advised a coal major in relation to its bid to acquire Aquila's 50% interest in the Isaac Plains coal mine and the Eagle Downs coal project.

Riversdale Mining

Due diligence

Advised a potential bidder in relation to its due diligence and proposed A\$4 billion takeover bid for ASX listed Mozambique focused Riversdale Mining.

Zijin Mining Group

Advised Zijin on its US\$298 million cash acquisition of a 50% interest in Barrick (Niugini) Limited which owns 95% of and manages the Porgera Gold Mine in Papua New Guinea.

RECENT RECOGNITION

Our team members are recognised as leaders in the mining industry. In fact, a number of Corrs' partners are ranked amongst the best mining lawyers in the world, as evidenced by some of our recent independent industry awards.

BEST LAWYERS

- **Michael MacGinley** – “Best Lawyer – Mining, Energy, Natural Resources and Oil & Gas” (2009-2016).
- **Bruce Adkins** – “Best Lawyer – Mining Energy, Natural Resources and Oil & Gas” (2013-2016).
- **Peter Jarosek** – “Best Lawyer – Natural Resources” (2014-2016), “Best Lawyer – Energy and Oil & Gas” (2009-2016).

CHAMBERS GLOBAL

Corrs is ranked amongst the leading practices for Energy & Resources in Australia in the Chambers Global Guide.

Partner **Michael MacGinley** is listed as a “Leading Individual” in Energy & Natural Resources – Mining (2008-2015).

Partner **Bruce Adkins** is listed as a “Leading Individual” in Energy & Natural Resources – Mining (2015).

THE LEGAL 500 – ASIA PACIFIC

The Asia Pacific Legal 500 guide recognises Corrs as a leading Energy & Resources Practice (2012-2014).

WHAT DO OUR MINING CLIENTS SAY ABOUT US?

As demonstrated in the commentary provided by our clients as part of the industry award programs, the advice and reputation of Corrs' mining team is highly esteemed.

Chambers Asia Pacific Guide 2015

"They are the sort of lawyers you want to work with: they're pragmatic, commercial and responsible with fees, and they really do focus on the relationship and understand our business drivers."

"They are good value, extremely efficient, completely across market practice, and their publications on what is going on in the market are the best on the street."

"They really stepped up to the plate: they were quick, very commercial and very efficient in the way they handled things."

"Specialist advice and first-rate service, but still competitive on cost."

"[Michael MacGinley is] praised by clients as being extremely hard-working and very responsive to time constraints, and also as a very knowledgeable source of measured, high-quality advice."

Chambers Global Guide 2015

"[Bruce Adkins'] technical brilliance combines well with a highly developed understanding of commercial issues, and he focuses on practical solutions to get the job done."

"[Peter Jarosek is] particularly praised for his accessible, straightforward manner when dealing with clients."

Chambers Global Guide – Energy & Natural Resources 2014

"Bruce Adkins excels at acquisition and project development matters in the mining sector. Clients note that he has good technical knowledge and has done so many deals in the resources space that there can't be a transaction structure he hasn't seen."

"Michael MacGinley acts across the energy and natural resources arena and is particularly respected for handling commercial arrangements concerning major mining and utilities projects."

THE AUSTRALIAN ECONOMY, LEGAL SYSTEM AND GOVERNMENT

ECONOMY

Australia has a strong and stable economy, based largely around traditional primary industries such as mineral and petroleum resources and agriculture, but with an increasing focus on information technology, tourism and education. In its 2015 *World Economic Outlook Report*, the International Monetary Fund predicted that Australia's GDP would grow by 2.8% this year and by 3.2% in 2016.¹

Australia ranks 22nd in the World Economic Forum's Global Competitiveness Report for 2014-15.² The nation has an efficient and well-developed financial system

(ranked 6th for financial market development) and receives very good ratings for higher education and training (ranked 11th).³

Relatively low unemployment, transparent public and private institutions, a strong resources industry, contained inflation and prudent macroeconomic policy management also contribute to Australia's stability and growth.

Australia has low barriers to trade and investment. It has a sound and practical structure of financial and corporate regulation which provides certainty for business and is open to investment without undue delay.

Australia is also party to a number of Free Trade Agreements with countries including the United States, Thailand, New Zealand, Singapore, Chile and Malaysia. Most recently, Free Trade Agreements have been signed with Korea, Japan and China.

Australia is also engaged in advanced negotiations with India to conclude a Comprehensive Economic Cooperation Agreement, as well as with Indonesia for a Comprehensive Economic Partnership Agreement.⁴

GOVERNMENT AND LEGAL SYSTEM

The Commonwealth of Australia is a federation of six States (Queensland, New South Wales, Victoria, South Australia, Western Australia and Tasmania), two internal Territories (the Northern Territory and the Australian Capital Territory) and a number of minor external Territories.

A written Constitution divides power between the central Federal Parliament, located in Canberra in the Australian Capital Territory, and the eight State and Territory Parliaments. The Constitution gives the Federal Parliament legislative power over various areas relevant to foreign investment, including corporations, taxation, international and interstate trade and commerce, communications, banking, insurance, bankruptcy and insolvency, intellectual property, immigration and industrial disputes.

Each State has legislative power to make any laws that it wishes to make, except in relation to a few matters reserved to the Federal Parliament. Federal law prevails over State or Territory law to the extent of any inconsistency.

Federal, State and Local Governments are democratically elected at general elections held every three or four years. These elections are contested by candidates from two major political parties (the Australian Labor Party and the Liberal / National Coalition) and several smaller parties and independent politicians.

Any foreign investment proposal must comply with both Federal law and the law of the State or Territory in which the investment is located.

There are two sources of law in Australia – statute law and common law. Statute law is the body of written law enacted by the various levels of Government. Common law is the body of law created out of decisions of the various Federal, State and Territory courts.

Each State has its own court system, consisting of a Supreme Court and a number of minor courts. The Federal Government has its own court system consisting of the High Court, the Federal Court, the Family Court and the Federal Circuit Court. The High Court is the highest court of appeal in Australia, and it hears appeals (if permission is granted) from the Federal Court and the State Supreme Courts. In addition, there are numerous panels and tribunals administering particular areas of law, such as industrial relations and takeovers.



THE AUSTRALIAN COAL INDUSTRY

COAL RESOURCES

BLACK COAL

Australia is endowed with abundant, high quality and diverse energy resources and is home to around 9.2% of the world's proven reserves of black coal.⁵ There are two main types of black coal:

- **metallurgical or coking coal**, which is used to produce coke for the steel-making process; and
- **thermal coal**, which is used to generate electricity.

Although black coal occurs in all Australian States⁶ and the Northern Territory, the largest share of Australia's total identified resources are located in

Queensland (58%) and New South Wales (38%).⁷ The Bowen Basin in Queensland and the Sydney Basin in New South Wales dominate black coal production in Australia and contain 60% of the nation's recoverable black coal. Significant black coal resources are also found in the Surat, Clarence-Moreton and Galilee Basins in Queensland and in the Gunnedah Basin in New South Wales.⁸

Black coal accounts for over half of Australia's energy production⁹ and it is also one of Australia's largest commodity exports, with earnings of nearly A\$40 billion in 2013-14.¹⁰ Australia's success in world coal markets has been based

on reliable and competitive supplies of high quality metallurgical and thermal coal.

BROWN COAL

Brown coal, or lignite, is a low rank coal with high moisture content which is mainly used to generate electricity. Approximately 19% of the world's recoverable brown coal resources are located in Australia.¹¹ Brown coal occurs in all Australian States, however it is currently only mined in Victoria to supply local power stations for domestic electricity generation.¹² Australia does not currently export brown coal.

COAL PRODUCTION

Australia's production of black coal rose from 398.4 Mt in 2012-13 to 425.8 Mt in 2013-14, an increase of almost 7%. This increase in production occurred as operations attempted to offset lower coal prices with higher output.¹³

The majority of Australia's metallurgical or coking coal is produced in Queensland, while New South Wales largely produces thermal coal. More than three quarters of this output is sourced from open cut mines.¹⁴

Figure 1 – Australia's metallurgical coal production (Mt)¹⁶

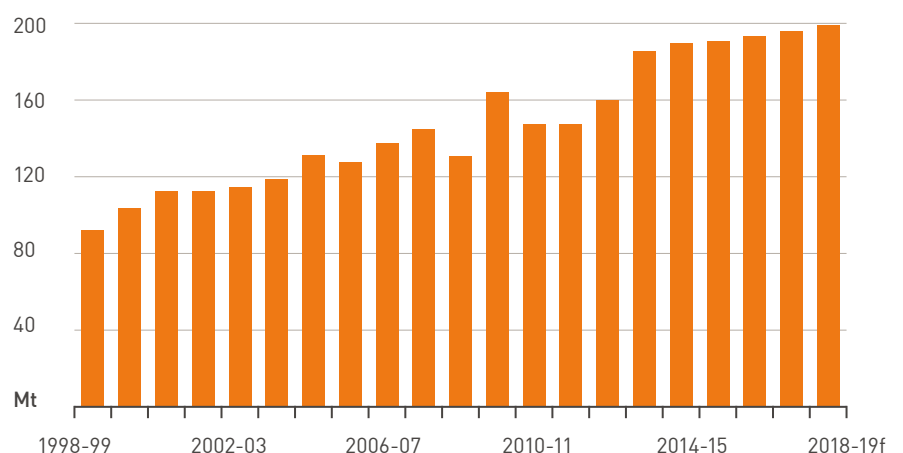


Figure 2 – Metallurgical coal production, exports and outlook¹⁶

METALLURGICAL COAL OUTLOOK					
	unit	2012	2013	2014 f	2015 f
Australia					
Production	Mt	146.9	159.5	180.7	189.2
Export volume	Mt	142.4	154.2	180.5	183.5
	nominal	A\$m	30 700	22 434	23 254
	real value e	A\$m	33 079	23 635	23 882

b fob Australian basis c Contract price assessment for high-quality hard coking coal d in current calendar year US dollars
f forecast s estimate e in current financial year Australian dollars

Figure 3 – Australia's thermal coal production (Mt)¹⁷

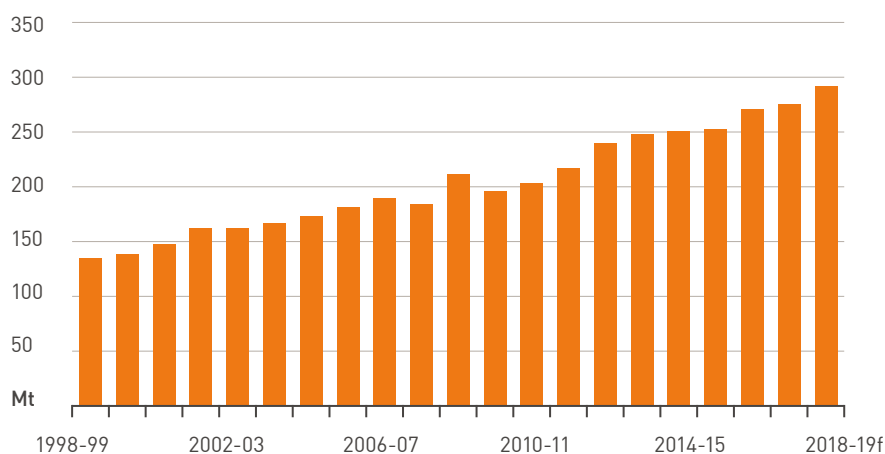


Figure 4 – Thermal coal historical and predicted production and exports¹⁸

THERMAL COAL OUTLOOK					
		2011-12	2012-13	2013-14	2014-15 f
Australia					
Production	Mt	215.9	238.9	245.1	250.1
Export volume	Mt	158.4	181.7	194.6	196.2
	nominal	A\$m	17 118	16 169	16 705
	real value d	A\$m	18 445	17 035	17 156

b Japanese Fiscal year (JFY) starting April 1, fob Australian basis c in current JFY US dollars
d in current financial year Australian dollars f forecast

COAL TRADE

ONE OF THE WORLD'S LARGEST EXPORTERS

Australia is a net energy exporter and has been a leading exporter of black coal since the mid-1980s.¹⁹

As the largest exporter of metallurgical coal in the world and the second largest exporter of thermal coal after Indonesia, Australia now accounts for almost a third of world black coal trade.²⁰

A majority of Australian black coal produced is destined for export, with just over 375 Mt being exported in 2013-14 to destinations around the world.²¹

In value terms, coal is Australia's largest energy export²² (and second largest export overall, after iron ore) with earnings of almost A\$40 billion in 2013-14.²³

EXPORT DESTINATIONS

Japan is Australia's largest export destination for black coal. China, the Republic of Korea, India and Chinese Taipei are also significant export destinations,²⁶ with China being the fastest growing export destination. Imports from Australia to China have increased more than sevenfold since 2006-07.²⁷

Figure 5 – World metallurgical coal trade – major exporters (2014)²⁴

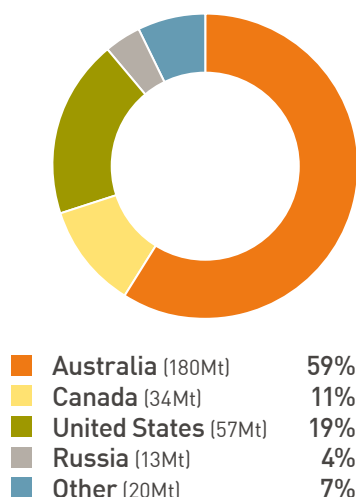


Figure 7 – Principal markets for Australian metallurgical coal by export value (2013-14 A\$m)²⁸

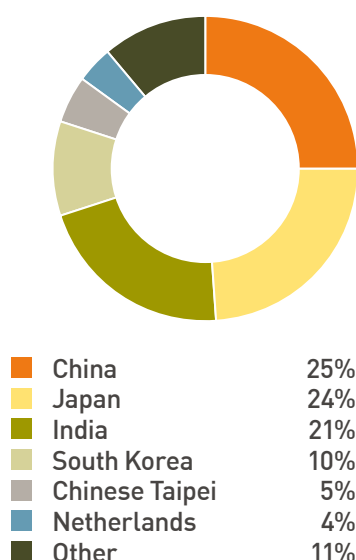


Figure 6 – World thermal coal trade – major exporters (2014)²⁵

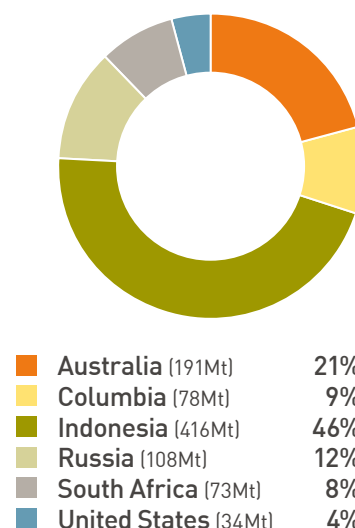


Figure 8 – Principal markets for Australian thermal coal by export value (2013-14 A\$m)²⁹

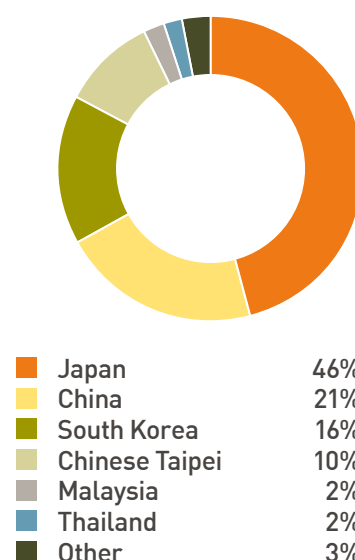


Figure 9 – Volume of Australian exports of coal by destination (Mt)³⁰

	2009-10 (Mt)	2010-11 (Mt)	2011-12 (Mt)	2012-13 (Mt)	2013-14 (Mt)
High quality metallurgical coal					
China (excludes Hong Kong)	15.52	9.64	9.84	20.42	30.94
Chinese Taipei	3.49	4.06	4.51	4.38	5.06
India	24.51	25.19	23.28	23.58	27.86
Japan	26.25	23.42	22.11	20.94	21.49
Republic of Korea	6.89	8.10	8.86	7.37	8.40
Pakistan	0.16	0.22	0.27	0.21	0.11
Other Asia	0.35	0.14	0.29	0.32	1.16
European Union (27 countries)	13.54	15.25	15.93	14.66	15.90
Other Europe	7.02	5.59	6.50	4.83	4.19
Metallurgical coal (not high quality)					
Asia	29.08	24.91	24.04	26.43	29.72
Europe	2.07	1.82	1.70	2.01	1.46
Americas	1.24	0	0	1.01	2.05
Total metallurgical coal	157.27	140.45	142.36	154.24	180.5
Thermal coal					
ASEAN	3.84	6.34	6.66	7.49	8.35
China (excludes Hong Kong)	13.92	16.67	28.46	38.06	47.53
Chinese Taipei	19.55	20.12	17.52	17.88	18.99
Hong Kong	0.90	0.52	0.98	0.45	0.53
Japan	66.41	66.96	69.80	77.65	80.57
Republic of Korea	24.84	28.19	28.85	33.36	33.25
Other Asia	0.61	0.49	1.16	2.63	1.89
European Union (27 countries)	0.28	0.14	0.04	0.04	0.12
Other Europe	4.63	3.88	4.97	4.10	3.35
Total thermal coal	134.98	143.32	158.44	181.66	194.59
World total	292.25	283.77	300.80	335.90	375.09

METALLURGICAL COAL EXPORTS

An estimated 304 Mt of metallurgical coal was traded worldwide in 2014. This is forecast to increase by about 2% to 310 Mt in 2015, driven by the expected growth in steel production in China and India.³¹

Australia is the world's largest exporter of metallurgical coal, exporting around 180.5 Mt in 2013-14 with a value of just over A\$23.25 billion.³² This represented a 17% increase in the volume of exports and a 3.7% increase in value.

Export volumes are forecast to rise by 1.7% in 2014-15 to 183.5 Mt. Earnings are, however, expected to decrease by around 3% to A\$22.56 billion as higher production volumes and the effects of a depreciating Australian dollar are more than offset by predicted lower prices.³³

Despite a number of Australian producers focusing on cutting costs to remain competitive and reduce capacity during periods of weak prices, higher exports are expected to be supported by recently completed projects such as BMA's open cut Caval Ridge Mine in central Queensland, which is expected to produce 5.5 Mtpa. New capacity has also been added to BMA's Daunia Mine, Whitehaven's Maules Creek Mine, Peabody's Metropolitan, Middlemount operations, and Cockatoo Coal's Baralaba Mine expansion.

THERMAL COAL EXPORTS

It is estimated that global trade in thermal coal fell by around 4.5% in 2014 to 1,023 Mt, a decline which was underpinned by lower imports

Figure 10 – Australian metallurgical coal exports³⁴

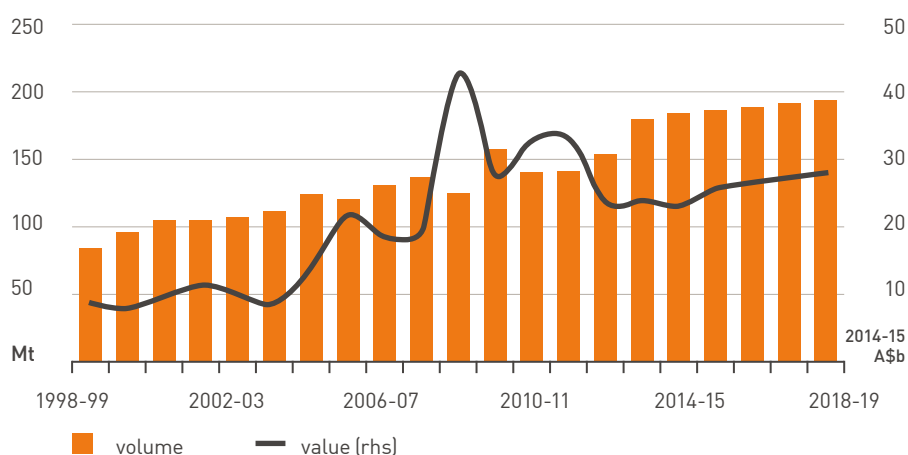
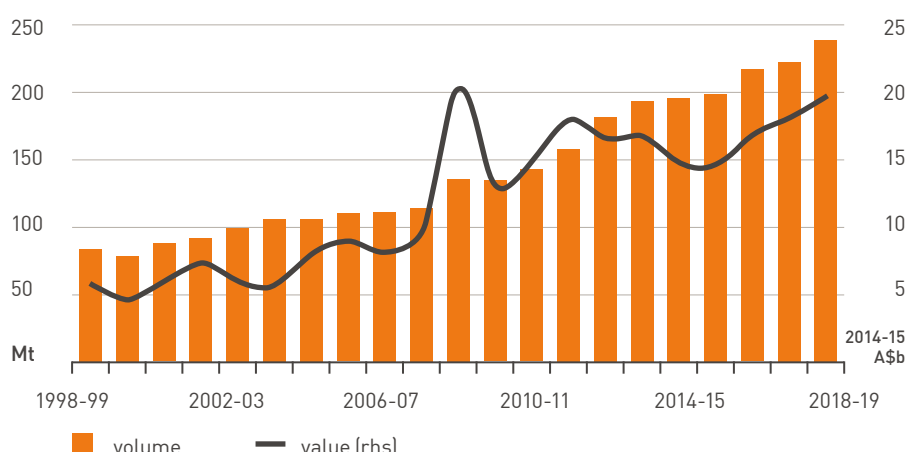


Figure 11 – Australian thermal coal exports⁴¹



into China following the introduction of trade targets.³⁵ Nevertheless, BREE says that the relatively low cost and reliability of thermal coal will continue to support its use, with world trade predicted to rise by 1.2% to 1,035 Mt in 2015.³⁶

Australia exported 194.6 Mt of thermal coal in 2013-14, representing a 7% increase from the previous year which was underpinned by higher output at some Australian operations.³⁷ The 2013-14 thermal coal export trade was worth A\$16.705 billion to Australia.³⁸

Australian thermal coal exports are forecast to rise by 0.8% to 196.2 Mt in 2014-15. Although consumption of thermal coal is predicted to remain strong in 2015, the global oversupply of thermal coal is expected to keep downward pressure on prices.³⁹ Earnings from thermal coal exports are therefore expected to decline by 10% to around A\$15 billion as weak prices more than offset higher volumes and the positive effects of a depreciating Australian dollar.⁴⁰

TRADE AND INFRASTRUCTURE

In the past, infrastructure has been a constraint on Australian coal exports. However, expansions to port capacity, including infrastructure upgrades at the Newcastle Coal Infrastructure Group terminal and the Kooragang Island Coal Terminal, have alleviated some of those constraints.⁴² Another key factor increasing export capacity has been increasing efficiency in the use of existing resources (in Newcastle in particular).⁴³

Upgrades to rail infrastructure in Queensland have increased metallurgical coal export capacity,⁴⁴ and BREE estimates that by 2015 Australia will have port infrastructure capacity to support exports of around 251 Mt of metallurgical coal.⁴⁵

The development of further infrastructure in Queensland and New South Wales will be required to support continued growth in coal exports. There are a number of port expansions under construction or recently completed, including:

- the Wiggins Island Coal Export Terminal (**WICET**) at the Port of Gladstone in Queensland, which will increase export capacity by 27 Mtpa⁴⁶; and
- Stage 2 and 3 of the Newcastle Coal Infrastructure Group (**NCIG**) terminal at the Port of Newcastle in New South Wales, which have increased capacity to 66 Mtpa.⁴⁸

EXPORT GROWTH PREDICTIONS

Black coal is projected to remain Australia's main energy export, increasing by around 54% from 2014-15 to 2049-50.⁴⁹ This implies an annual growth rate of 1.2%, which is based on the expectation that the global demand for coal will continue to increase over the next 35 years driven by growing demand for electricity and steel-making raw materials, especially in emerging market economies in Asia.⁵⁰ In particular, global demand for metallurgical coal is expected to remain robust, as there is less scope for its replacement by other less carbon intensive fuels in steel making.⁵¹

Australia, with its abundant reserves of high-quality coal, is well positioned to make a substantial contribution to meeting this increased demand, subject to adequate infrastructure development.⁵²

QUEENSLAND'S COAL RESOURCES

With more than 36 billion tonnes of black coal,⁵³ Queensland is home to around 62% of Australia's total identified coal resources.⁵⁴ This coal is located in 12 separate coal regions including the Bowen, Galilee and Surat Basins.

As Queensland's most important source of metallurgical and thermal coal, development of open cut coal mines in the Bowen Basin has been the main driver of recent growth in Queensland's coal production.⁵⁵

With vast reserves of unexploited coal, the largely undeveloped Galilee and Surat Basins also contain massive resources of export quality thermal coal. These resources are expected to be developed over the next decade to contribute to the future expansion of Queensland's coal export industry. In particular, Adani's A\$16.5 billion Carmichael Project, which received State and Federal approval in 2014, is expected to play a major role in opening up the region, especially through the development of critical export infrastructure.

While a number of other mining projects in the Galilee Basin are progressing towards the final investment decision, there are challenges to be overcome. Despite these challenges, BREE expects the Galilee Basin to become an important coal producing region over the next 20 years.⁵⁶

Figure 12 – Queensland coal basins⁵⁷

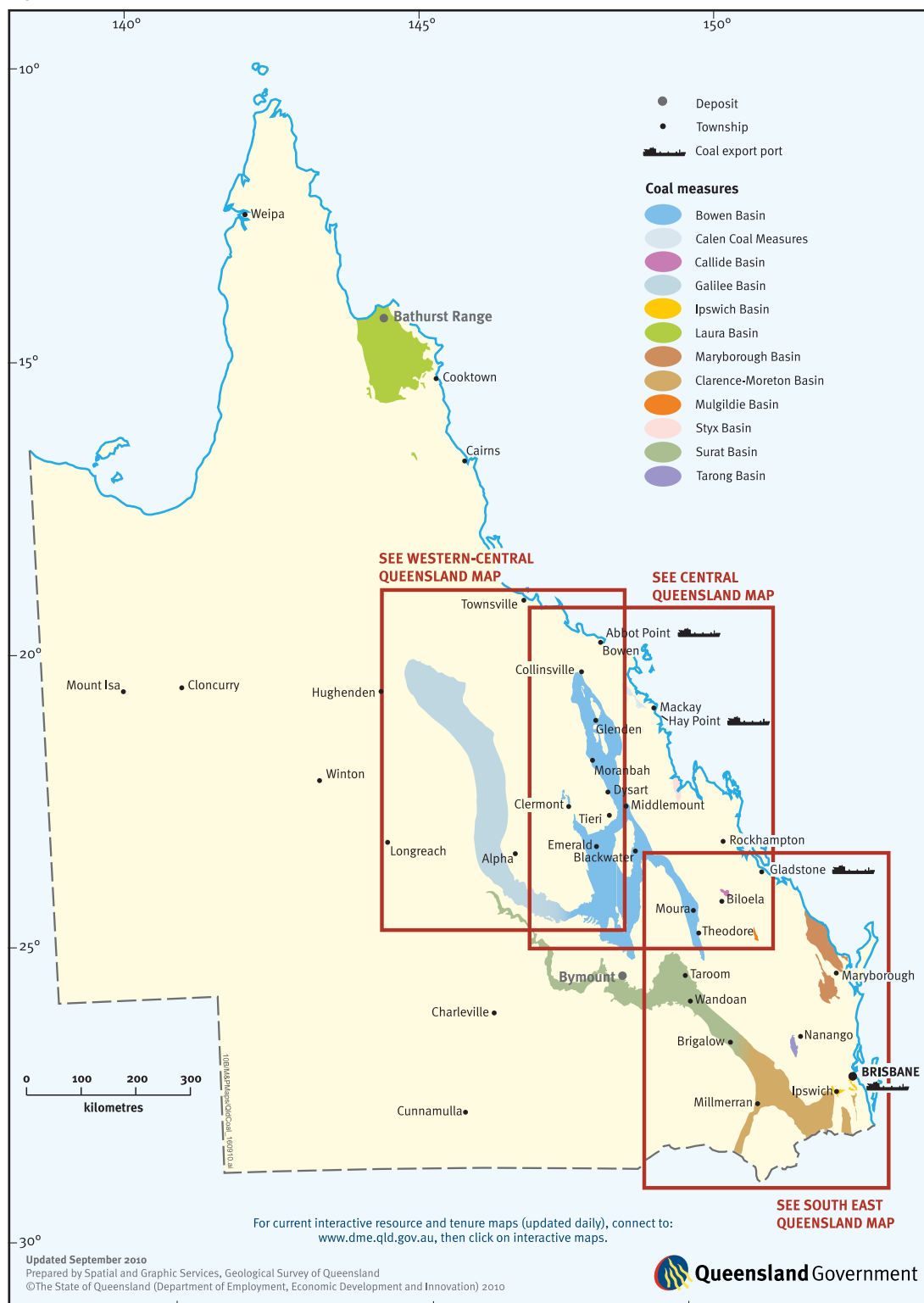


Figure 13 – South-east Queensland coal mines and coal deposits⁵⁸

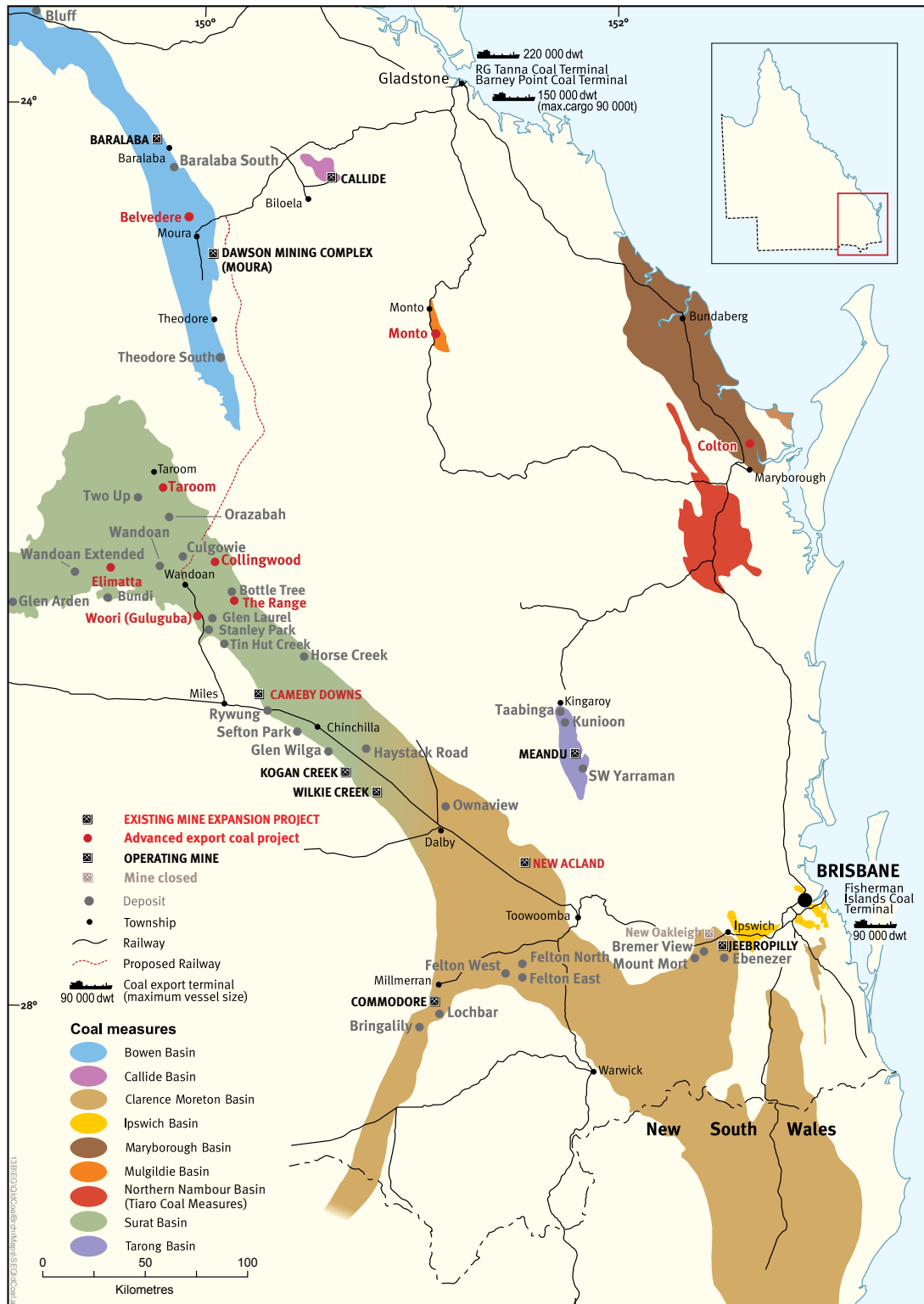


Figure 14 – Central Queensland coal mines and coal deposits⁵⁹

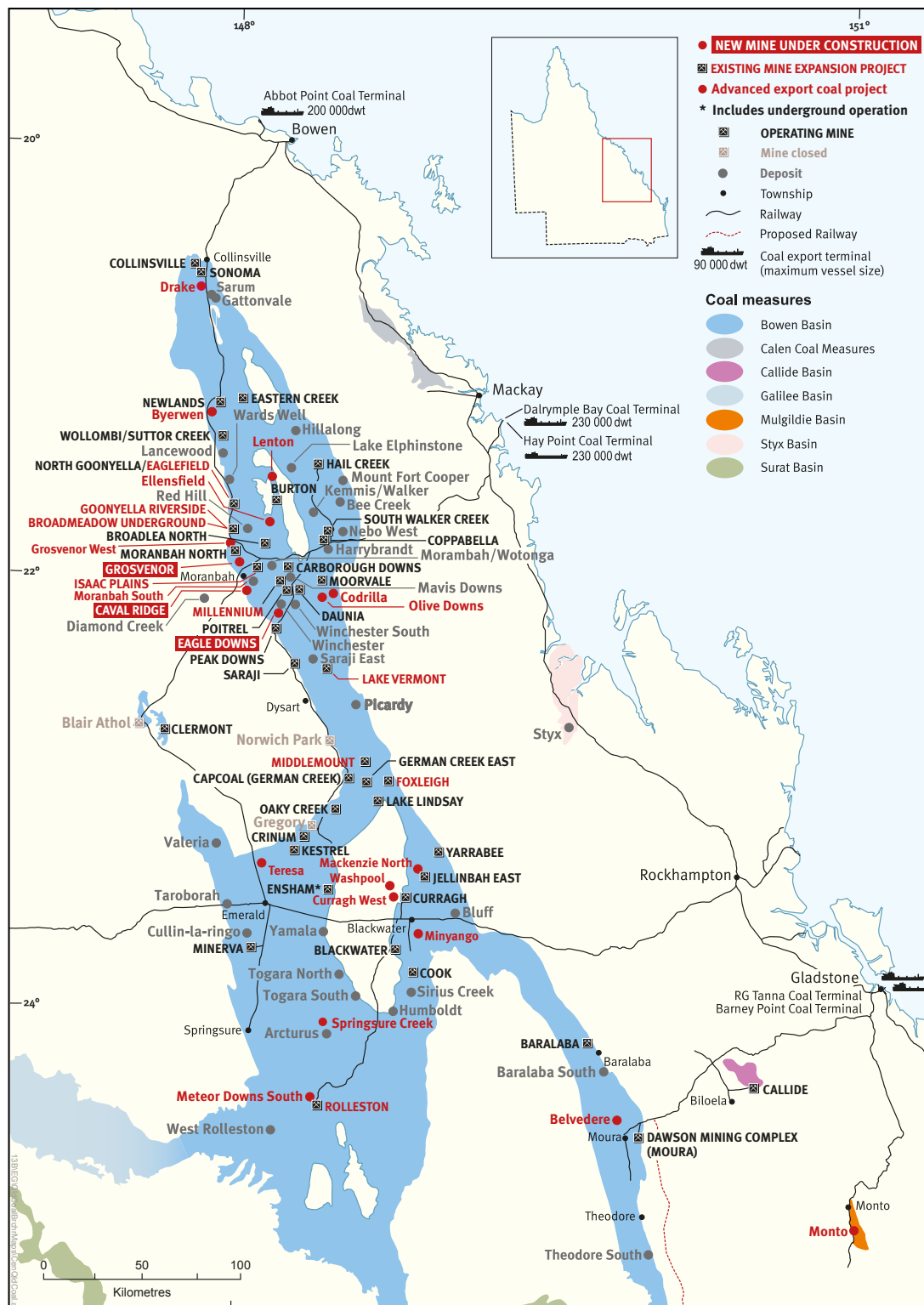


Figure 15 – Western-central Queensland coal mines and coal deposits⁶⁰



QUEENSLAND COAL PRODUCTION AND TRADE

PRODUCTION

In 2013-14, Queensland produced around 412 Mt of raw coal, yielding just over 224.2 Mt of product or saleable coal.⁶¹ This represented an 8.5% increase in saleable production from the previous financial year.⁶²

TRADE

Queensland is one of the largest exporters of seaborne coal in the world, exporting over 204.4 Mt in 2013-14.⁶³ Nearly three quarters of this export volume was metallurgical coal with thermal coal comprising approximately 25% of Queensland coal exports.⁶⁴

Following a downturn in the State's coal trade during 2010-11 caused by extreme weather events, the Queensland coal export market began its recovery in 2011-12, and increased a further 13.7% in 2013-14 (from 2012-13 volumes).⁶⁵

By volume, China, Japan, India and Korea are the primary destinations for Queensland coal with China importing almost 52 Mt in 2013-14, valued at nearly A\$6 billion. By value, Japan (followed by China, India and Korea) is the largest importer of Queensland coal, importing nearly 50.3 Mt in 2013-14 valued at over A\$6.1 billion.⁶⁶

Coal is exported from five major Queensland ports which, in order of smallest to largest export volume, are the Ports of Brisbane, Hay Point, Abbot Point, Dalrymple Bay and Gladstone. The coal terminals at Dalrymple Bay and Gladstone exported over 60 Mt each in 2013-14, together comprising about 65% of total coal throughput by port in Queensland.⁶⁸

Figure 16 – Queensland exports by destination (2013-14)⁶⁷

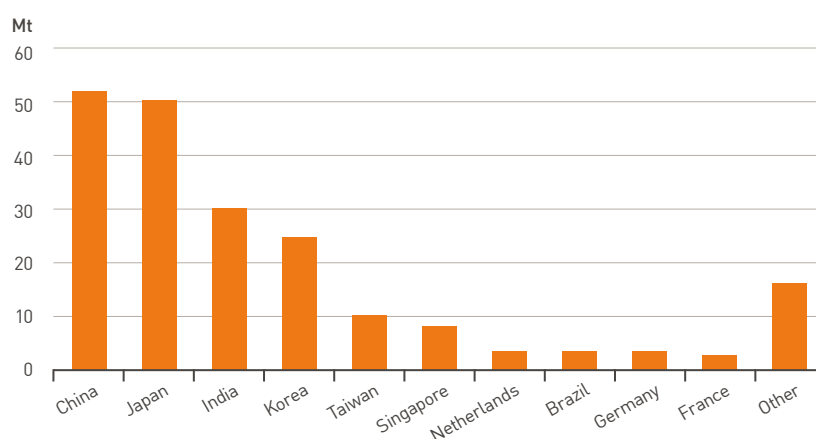
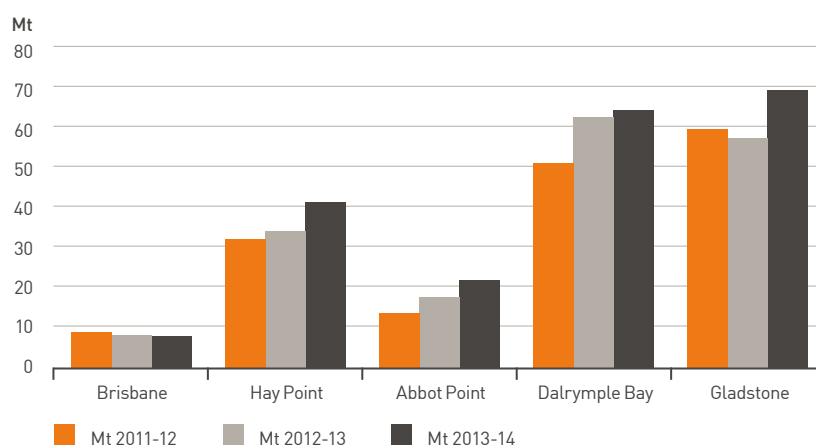


Figure 17 – Queensland export sales by port (t)⁶⁹

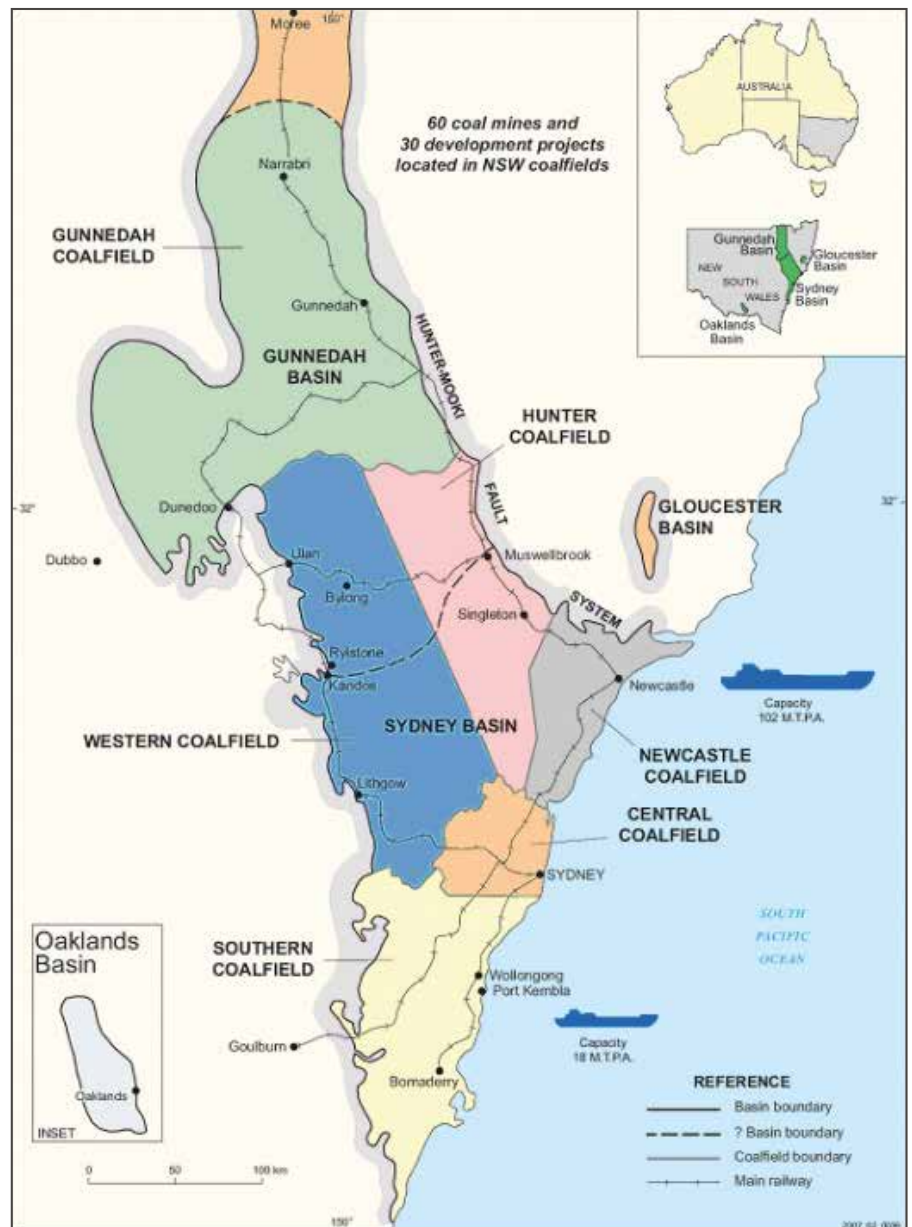
Port	2011-12 (t)	2012-13 (t)	2013-14 (t)
Brisbane	8,910,825	8,294,021	8,023,127
Hay Point	32,010,349	34,128,255	41,315,536
Abbot Point	13,602,137	17,723,836	21,867,490
Dalrymple Bay	51,011,208	62,374,219	64,056,831
Gladstone	59,400,656	57,248,872	69,169,944
Total	164,935,175	179,769,203	204,432,928



NEW SOUTH WALES COAL RESOURCES

The major coal resources of New South Wales are located in the Sydney-Gunnedah Basin, which extends from south of Wollongong to north of Newcastle, through the Hunter Valley and up to Narrabri. Minor coal resources are also found in the Gloucester and Oaklands Basins.⁷⁰

Figure 18 – New South Wales coalfields⁷¹



NEW SOUTH WALES COAL PRODUCTION AND EXPORTS

PRODUCTION

New South Wales is the second largest coal mining State in Australia, producing just under half of the country's black coal.⁷² Coal accounts for the majority of the State's mining production with a record 261 Mt of raw black coal produced in 2013-14, of which 196.6 Mt was saleable black coal.⁷³

Although four mines closed in the 2013-14 financial year due to challenging economic conditions, coal production in New South Wales has continued to increase at an average annual rate of 6% over the past decade and as at 30 June 2014, there were 51 operating coal mines in the State.⁷⁴ In 2013-14, productivity measured as raw coal production per mineworker increased by 13%.⁷⁵

EXPORTS

New South Wales is a leading coal exporter and is home to the one of the world's largest coal export ports at Newcastle.

Mining is New South Wales' largest export industry with coal being the State's most valuable export commodity. The value of coal shipments increased marginally from A\$15 billion in 2012-13 to A\$15.2 billion in the 2013-14 financial year.

Coal exports grew by about 8% from 155 Mt in 2012-13 to a record 167 Mt in 2013-14. This was due to record shipments of thermal coal with 142 Mt exported in 2013-14, an increase of almost 10% on the previous year. Metallurgical coal exports, however, fell by 1% to just over 25 Mt.

Figure 19 – Production of raw black coal in New South Wales (Mt)⁷⁶

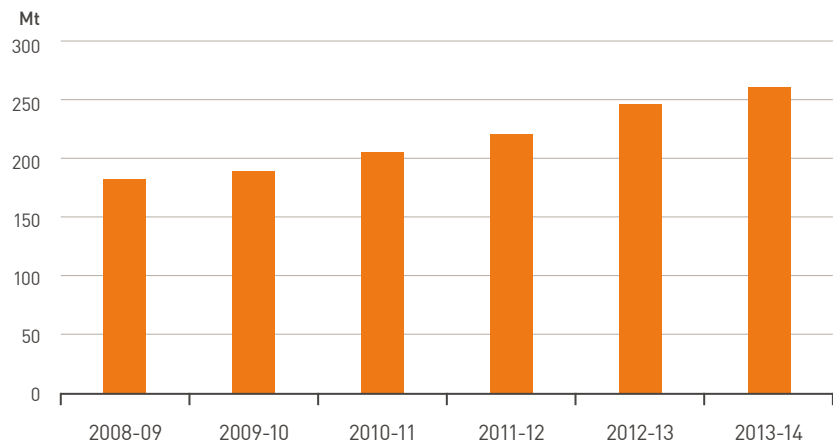
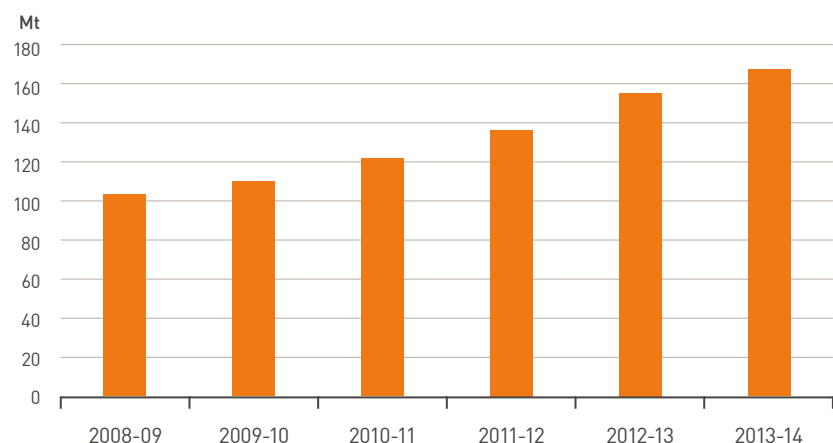


Fig 20 – New South Wales coal exports (Mt)⁸⁰



Asia is the major export destination for New South Wales coal.⁸¹ Coal that is not exported is used for local electricity generation and in the steel and cement production process.⁸²

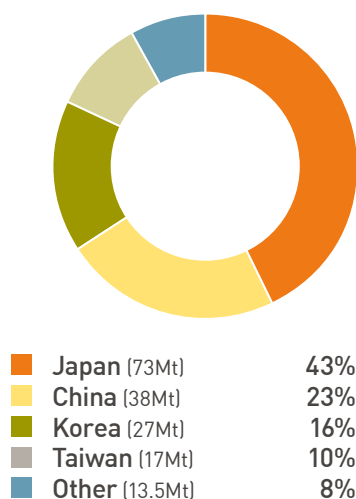
Japan is the largest export market for New South Wales coal, with shipments of 73 Mt in 2012-13 followed by China (38 Mt), Korea (27 Mt) and Taiwan (17 Mt). Although New South Wales coal was shipped to 18 countries in 2013-14, these top four markets accounted for over 92% of the total tonnage exported.⁸³

DOMESTIC MARKET

Deliveries of New South Wales coal to domestic markets has declined at an average annual rate of 4% for the last five years as coal usage within Australia is being offset by natural gas and renewable energy sources.⁸⁵

With an 84% share of the domestic market, New South Wales' power stations are the largest market for the State's coal in Australia. Just over 23 Mt of coal was supplied to New South Wales power stations during 2013-14, reflecting a 5% decline from the previous year.⁸⁶

Figure 21 – Export markets for New South Wales coal (2012-13)⁸⁴





THE AUSTRALIAN IRON ORE INDUSTRY

AUSTRALIAN IRON ORE RESOURCES AND PRODUCTION

TYPES OF IRON ORE

Australia has some of the largest iron ore deposits in the world and continues to lead global production by volume over competitors such as Brazil.

Almost all of Australia's iron ore is mined in Western Australia although several new projects are also being developed in South Australia, and minor production is taking place in the Northern Territory and Tasmania.⁸⁷

Approximately 98% of the iron ore produced in the world is used to make steel.⁸⁸ The two most common types of iron ore are:

- **hematite**, which has a very high iron content and is often referred to as "direct shipping ore" because it is mined and extracted using a relatively simple crushing and screening process before being exported for use in steel mills;⁸⁹ and
- **magnetite**, which has a lower iron content and must go through additional processes to be upgraded to make it suitable for steelmaking.⁹⁰

Approximately 96% of Australia's iron ore exports are high-grade hematite.⁹¹ Australian magnetite iron ore resources, which were previously considered to be sub-economic, are also becoming increasingly more viable and have led to the development of a number of large magnetite iron ore deposits in the Pilbara and mid-west regions of Western Australia.⁹²

Figure 22 – Major Australian hematite iron ore deposits⁹³

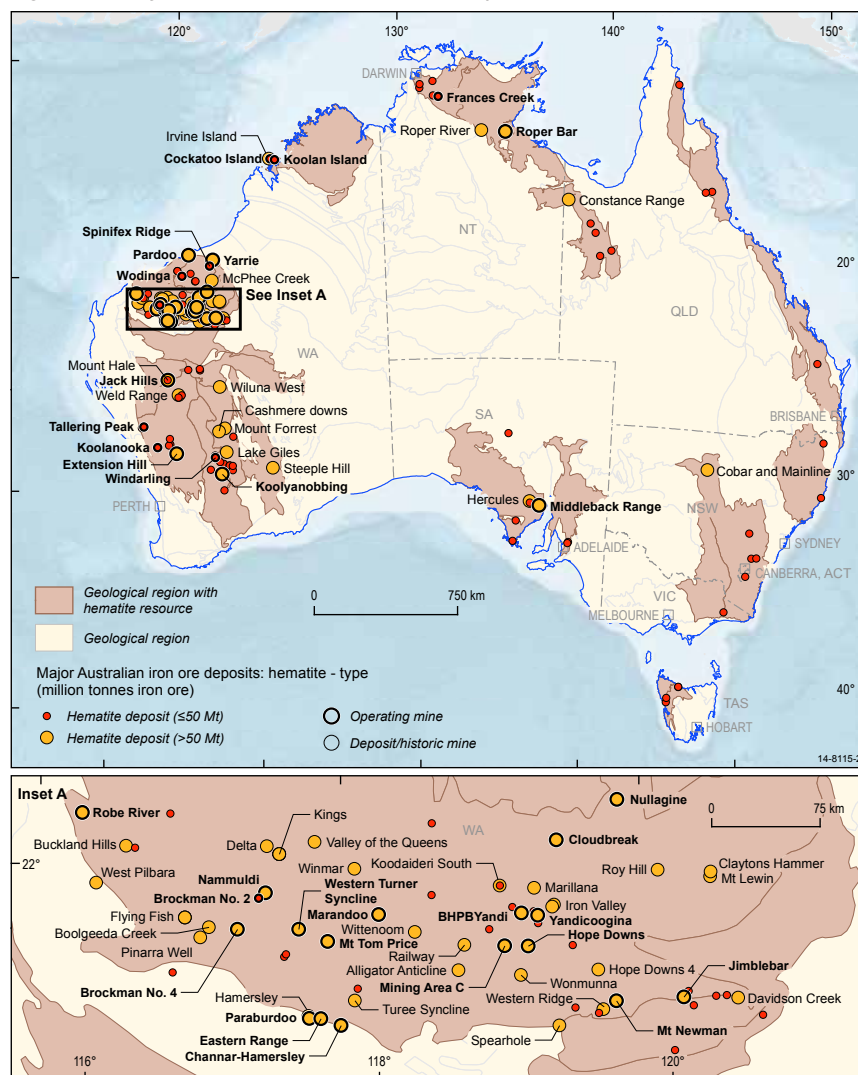


Figure 23 – Major Australian magnetite iron ore deposits⁹⁴

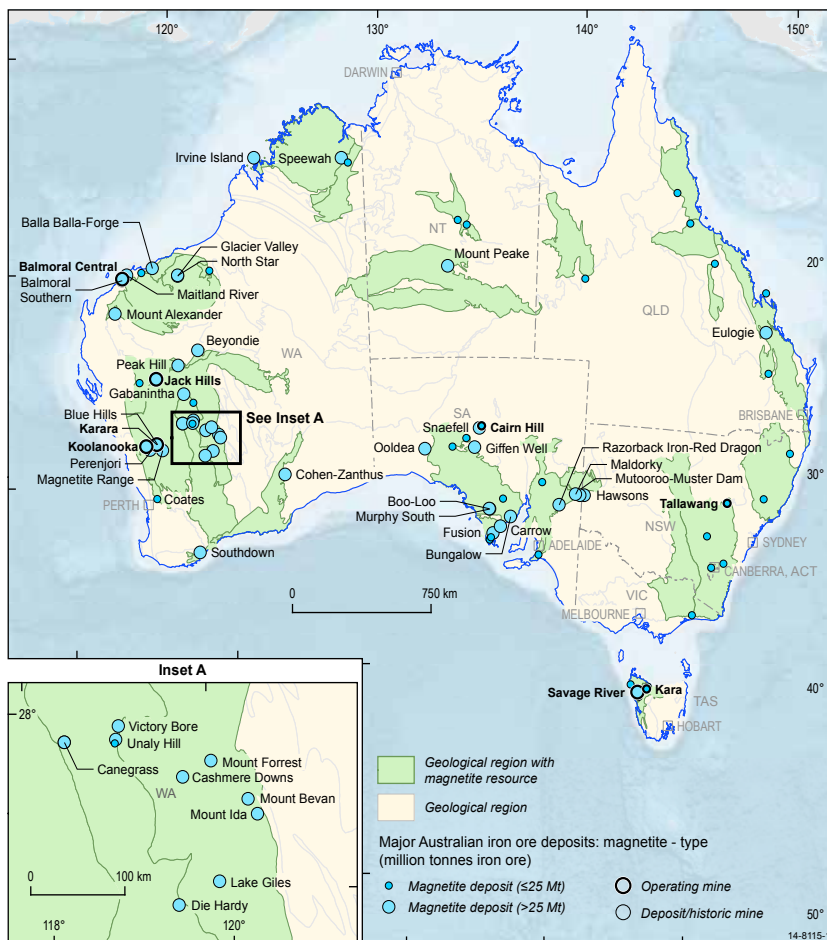
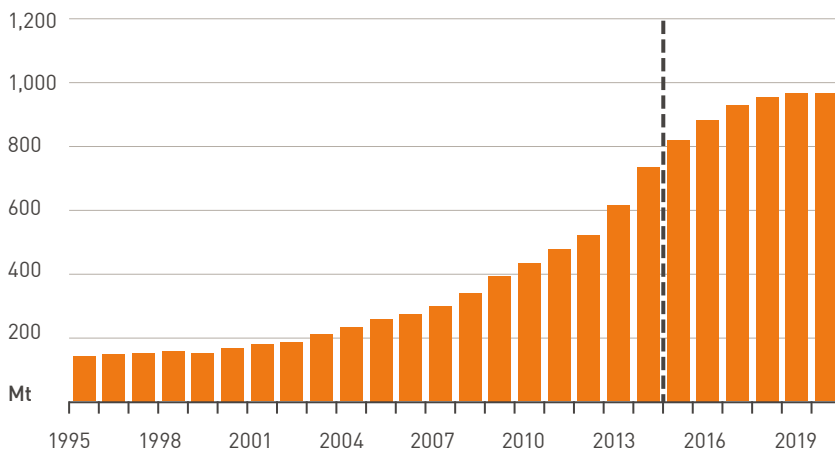


Figure 24 – Australian annual iron ore production⁹⁸



PRODUCTION

Production of iron ore in Australia rose from 555.5 Mt in 2012-13⁹⁵ to a record 677.4 Mt in the 2013-14 financial year,⁹⁶ an increase of nearly 22%.

Production is forecast to increase to over 962 Mt in the 2019-20 financial year⁹⁷ as iron ore majors such as Rio Tinto and BHP Billiton target higher production, improve productivity and cut costs.

EXPORT OF IRON ORE

Australia is the world's largest exporter of iron ore with almost all iron ore produced in the country being exported. Demand for Australia's iron ore is linked to economic growth trends which drive global demand for steel⁹⁹ and major importers of Australian iron ore therefore include China, Japan and the Republic of Korea, which require iron ore for steel production. Strong activity in industries such as construction, plant and equipment manufacturing, motor vehicle manufacturing and shipbuilding increase demand for steel and iron ore production.

In 2014, Australia exported a record 717 Mt of iron ore, an estimated 24% increase from the previous year.¹⁰¹ The growth in export volumes is the result of the start of production at operations in the Pilbara including BHP's Jumblebar Mine and Fortescue

Metals Group's Kings Mine,¹⁰² as well as infrastructure improvements, particularly in rail and ports.¹⁰³

Australia's iron ore exports are predicted to increase by a further 11% to 792 Mt in 2015.¹⁰⁴ This growth will be supported by the start of production at Hancock Prospecting's Roy Hill Mine which, at capacity, is expected to produce around 55 Mtpa of high grade iron ore, as well as additional output from Australia's major Pilbara producers.¹⁰⁵

Over the next five years, the volume of Australia's iron ore exports are forecast to grow by an average of 4% a year to reach 935 Mt in the 2019-2020 financial year.¹⁰⁶ Increased production will primarily be supported by improving productivity, expanding capacity at existing mines and debottlenecking initiatives.¹⁰⁷

Although Australia's iron ore export revenue is predicted to decline in the next few years due to falling prices driven by global oversupply and other market factors such as weak steel production growth in China, export values are forecast to rebound to around A\$81 billion in 2019-20.¹⁰⁹ As higher cost producers exit the market and growth in the steel markets rebounds in the medium-term, weak iron ore prices are expected to recover.¹¹⁰

Further, China's steel producers are expected, in both the short and medium term, to choose to import iron ore from Australia and Brazil to satisfy a greater portion of China's domestic iron ore requirements based on the need to obtain the lowest cost raw material. Australia's share of China's iron ore imports increased to 60% in 2014 (up from 50% in 2013), at the expense of smaller, higher cost producers in South Africa, Iran and the Ukraine.¹¹¹

Figure 25 – World iron ore trade – major exporters (2014)¹⁰⁰

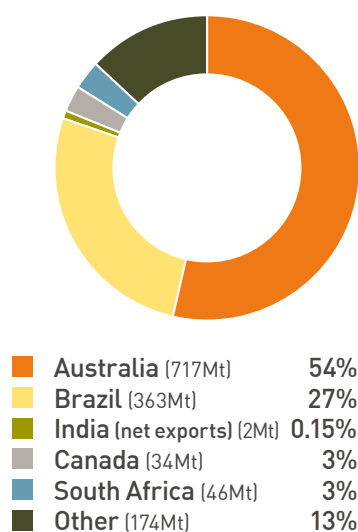
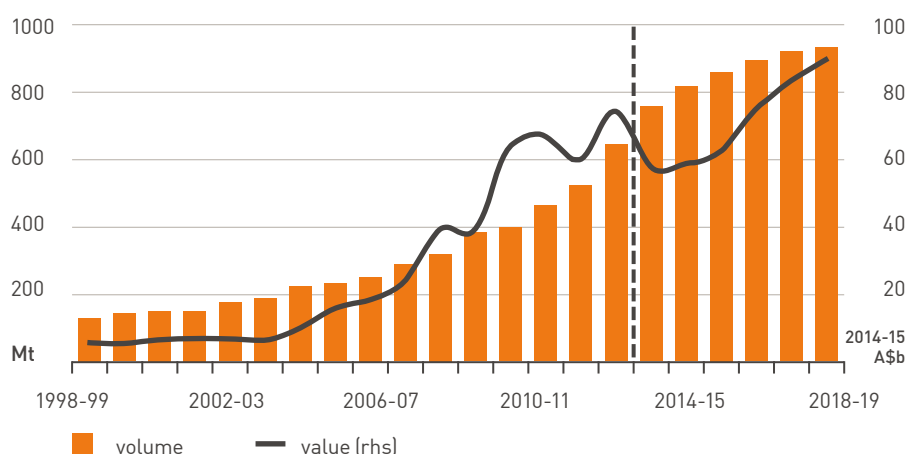


Figure 26 – Australia's iron ore exports¹⁰⁸



WESTERN AUSTRALIAN IRON ORE

Western Australia dominates the Australian iron ore industry, with A\$23.4 billion of iron ore mining projects under construction or committed in the State in 2014.¹¹²

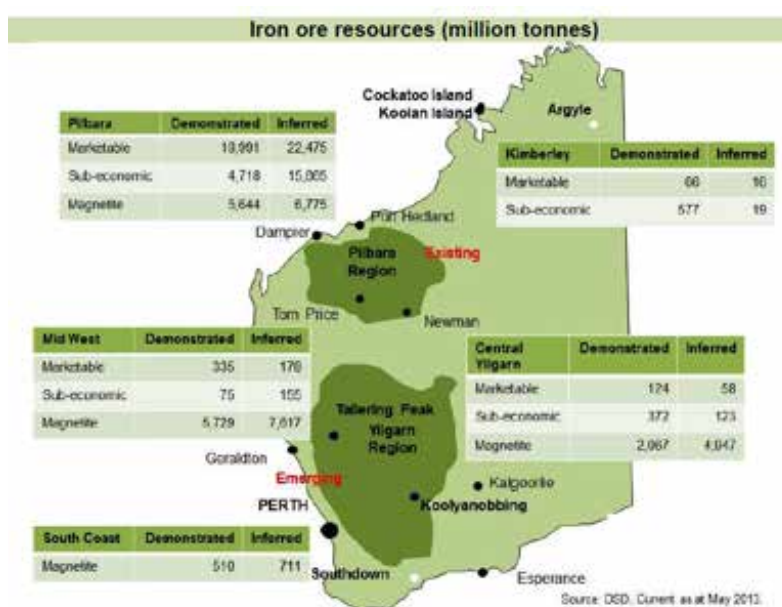
97% of Australia's total iron ore production occurs in the Pilbara region of the State's north west,¹¹³ which is home to Australia's three largest iron ore producers, Rio Tinto, BHP Billiton and Fortescue Metals Group, as well as several smaller mining projects, including Hancock Prospecting's Roy Hill iron ore mine. Together, Rio Tinto, BHP Billiton and Fortescue Metals Group produce nearly 20% of global iron ore.¹¹⁴

In 2010 Rio Tinto invested US\$15 billion for its five year growth program which has seen new projects developed and massive expansion programs at its Australian operations to increase existing mine life and capacity. Rio Tinto announced a new annual production record in 2014, producing 295.4 Mt of iron ore.¹¹⁵ The company said this record production was due to the early completion of a 290 Mt expansion project at its Pilbara operations.¹¹⁶ Infrastructure for Rio Tinto's 360 Mt port and rail expansion is reportedly around 80% complete with all major rail, marine and wharf works in place. Completion of this expansion is expected in 2015.¹¹⁷

BHP Billiton has shelved its US\$500 million upgrade to Port Hedland's inner harbour, saying it will reach its ultimate iron ore expansion target of 290 Mtpa without the capital intensive upgrade, albeit later than expected, by improving productivity.¹¹⁸

In March 2014, Fortescue Metals Group announced the completion of

Figure 27 – Western Australian iron ore resources¹²⁰



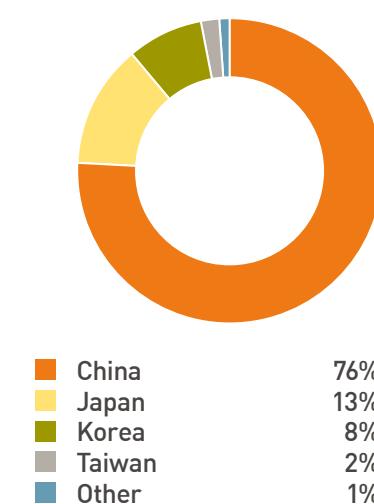
its A\$9.2 billion Pilbara expansions at Solomon.¹¹⁹

The progress of these three companies, and to a lesser extent the junior miners, drives the industry of service providers and mining contractors who service their operations.

The value of Western Australian iron ore exports totalled A\$73.7 billion in the 2013-14 financial year, a 31.7% increase from the previous year.¹²¹ China was the largest importer of Western Australian iron ore, accounting for 76% of export value, followed by Japan, Korea and Taiwan.

Access to infrastructure continues to be an important issue in the Australian iron ore industry. According to forecasts by BREE, the iron ore industry will rely on additional infrastructure capacity in the short to medium term to support the anticipated growth in iron ore exports.¹²³

Figure 28 – Importers of Western Australian iron ore¹²²



IRON ORE MINING IN OTHER AUSTRALIAN STATES

Iron ore mining also occurs in South Australia and the Northern Territory, although on a much smaller scale than in Western Australia.

South Australia is a growing iron ore region.¹²⁴ Several new, predominantly magnetite projects are planned for South Australia,

although the successful development of these projects depends upon the construction of a suitable deepwater port. The region faces challenges such as higher production costs relative to haematite producers in the Pilbara and additional freight costs for shipping ore to key customers in Asia.¹²⁵

Queensland does not produce significant quantities of iron ore, however exploration programs in recent years have discovered several iron ore deposits, particularly in the north west of the State.¹²⁶

THE FUTURE OF AUSTRALIAN IRON ORE

The expansion of existing projects and exploration to discover new iron ore projects are integral to the long-term strength of Australia's iron ore industry. In 2015, Australia's iron ore exports are predicted to increase by a further 11% to 792 Mt, with exports forecast to grow at an average rate of 3.4% a year to reach 935 Mt in 2020. Increased production will be supported mainly by improving productivity, expanding capacity at existing mines and debottlenecking activities.¹²⁷

In the short-term, weak demand fundamentals in China combined with higher production outputs from low cost producers have

caused an imbalance between global supply and demand which is expected to prolong soft commodity prices in 2015 and 2016. Some high cost suppliers are expected to exit the market, but the market is likely to remain oversupplied in the short term. In response to falling prices, iron ore miners around the world have focused on improving productivity and cutting production costs.

This period of subdued prices is not expected to severely impact Rio Tinto and BHP as they are some of the world's cheapest producers. These miners have significant cost advantages due to the scale

of their operations and superior ore grades. However, the subdued iron ore price is likely to materially impact junior iron ore producers in the Pilbara who produce at higher costs and do not have the balance sheets to weather a prolonged dip in the iron ore price. The lower iron ore price and its resultant impact on profitability has forced many of the Pilbara producers to continue to drive cost and productivity improvements to seek to maintain profit margins.

While Australia is expected to increase its share of global iron ore exports, Brazil will likely remain a key competitor.¹²⁸

A background image showing a blurred view of high-speed train tracks, suggesting speed and infrastructure. The tracks are light brown and run diagonally across the frame. A solid orange horizontal line is positioned at the top of the page, above the main title.

RAIL AND PORT INFRASTRUCTURE AND SERVICES

Regardless of the country in which a project is located, the development and operation of a mining project requires access to critical infrastructure and services, including rail and ports.

Determining whether a project will have access to critical infrastructure and services is a key issue for due diligence investigation, and may determine whether or not a project is commercially viable.

The majority of Australia's key mineral and energy resources are located in remote regions that

require an extensive and reliable infrastructure network to facilitate transportation to export markets. Existing port and rail systems in Australia are approaching capacity and the viability of new mines and the long term growth in exports will depend heavily on the development and expansion of this infrastructure.

Over the past decade, over A\$30 billion has been invested to develop and improve privately and publicly owned export infrastructure in Australia.¹²⁹ In 2012-13, the network of pipelines, roads, rail and port facilities enabled approximately 651 Mt of iron ore and 375 Mt of coal to be exported from Australia.¹³⁰

RAIL

In Australia, coal, iron ore and other bulk commodities are usually transported from the mine of origin to the port of export by rail.

There are several reasons why rail is the preferred method of transport, including cost, reliability, environmental issues and safety. Road transportation and overland conveyors are sometimes used for transporting bulk minerals over shorter distances, and there are also some examples of slurry pipelines being used to transport ore. However rail is still by far the most common means of transportation, especially where the haulage distances are longer.

Australia's main coal and iron ore producing States – Queensland, New South Wales and Western Australia – are serviced by existing high quality heavy rail networks. The rail networks in the eastern States of Queensland and New South Wales are owned by dedicated railway companies whose business includes the provision of third party access to

their rail networks by private train operators. In contrast, the iron ore rail networks in Western Australia are largely privately owned by major mining companies.

Although Australian law potentially provides a mechanism for third parties to gain access to these privately owned railways, there are often challenges involved in securing that access. For these reasons, it is not uncommon for smaller producers to look to enter into mine gate sales arrangements with the owners of the relevant infrastructure.

Despite having modern, efficient and well-maintained rail infrastructure, Australia's rail networks are often capacity constrained. This means that the development of new mines, or expansion of production from existing mines, will often require an expansion, extension or upgrade to the rail network to create additional rail capacity. The party who requires the rail network upgrades will usually be required to financially

underwrite the construction of those upgrades. These costs can often form a significant part of the capital costs (or ongoing operating costs) of a new mine.

RAIL IN QUEENSLAND

Queensland's coal industry is serviced by a world class narrow gauge heavy rail network which transports coal from more than 50 operating coal mines to six existing export coal terminals. At these export coal terminals, ships of up to 230,000 deadweight tonnes export coal to world markets.

The coal rail network (ie track) in Queensland is owned by Aurizon (formerly QR National), a "spin-off" from the former State-owned rail business which was privatised and listed on the ASX in late 2010.

The network includes four major coal systems: Moura, Blackwater, Goonyella, and Newlands. Aurizon is progressing a number of capital projects aimed at expanding and

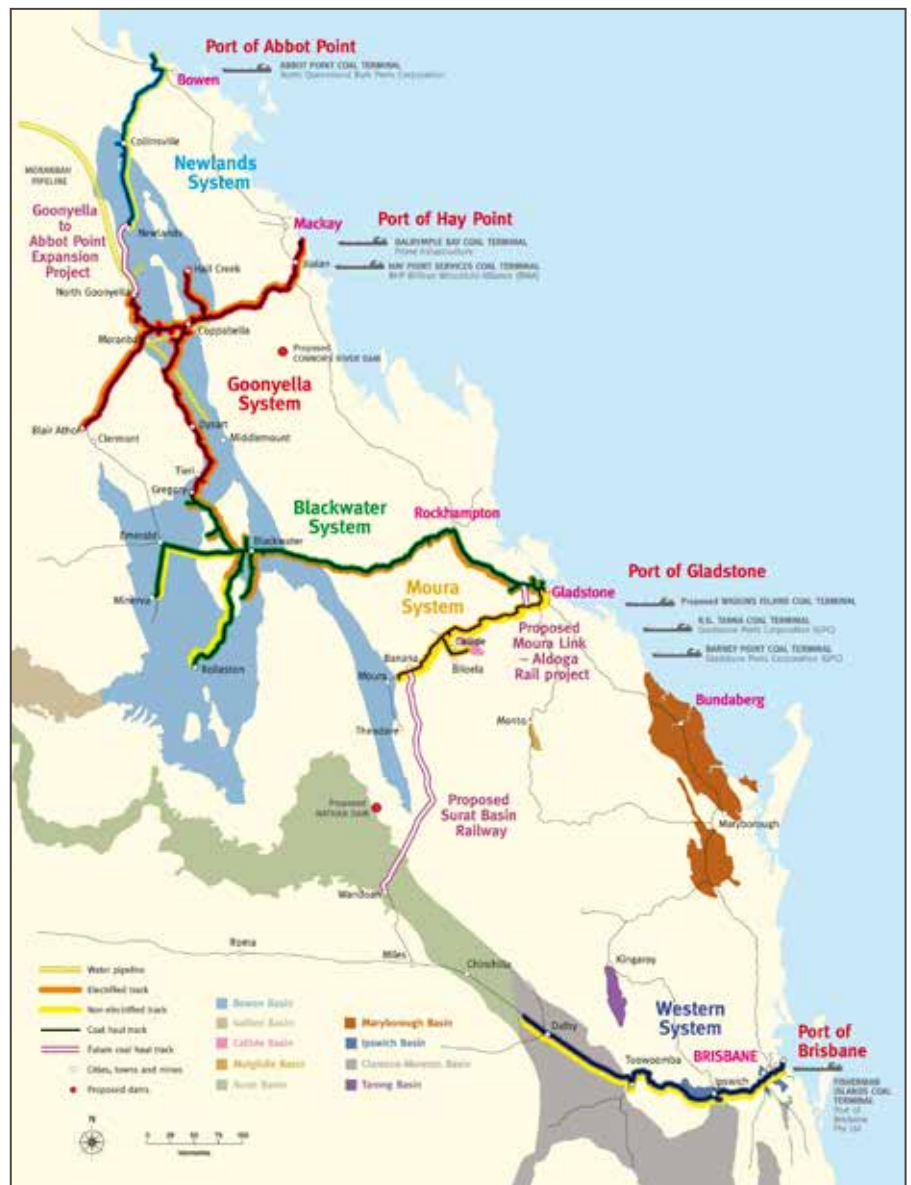
enhancing capacity on the network. However, the proposed Surat Basin Rail in Central Queensland, which was to include a new 210 kilometre rail corridor from Wandoan to the Moura System near Banana, 130 kilometres west of Gladstone, is not currently proceeding following Glencore's decision in September 2013 to put its Wandoan coal project on hold and the Queensland Government and the Surat Basin Rail Joint Venturers agreeing in December 2013 to end the exclusive mandate to develop the rail line.

There are currently two rail haulage service providers in Queensland – Aurizon and Pacific National (a subsidiary of ASX-listed transport company Asciano Limited). Both operate modern train fleets and provide efficient and reliable rail transport services.

Aurizon is Australia's largest transporter of coal, hauling on average nearly 600,000 tonnes a day. Aurizon hauled 169.9 Mt of coal in Queensland in 2013-14.¹³¹

Pacific National is Australia's second largest transporter of coal hauling an estimated 30% (based on net tonne kilometres) of the Queensland coal haulage market in 2013-14, up from an estimated 21% in the previous year.¹³²

Fig 29 – Queensland rail network and coal export terminals¹³³



RAIL IN NEW SOUTH WALES

The main ways of transporting coal in New South Wales are by rail, road and conveyor, with rail being the most effective means of long-distance transport, particularly for export coal. Major investments have been made by both the New South Wales Government and the private sector to fund the expansion and upgrading of transport and loading facilities, with the intention of ensuring that coal production and exports are well supported into the 21st century.

The rail network that services the New South Wales coal industry extends over 1,050 kilometres, and export coal is loaded at 31 rail loading terminals. The majority of the coal hauled across the New South Wales Hunter Valley rail network is exported through the Port of Newcastle to overseas customers, with 163 Mt of coal delivered to the Port of Newcastle in 2013-14.¹³⁴ The Australian Rail Track Corporation, which operates the network, has substantially completed a A\$7 billion investment program to repair, upgrade and expand the capacity of the Hunter Valley and Interstate rail networks.¹³⁵ The Australian Rail Track Corporation plays a critical role in the transport supply chain and is responsible for selling access to train operators, capital investment in the corridors, management of the rail network

and infrastructure maintenance and the development of new business.¹³⁶

Pacific National is the primary coal rail haulage operator in New South Wales with an estimated 72% market share (based on net tonne kilometres). The company services the mines of the NSW Hunter Valley, Illawarra, Lithgow, Mudgee and Gunnedah regions hauling export coal into the ports of Newcastle and Port Kembla.

Aurizon recently commenced its rail freight business in New South Wales hauling around 40.5 Mt of coal in New South Wales in the 2013-14 financial year.¹³⁸

RAIL IN WESTERN AUSTRALIA

Western Australia has an extensive network of rail infrastructure, some owned by miners and other by infrastructure and service providers.

Access to existing rail infrastructure in Western Australia is subject to various State Agreements and State and Federal access regimes. Attempts to secure access to private infrastructure has been a source of controversy over the past decade, with BHP and Rio Tinto seeking to resist attempts by other miners, such as Fortescue Metals Group, to gain access to their rail networks.¹³⁹

Fortescue Metals Group has completed a US\$9 billion expansion program which included the construction of new rail lines

and spurs and expansion of port facilities at Port Hedland. Meanwhile, the proponents of the West Pilbara Iron Ore Project in Western Australia (Baosteel, Aurizon, AMCI and POSCO) are looking to develop port and rail infrastructure to support the project, the first stage of which involves the development of a new deep-water port at Anketell and a 280 kilometre railway to support at least 40 Mtpa throughput from eight mining areas.¹⁴⁰

Brookfield Rail (one of the world's few independent rail infrastructure providers) also controls over 5,500 kilometres of critical rail infrastructure throughout the southern half of Western Australia, from Geraldton in the north, to Leonora and Kalgoorlie in the east, and Esperance, Albany and Bunbury in the south.

Brookfield Rail's network transports grain, alumina, bauxite and interstate freight as well as passengers on the Perth to Kalgoorlie and Perth to Bunbury lines. Considerable tonnages of iron ore are also railed to the Port of Geraldton over the narrow gauge railway between Morawa, Mullewa and Geraldton which is managed by Brookfield Rail. Brookfield Rail recently completed a A\$550 million upgrade to the rail infrastructure in the Mid West region, which increased the capacity of the line from 3 Mtpa to 25 Mtpa.¹⁴¹

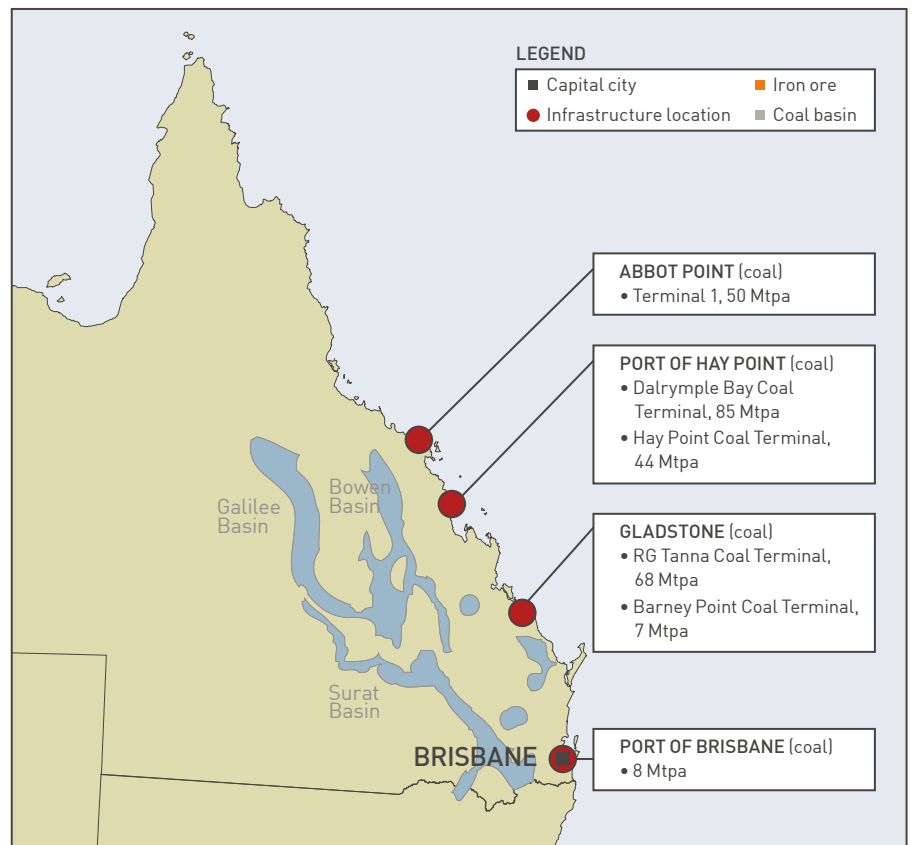
PORT

Australia has some of the busiest bulk commodity export ports in the world.

Port Hedland in Western Australia is the world's largest bulk export facility, predominantly handling iron ore. The Port of Newcastle in New South Wales is the world's largest export coal terminal, handling 154.4 Mt of coal (valued at A\$13.6 billion) in 2013-14.¹⁴² There are currently six export coal terminals in Queensland which exported over 204.4 Mt of coal in 2013-14.¹⁴³

As with rail, there are often capacity constraints at export ports. Both construction of new ports and expansion of existing ports is currently planned in the key mining States of Queensland, New South Wales and Western Australia. BREE has suggested that up to an additional 20% of total port capacity (existing, under construction and planned) may be needed to provide sufficient infrastructure for projected commodity export volumes by 2025 if previous port utilisation rates continue into the future.¹⁴⁴

Figure 30 – Queensland coal terminals¹⁴⁵



QUEENSLAND PORTS

Queensland's rail network delivers coal to six export coal terminals which are located at four major ports. From north to south, these are:

- **Abbot Point Coal Terminal** near Bowen;
- **Dalrymple Bay Coal Terminal** and **Hay Point Services Coal Terminal** near Mackay;
- **RG Tanna Coal Terminal** and **Barney Point Coal Terminal** at the Port of Gladstone; and
- **Fisherman Islands Coal Terminal** at the Port of Brisbane.

Like the rail network, export terminals in Queensland are capacity constrained. There are a number of expansions currently underway or recently completed, including the 11 Mtpa Stage 3 expansion at Hay Point by the BHP Billiton-Mitsubishi Alliance which saw first coal loaded on 12 January 2015 and which increased the capacity of the Hay Point Coal Terminal to approximately 55 Mtpa.

At the Port of Gladstone, the first stage of the proposed Wiggins Island Coal Terminal (**WICET**) is under construction with first coal shipments anticipated from 2015. WICET will initially have a capacity of 27 Mtpa. To reach full capacity of 81 Mtpa would require the construction of two further expansions, although the likelihood of Stage 2 proceeding in the short to medium term is uncertain.

A 25 Mtpa expansion was recently completed at the Abbot Point terminal in Bowen. This expansion increased coal export capacity to 50 Mtpa and was constructed in conjunction with Aurizon's Northern Missing Link rail project.

There is still scope to significantly increase port capacity at Abbot Point to support increased coal production from the Galilee and Bowen Basins. The approval for the proposed A\$6.2 billion expansion of Abbot Point port, which will provide an additional 120 Mtpa capacity at the terminal, was granted by the Federal Government in December 2013.

NEW SOUTH WALES PORTS

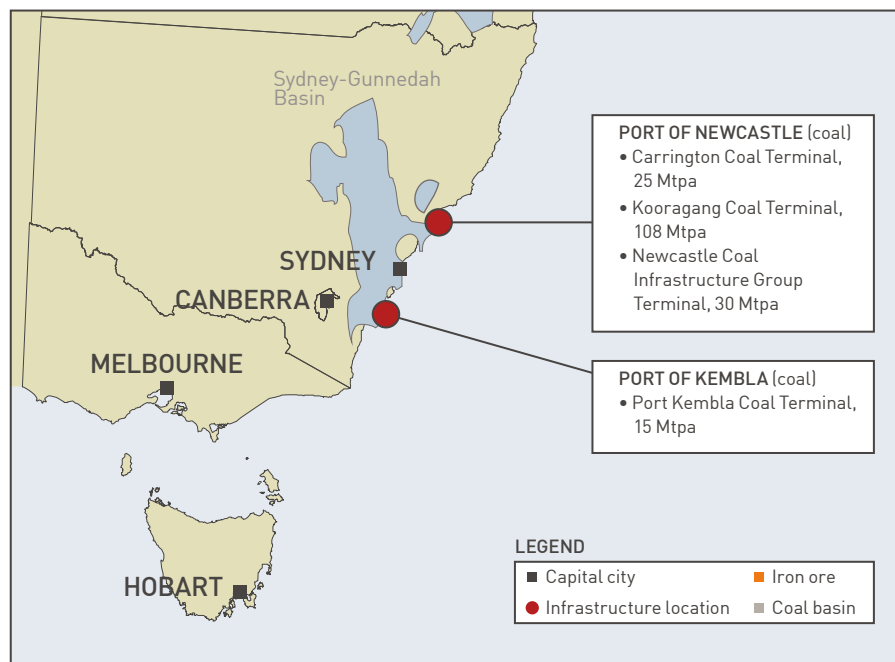
The major coal mining areas of New South Wales are serviced by four export terminals which are located at two major ports. These are:

- **Carrington Coal Terminal and Kooragang Coal Terminal** (operated by Port Waratah Coal Services) at the Port of Newcastle;
- **Newcastle Coal Infrastructure Group Terminal** (operated by NCIG) at the Port of Newcastle; and
- **Port Kembla Coal Terminal** (operated by the NSW Ports Consortium) in Wollongong.

The Hunter Valley is the largest thermal coal producing area in Australia. Coal produced in the region is railed distances of between 15 and 120 kilometres to the Port of Newcastle. Rapid growth in demand and production of thermal coal in New South Wales has led to substantial inefficiencies in the export chain due to limited infrastructure capacity.

A number of expansions are currently underway to resolve these capacity constraints with several other expansions having been recently completed, including the final stage of the Port of Newcastle expansion.

Figure 31 – New South Wales coal terminals¹⁴⁸



WESTERN AUSTRALIAN PORTS

Rail and port infrastructure is vital to the success of the Western Australian iron ore industry. The combination of geographical isolation, strong growth and export focus means that maintaining an adequate infrastructure network is an ongoing challenge to the industry and the State Government of Western Australia.

The Western Australian Government has authority over eight ports around the State. The port authorities are commercial entities which operate independently of the Government and are responsible for the planning and development of future growth of the ports.

The *Ports Legislation Amendment Act 2014* (WA), which provides for the amalgamation of the former seven regional port authorities into four new port authorities, was passed by Parliament in May 2014. The amalgamation aims to increase efficiency, marine safety and consistency between ports.

Western Australian ports handle a diverse range of export materials. Traditionally the northern ports (Broome, Port Hedland and Dampier) handle mineral exports, while the southern ports (Geraldton, Fremantle, Bunbury, Albany and Esperance) handle primarily agricultural exports. However, as mineral exploration and production increase in the southern half of the State, it is expected that mineral export trade will become a major component of activity for all ports other than Fremantle (which predominantly handles container trade and livestock exports). The northern Port of Geraldton now also handles both mineral and agricultural exports.

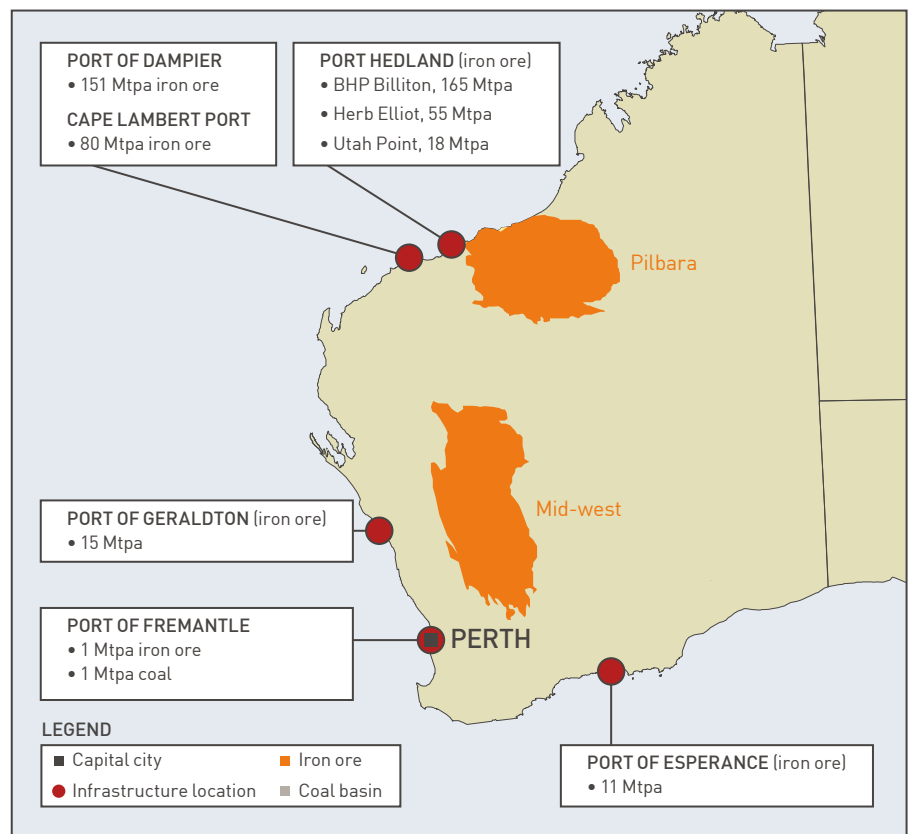
Port Hedland is a central component of Western Australia's iron ore export infrastructure. It is the largest bulk export facility in the world, and iron ore accounts for 97% of the total trade volume of the port. Port Hedland achieved record tonnage throughput of just over 370 Mt for 2013-14 (364 Mt of which was iron ore exports).¹⁴⁹

There are also a number of other ports which are operated by mining companies such as the Cape Lambert Port that is used exclusively by Rio Tinto.

There are numerous projects underway to expand the iron ore handling capacity for both privately and publicly owned ports.

Rio Tinto has invested heavily in developing its port infrastructure in Western Australia. The company operates three shipping terminals, two at the Port of Dampier and one at Cape Lambert Port. In August 2013, Rio Tinto completed infrastructure works associated with the first phase of its capacity expansion to 290 Mtpa which included construction of two additional berths on the new Cape Lambert jetty and wharf, replacement and upgrade of car dumpers at Cape Lambert, improved power stations and the installation of gas and water pipelines.¹⁵¹ Further expansion of Rio Tinto's port, rail and power infrastructure capacity to 360 Mtpa is currently underway and is due for completion in 2015.¹⁵²

Figure 32 – Western Australian ports¹⁵⁰



The Port of Esperance is seeking a partner to develop a multi-user iron ore facility, intended to increase iron ore export capacity for the southern part of the State. It is planned to cater for export needs of iron ore mining companies with projects in the Yilgarn Region, and to reduce port capacity and transportation constraints associated with exporting iron ore from ports on the State's west coast.

In August 2013, Fortescue Metals Group completed a US\$2.4 billion

expansion of its port facilities in Port Hedland. The expansion lifted the company's export capacity to 155 Mtpa.

Construction of a number of bulk berths within Port Hedland's inner harbour are at varying stages of completion. These berths should bring the total inner harbour throughput close to its capacity of 495 Mtpa.¹⁵³

Development of port and rail infrastructure in the Mid West region is integral to the

development of several new iron ore mines, including Mitsubishi's Jack Hills Expansion Project (being developed by Crosslands Resources Ltd, a wholly owned subsidiary of Mitsubishi), the Karara Iron Ore Project (being developed in joint venture between Gindalbie Metals Ltd and Chinese steel producer Ansteel) and the Weld Range iron ore project (being developed by Sinosteel Midwest Corporation Ltd, a wholly-owned subsidiary of Sinosteel Corporation).



INVESTMENT STRUCTURES

Investments into Australia's mining industry generally take one of two forms – either the acquisition of an interest in a company which owns the mining project, or the acquisition of a direct interest in the assets and business of the mining project.

COMPANIES

In Australia a “company” is a separate legal entity that is established under Australia's *Corporations Act 2001* (Cth) (**Corporations Act**) and whose formation and ongoing operations are regulated by the Australian Securities and Investments Commission (**ASIC**).

There are broadly three types of companies that a foreign investor might encounter in the Australian mining sector. They are listed public companies, unlisted public companies and private companies.

LISTED PUBLIC COMPANIES

Listed public companies are companies that are listed on the Australian Securities Exchange (**ASX**) or the securities exchange of another jurisdiction. Listed companies are highly regulated, being governed not only by the Corporations Act but also by the Listing Rules of the relevant securities exchange. Listed public companies will tend to be, but are not always, larger in size than unlisted public companies and private companies.

In Australia, listed public companies have an obligation of “continuous disclosure”, which requires the company to disclose to the market (via releases to the ASX) all information that is price sensitive.

This obligation is subject to a limited number of exceptions.

The acquisition by a foreign investor of an interest in a listed public company can be “on market” or “off market” and may be friendly or hostile. An investor may directly approach one or more of the existing major shareholders with a proposal to acquire their shares. Alternatively, an investor may approach the company with a proposal to acquire an interest in the company (for example by purchasing new shares or other securities in the company) or to take over the company. There are limits on the size of the shareholding that an investor may acquire without launching a formal takeover, and rules that govern the “creeping” of the size of a shareholding over time without a takeover.

Examples where a foreign investor has acquired an interest in an Australian listed public company include the joint A\$1.4 billion bid for Aquila Resources in 2014 by Baosteel's and Aurizon and Peabody Energy's A\$5.2 billion bid for Macarthur Coal Ltd in 2011.

UNLISTED PUBLIC COMPANIES AND PRIVATE COMPANIES

Unlisted public companies and private companies are generally far less regulated than listed

public companies. They are not subject to the Listing Rules, and are governed primarily by the Corporations Act. Different rules apply to unlisted public companies and private companies. Private companies are the least regulated of the two, however, the acquisition of an interest in an unlisted public company which has less than 50 shareholders and a private company is essentially the same. An example where a foreign investor has acquired an interest in a private Australian company occurred in 2011 when India's GVK announced its acquisition of a majority interest in Hancock Coal Pty Ltd for US\$1.26 billion.

INCORPORATED JOINT VENTURES

Where two or more parties are shareholders in an unlisted public company or private company which owns a mining project, this is often referred to as an incorporated joint venture (**IJV**).

Listed public companies, unlisted public companies and private companies are all common in the Australian mining industry, and a foreign investor who wishes to acquire an interest in a mining project that is owned by one of these companies may be able to do so by buying an interest in the company.

ASSETS

The other way for an investor to acquire an interest in a mining project in Australia is to acquire a direct interest in the assets and business of the mining project. This is quite common in the Australian mining industry, particularly where the project is not wholly owned by a single entity.

UNINCORPORATED JOINT VENTURES

Unincorporated joint ventures are very common in the Australian mining industry. An unincorporated joint venture is where two or more parties own interests in the assets of a mining project, and the project is governed by a contract between the parties (a “joint venture agreement” or “joint operating agreement”). This contract sets out the arrangements between the parties for the development and operation of the project, the sharing of costs and the sharing of production from the project.

The joint venture agreement will set out the scope of the venture, the obligations and commitments of individual parties and provisions covering the financing of the venture and the entitlement of individual participants to the outputs of the venture. The rights and obligations of parties to the joint venture are governed by contract without any significant legislative interference.

Another feature of the unincorporated joint venture is that participants have individual liability in proportion to their interest in the joint venture.

In Australia, unincorporated joint ventures are the most favoured structure for mining projects where there are multiple owners due to various tax and other benefits.

One tax benefit of an unincorporated joint venture is that, structured carefully, the project is not a separate legal entity for tax or other purposes. It is a purely contractual relationship between the parties to the joint venture. The unincorporated joint venture does not lodge a joint tax return. Instead each party to the joint venture must lodge a separate tax return. This allows each party flexibility in relation to the tax treatment of the income and expenses referable to its share of the joint venture.

Another benefit of an unincorporated joint venture is that tax losses (such as those which arise in the exploration phase of a resources project) are immediately available to offset other income of the party, unlike incorporated joint ventures where the joint venture company’s losses are “locked up” in the company and are not available to be netted off against other income of the shareholders.

However, careful structuring is needed to prevent an unincorporated joint venture from being a partnership for tax purposes.

The activities of the joint venture will be conducted by a “manager” or “operator”. This will normally be the party with the largest interest in the joint venture, a wholly owned subsidiary of that party, or a company which is jointly owned by all of the parties who have an interest in the joint venture.

Joint venture agreements will often contain restrictions on a party who wishes to sell all or part of their interest in the joint venture. There may be a requirement that the party wishing to sell its interest has to first obtain the consent of the other parties to the joint venture. Another possible restriction requires the seller to grant a “pre-emptive right” to the other parties to the joint venture, allowing them to buy the interest that is for sale at the same price, and on the same terms, as a third party buyer is willing to accept. In some cases there is both a consent requirement and a pre-emptive right, although this is not common.

FARMIN AND FARMOUT AGREEMENTS

Farmin agreements (also known as farmout agreements) are another common form of project participation in the Australian mining industry. Under a farmin agreement, a party (**Farmee**) agrees to fund certain exploration costs for the project or pay an upfront capital contribution to the other party (**Farmor**) in exchange for an interest in the underlying mining tenement which is owned by the Farmor. The interest received by the Farmee is a “farmin interest” and the interest assigned by the Farmor is a “farmout interest”.

Farmin agreements are typically used in the exploration stage of mining projects. Often, a farmin agreement will be entered into where the Farmee has funds to conduct exploration but does not have sufficient access to suitable exploration tenements, and

where the Farmor holds suitable exploration tenements but does not have the funds to explore them.

Similarly, a Farmor may decide to enter into a farmout agreement where it holds an exploration tenement over an area of land that is peripheral to its main project and that it does not wish to explore further.

The farmin agreement will set out the specific activities that the Farmee must fund, or the amount of capital contribution that it must make and the timing of that payment, in order for the Farmee to obtain an interest in the mining tenement. Once the Farmor has transferred an interest in the mining tenement to the Farmee or earned an interest in the mining tenement, the

Farmee and Farmor will generally form a joint venture (governed by a joint venture agreement) for the continued exploration, and subsequent development, of the mining tenement.

COMPANY OR ASSETS

When deciding whether to acquire an interest in the company which owns a mining project, or a direct interest in the assets of the project itself, neither method is inherently better than the other. Sometimes

only one method will be available in the circumstances.

In other cases both options might be open, and the best approach will need to be determined on a case-by-case basis. Often tax

and other legal issues will play a significant part in determining the best acquisition method.

INVESTMENT VEHICLE

Although it is generally possible for a foreign buyer to directly acquire shares in an Australian mining company, or an interest in the assets and business of an Australian mining project, direct investment by a foreign entity is relatively uncommon.

The choice of investment vehicle for a foreign investor into the Australian mining industry will largely be driven by tax considerations, including the tax laws of both Australia and the foreign investor's home jurisdiction, and the interaction between those tax laws.

INCORPORATED PRIVATE COMPANIES

More often than not, foreign investors will establish an Australian incorporated private company as the investment vehicle. Sometimes the new Australian company will be directly owned by the foreign investor, while at other times there will be one or more interposed holding companies incorporated in other jurisdictions. The best investment structure will depend upon the circumstances of the particular case, and will need to be determined on a case-by-case basis.

An Australian incorporated private company must have at least one shareholder, and may not have

more than 50 non-employee shareholders. It must have at least one director, including a director who ordinarily resides in Australia.

Relative to public companies, private companies are less tightly regulated and subject to less onerous reporting requirements. Areas in which this more relaxed regulatory approach is evident include the regulations and restrictions in relation to meetings, the appointment, qualification and removal of directors, the giving of financial benefits to directors and related parties, the power to allot shares and the required contents of annual reports.



CURRENT HOT TOPICS

CARBON PRICING AND MRRT REPEAL

There have been significant reforms to the Australian tax system that have a material impact on investment in the Australian mining industry.

In July 2012, the Federal Government's Carbon Pricing

Scheme (**CPS**) commenced. The CPS imposed upon liable entities (generally speaking, heavy carbon dioxide emitters) an obligation to pay a fixed price for each tonne of carbon dioxide released into the atmosphere. However, the CPS was abolished in 2014.

The Mineral Resource Rent Tax (**MRRT**) also commenced in July 2012 and was designed to tax profits over a certain threshold made from the large-scale exploration of Australia's coal and iron ore resources. The MRRT was abolished in 2014.

PROPOSED EXPLORATION DEVELOPMENT INCENTIVE

In early March 2015, two bills passed Federal Parliament which introduce an Exploration Development Incentive (**Incentive**).

The proposal, contained in the *Tax and Superannuation Laws Amendment (2014 Measures No 7) Act 2014* (Cth) and the Excess Exploration Credit Tax Act 2014 (Cth), is intended to encourage investment in small exploration companies undertaking greenfields mineral exploration in Australia.

The Incentive is targeted at addressing the recent downturn in mineral exploration expenditure and would be available to Australian-resident investors in small mineral exploration companies. Under the incentive, investors may be entitled to a tax offset or additional franking credits where the company in which they are a member issues them an exploration credit.

WHO WILL BE ABLE TO ACCESS THE INCENTIVE?

To ensure that the Incentive is only available for investment in junior mineral exploration companies, it is proposed that the Incentive will be open to companies that are "greenfields minerals explorers". An entity will be a "greenfields mineral explorer" if it satisfies a number of criteria, including that it has not carried on mining operations during that income year or the previous income year and not be connected or affiliated with an entity that has carried on mining operations in this time.

TAX CREDITS

Specifically, it is proposed that under the Incentive, a tax credit will be provided to Australian resident shareholders for eligible greenfields exploration expenditure incurred in Australia, starting for investments made from 1 July 2014.

EXPLORATION CREDITS

Companies may issue exploration credits to their shareholders up to a capped amount in an income year, with the cap for a company based on the company's exploration expenditure and tax loss for the relevant income year, adjusted by a modulation factor to ensure that the total value of credits provided in respect of an income year does not exceed \$25 million in respect of 2014-15, \$35 million for 2015-16 and \$40 million for 2016-17.

PROPOSED TAX RELIEF FOR CERTAIN MINING ARRANGEMENTS

The Federal Government has released exposure draft legislation to provide relief to taxpayers entering into certain arrangements regarding mining, quarrying and prospecting rights. In 2014, legislation was introduced to limit the immediate deduction available for expenditure on mining rights and address concerns deductions were being claimed for acquisitions of resources already discovered.

Under the exposure draft, relief for these provisions will apply to “interest realignment

arrangements” and farm-in farm-out (**FIFO**) arrangements.

An interest realignment occurs where, as part of a joint venture, parties exchange interests in mining, quarrying and prospecting rights, with the aim of aligning the individual rights with the rights of the overall venture. Under the current law, a deduction is not immediately available for new rights acquired as part of the realignment. The exposure draft will redress this situation, with the aim of encouraging such joint ventures.

A FIFO arrangement involves a “farmor” providing an interest in a mining, quarrying or prospecting right to a “farmee” in return for the farmee providing an entitlement to receive exploration services or fund the exploration. The exposure draft provides relief for taxpayers entering FIFO arrangements that support exploration activity by ensuring that, broadly, these arrangements have tax neutral outcomes for the parties.

ONE-STOP SHOP FOR ENVIRONMENTAL APPROVALS

The Australian Government is committed to delivering on its One-Stop Shop policy for project environmental approvals. The One-Stop Shop policy will see State planning systems accredited under national environmental law to create a single environmental assessment and approval process for nationally protected matters. The One-Stop Shop policy aims to simplify the approvals process for businesses, lead to swifter decisions and improve Australia’s investment climate, while maintaining high environmental standards.¹⁵⁴

Some States and Territories currently have an **Assessment Bilateral Agreement** with the Federal Government which enables eligible projects to be assessed under a State/Territory accredited environmental assessment process, but leaves the power to approve or impose conditions on a project with

the Federal Minister.

In order to deliver on the One Stop Shop commitment, the Federal Government proposes to negotiate additional **Approval Bilateral Agreements** with each of the willing jurisdictions so that eligible projects will be able to be both assessed and approved under a single process undertaken at the State/Territory level. At the time of publication, Queensland,¹⁵⁵ New South Wales, Western Australia, South Australia, the ACT and Tasmania have progressed draft Approval Bilateral Agreements with the Federal Government.

This proposed single assessment process reflects a key recommendation of the Productivity Commission’s *Mineral and Energy Resource Exploration* report released in March 2014 to improve the efficiency of the

environmental assessment and approval processes under the EPBC Act by strengthening bilateral arrangements with the States and Territories for assessments and establishing bilateral agreements for the accreditation of approval processes where the State and Territory processes meet appropriate standards.¹⁵⁶

A draft **Conditions Policy** has been issued by the Federal Government for public comment, which closed on 15 May, 2015. The Policy seeks to reduce unnecessary duplication between States and Territories and the Commonwealth in setting conditions for environmental approvals. The Policy already applies to projects in New South Wales. Its extension to other States and Territories will be considered following the public comment period.

FREE TRADE AGREEMENTS

Australia has recently entered into free trade agreements (FTAs) with three of its most significant trading partners Korea, Japan and China.

The FTAs with Korea, Japan and China are significant and expected to deliver a number of benefits including the removal of tariffs over resources, energy and manufactured exports:

- Korea-Australia Free Trade Agreement: on entry into force 88% of exports by value will enter Korea duty free, with all remaining tariffs phased out within ten years.

- Japan-Australia Economic Partnership Agreement: on entry into force 99.7% of exports by value will enter Japan duty free, rising to 100% on full implementation.

- China-Australia Free Trade Agreement: on entry into force 92.9% of exports by value will enter China duty free, rising to 99.9% on full implementation.

In particular, tariffs that have been or will be removed under the FTAs include:

Product	Korea	Japan	China
Coking coal	Not subject to tariffs prior to KAFTA	3.2% tariff removed	3% tariff to be removed when CHAFTA commences
Titanium dioxide	6.5% tariff removed	3.2% tariff removed	10% tariff to be phased out within 4 years
Unwrought aluminium	1-3% tariff removed	Not subject to tariffs prior to JAEPA	5-7% tariff to be removed when CHAFTA commences

REFORMING RESOURCES LEGISLATION IN QUEENSLAND

In 2014, the Queensland Government announced major reform of the resources sector through the Modernising Queensland's Resources Acts (**MQRA**) Program. The MQRA Program proposes to harmonise Queensland's resources legislation by replacing the existing Acts which deal with minerals, petroleum and gas, greenhouse gas and geothermal energy, with a single, common resources Act to govern all resources tenure. The staged reform process is anticipated to take three to four years to complete, and targets a reduction in existing regulatory burdens and related compliance costs.

In September 2014, the Queensland Parliament passed the *Mineral and Energy Resources (Common*

Provisions) Act 2014 (Qld) (**MERA**), representing the first stage in the MQRA Program and creating the "shell" into which provisions will incrementally be transferred from the other resources Acts.

Amongst other things, the MERA implements a consistent restricted land framework across all resource sectors and provides a new overlapping tenure regime for Queensland's coal and CSG industries.

The majority of the MERA provisions will commence on a date to be set by proclamation, once the supporting Regulations have been finalised. Commencement may be staged with some provisions and their associated Regulations commencing before others.

NEW OVERLAPPING TENURE REGIME

A major component of the MERA is a complete re-design of Queensland's overlapping coal and CSG tenure regime. The existing overlapping tenure framework, which was introduced in 2004, has been widely criticised for being unnecessarily complex and impeding the development of coal and CSG resources in Queensland.

In response to these issues, the MERA implements a new overlapping tenure regime which is based on the following foundation principles:

- **direct path to grant:** the MERA removes existing barriers to the grant of coal and CSG production

tenures where there is overlap between these tenures. This means that, provided all other requirements are satisfied, an application for a production tenure for one resource (eg coal) will be granted even if it overlaps an existing exploration or production tenure for the other resource (eg CSG). This is achieved by “decoupling” the requirements which must be satisfied before a production tenure can be granted from the overlapping tenure framework;

- **right of way for coal:** subject to certain notice and information

sharing requirements, the MERA establishes a “right of way” for coal which operates by temporarily suspending the rights of a CSG tenure holder within pre-determined areas of a coal mining lease where sole occupancy is required for safe and efficient coal mining operations;

- **information exchange:** the MERA requires overlapping tenure holders to, at least once a year, exchange (on a confidential basis) information reasonably necessary to allow them to optimise the development and

use of coal and CSG resources in the overlapping area. This information includes operational and development plans, development and production goals, scheduling of activities, rehabilitation and environmental management, safety and health arrangements and location of infrastructure; and

- **bespoke agreements:** the statutory overlapping tenure regime will apply by default, however the MERA allows parties to negotiate their own bespoke agreements to manage overlapping tenement issues.

KEY LEGAL CONSIDERATIONS WHEN BUYING OR DEVELOPING AUSTRALIAN MINING PROJECTS

OVERVIEW

When a foreign buyer is considering the acquisition of an interest in an Australian mining project or the development of a new Australian mining project, there are a number of legal issues that should be taken into account.

These issues include:

- foreign investment approval;
- exploration and mining tenure;
- competing resources;
- landholder issues;
- native title;
- cultural heritage;
- environmental approvals and assessment;
- planning
- rail, port, electricity and water access;
- competition issues;
- royalties; and
- employee relations and skilled labour.

Depending on the structure of the transaction, corporate and tax issues may also require consideration.



FOREIGN INVESTMENT APPROVAL

The Australian Government welcomes foreign investment into Australia and recognises the substantial contribution it makes to the development of Australia.

Foreign investment in Australia is regulated and notifiable foreign investment proposals are required to be reviewed by the Australian Treasurer against the national interest on a case-by-case basis. In practice it is very rare for a proposal to be refused approval, however, foreign investors wishing to successfully navigate Australia's foreign investment regulatory regime need to understand not only the letter but the spirit of the regime. Adopting a clear commitment to Australia's foreign investment regime from the outset is critical to facilitate timely approval.

A more generous investment regime applies to investors from the United States, New Zealand, Korea, Chile and Japan, reflecting the terms of Australia's free trade arrangements (FTAs) with those nations. Following the conclusion of negotiations for the China-Australia Free Trade Agreement (CHAFTA) in November 2014, Chinese private investors will also receive preferential treatment on ratification of the CHAFTA and the subsequent change to the foreign acquisitions and takeovers legislation.

OVERVIEW OF FOREIGN INVESTMENT REGULATION

Framework

Foreign investment regulatory framework in Australia is comprised principally by:

- Foreign Acquisitions and Takeovers Act 1975 (Cth) (**FATA**)
- Foreign Acquisition and Takeovers Regulations 1989 (Cth) (**Regulations**)
- Australia's Foreign Investment Policy (**Policy**) which is issued by the Australian Government.

The Policy provides an indication to investors of the Australian Government's approach to foreign investment and likely application of the FATA. While elements of the Policy are a restatement of what is contained in FATA and the Regulations, certain aspects of the Policy (such as the national interest considerations and the requirements on foreign government investors) are not dealt with in FATA. While on a strict legal view these aspects of the Policy which are not addressed in FATA have no legislative force, given the significant discretion of the Australian Treasurer under FATA and the practical powers of the Government to refuse to grant necessary ministerial or other approvals under Commonwealth legislation, the Policy is, and should be complied with by investors as if it has, the force of law.

Regulators

Foreign investment is regulated by:

- The Australian Treasurer who is responsible for the foreign investment framework and reviews investment proposals against the national interest on a case-by-case basis; and
- The Foreign Investment Review Board (**FIRB**), a non-statutory body which advises the Treasurer on the foreign investment regime and is responsible for the day-to-day administration of the regime, together with the Board Secretariat that is within the Commonwealth Treasury. In practice, FIRB examines notifiable foreign investment proposals and makes recommendations to the Treasurer.

WHO SHOULD CONSIDER THE REGIME?

Foreign persons

FATA and the Policy apply to "foreign persons". Broadly, a "foreign person" means:

- a natural person not ordinarily resident in Australia;
- a corporation in which a natural person not ordinarily resident in Australia or a foreign corporation (together with any associates) holds at least a 15 per cent controlling interest;

KEY LEGAL CONSIDERATIONS WHEN BUYING OR DEVELOPING AUSTRALIAN MINING PROJECTS

- a corporation in which two or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, (together with any associates) hold at least a 40 per cent aggregate controlling interest; or
- the trustee of a trust estate, in which a natural person not ordinarily resident in Australia or a foreign corporation holds (together with any associates) a beneficial interest in at least 15 per cent of the corpus or income of the trust estate, or two or more foreign persons hold (together with any associates) beneficial interests in at least 40 per cent of the corpus or income of the trust estate.

When calculating interests held or controlled by a person, the interests of the person's associates are also taken into account, which includes spouses, parents, children, officers of corporations and employees.

Prescribed foreign investors

Australia has entered into various FTAs with other countries, including the USA, New Zealand, Singapore, Thailand, Chile, Malaysia, China, Japan and Korea to provide for the immediate elimination or phasing out of customs duties on bilateral trade between Australia and the relevant country counter-party. In addition, depending upon the particular FTA, significant commitments are made concerning trade in services, foreign investment, intellectual property rights,

government procurement, customs formalities, technical barriers to trade, telecommunications, business migration, competition policy and the environment. The Australian Government is also currently negotiating economic partnership agreements with India and Indonesia.

The current "prescribed foreign investors" are investors from the US, New Zealand, Korea, Chile and Japan by reason of Australia's FTAs with these countries and China will soon be added to this preferential list. US Investors, NZ Investors, Korean Investors, Chilean Investors and Japanese Investors are defined broadly to include nationals or permanent residents of those countries, entities constituted or organised under the laws of those countries or branches of entities that are not constituted or organised in those countries but are carrying on business activities in that country.

Prescribed foreign investors are subject to the same regulatory requirements as other foreign persons, except that they are afforded more favourable treatment because higher monetary thresholds apply to certain investments directly from the prescribed country to Australia, ie no interposed entity. These higher thresholds reflect the obligations that Australia has under FTAs to afford favourable treatment to the investors from the relevant counter-party country.

Foreign governments and their related entities

Direct investments by foreign governments and their related entities (including state-owned enterprises (**SOEs**) and sovereign wealth funds (**SWFs**) are assessed on the same basis as private sector investment proposals. However, the Treasurer also takes into account a number of additional factors in respect of an investment proposal by a foreign government or a related entity (see below).

NOTIFICATION REQUIRED UNDER FATA AND THE POLICY

FATA and the Policy require notification to FIRB of proposals by foreign persons depending on the identity of the investor, the type of investment, the industry sector and the value of the proposed investment. All notifiable proposals require prior approval by the Treasurer.

A failure to comply with Australia's foreign investment regime has significant and serious consequences for a foreign investor and its officers. Substantial civil and criminal penalties are imposed for breach of the FATA. The Treasurer also has extensive powers to divest or unwind transactions that are subsequently found to be contrary to the national interest.

The transactions set out below should therefore be made conditional on foreign investment approval.

Type of Investment	Foreign investors	Foreign government investors (SOEs or SWFs)	Prescribed foreign investors (US, NZ, Japan, Korea, Chile)
Real estate (interests arising under leases, financing and profit sharing arrangements)			
Vacant land	Must be notified regardless of value	Must be notified regardless of value	Must be notified regardless of value
Residential real estate	Must be notified regardless of value	Must be notified regardless of value	Must be notified regardless of value
Developed commercial real estate	A\$5 million (heritage listed) A\$55 million (not heritage listed)	Must be notified regardless of value	A\$1,094 million
Shares or units in Australian urban land corporations or trust estates	Must be notified regardless of value	Must be notified regardless of value	Must be notified regardless of value
Rural land (used wholly and exclusively for carrying on a business of primary production)	A\$252 million	Direct investments must be notified regardless of value	A\$1,094 million
Companies / businesses			
Acquisition of a substantial interest in an Australian business or corporation	\$252 million (value of the total business or corporation)	Direct investments must be notified regardless of value	A\$1,094 million, except for investments in prescribed sensitive sectors which are subject to a A\$252 million threshold
Acquisition of a primary production business (acquiring rural land)	A\$252 million	Direct investments must be notified regardless of value	A\$1,094 million
Proposal to invest 5% or more in the media sector	Must be notified regardless of value	Direct investments must be notified regardless of value	Must be notified regardless of value
Prescribed sensitive sectors	N/A	N/A	A\$252 million
Starting a new business eg incorporating a company	N/A	Direct investments must be notified regardless of value	N/A
Banking and finance			
Lending		N/A	
Taking security		<p>Banks regulated by the Australian Prudential Regulation Authority (APRA) as Authorised Deposit-taking Institutions (ADIs) will be required to notify where a security interest is enforced, but only if the banks (1) gain control over the assets, and (2) retain the assets for more than 12 months.</p> <p>For banks not regulated by APRA, entry into the security agreement requires prior approval required if money lending is not in the ordinary course and not an ADI.</p>	

Notes

i) Threshold figures are indexed on 1 January annually against the Australian Consumer Price Index (the most widely accepted measure of inflation in Australia).

ii) Some exemptions apply to the requirement to notify for proposed acquisitions of real estate.

KEY LEGAL CONSIDERATIONS WHEN BUYING OR DEVELOPING AUSTRALIAN MINING PROJECTS

NATIONAL INTEREST

Under Australia's foreign investment regime, the Treasurer, on behalf of the Australian Government assesses foreign investment proposals against national interest on a case-by-case basis. The Treasurer can block proposals that are contrary to the national interest or apply conditions to a proposed investment to ensure they are not contrary to the national interest. The onus is on the Treasurer to form a view that the proposed investment is contrary to the national interest.

The broad criteria for the "contrary to the national interest" test were deliberately not enshrined in the legislation to ensure that the test is interpreted and applied in a flexible manner by the government of the day.

Direct investments by foreign governments and related entities

Direct investments by foreign governments and their related entities (including SOEs and SWFs) are assessed on the same basis as private sector investment proposals. In addition, the Australian Government also considers the following factors in respect of a proposal involving a foreign government or a related entity:

- whether the investment is commercial in nature or whether the investor is pursuing broader political or strategic objects that may be contrary to Australia's national interest;

The Government typically considers the following factors when assessing foreign investment proposals:

FACTOR	EXPLANATION
National security	The extent to which the investment affects Australia's ability to protect its strategic and national interests.
Competition	Whether investment may result in the foreign investor gaining control over market pricing and production of a good or service or affects diversity in ownership and competition within Australian or global industries.
Government policies	The extent to which the investment is consistent with the Government's policy objectives and the impact the investment may have on Government revenues.
General economy and community	A range of factors including the nature of funding of the investment, Australian participation in the target enterprise following investment and the interests of employees, creditors and other stakeholders.
Character of the investor	The extent to which the foreign investor operates on a transparent commercial basis and is subject to adequate and transparent regulation and supervision. The corporate governance practices of the foreign investor will also be considered.

- for a partially privatised potential investor: the size, nature and composition of any non-government interests and any restrictions on the exercise of their rights as interest holders; and
 - any investment proposals not operating on a fully arm's length and commercial basis.
- Investment proposals from foreign government entities operating on an arm's length and commercial basis are less likely to raise national interest concerns. Other mitigating factors which assist in determining that a proposed foreign investment is not contrary to national interest include:
- existence of external partners or shareholders in an investment;
 - level of non-associated ownership interests;
 - governance arrangements for the investment;
 - ongoing arrangements to protect Australian interests from non-commercial dealings;
 - future or continuous listing of the investment target on the ASX or another recognised exchange; and
 - size, importance and potential impact of an investment.

MINING TENEMENTS

- FATA defines an “interest in Australian urban land” sufficiently broadly that it can include an interest in certain types of mining tenements.
- The following table sets out which mining interests will require FIRB notification and approval and the relevant thresholds that apply.

APPROVAL PROCESS

Under FATA the Treasurer examines investment proposals and may:

- prohibit a proposed investment which the Treasurer decides would be contrary to the national interest; or
- raise no objections to an investment subject to the satisfaction of particular conditions which the Treasurer regards as necessary to address any national interest concerns.

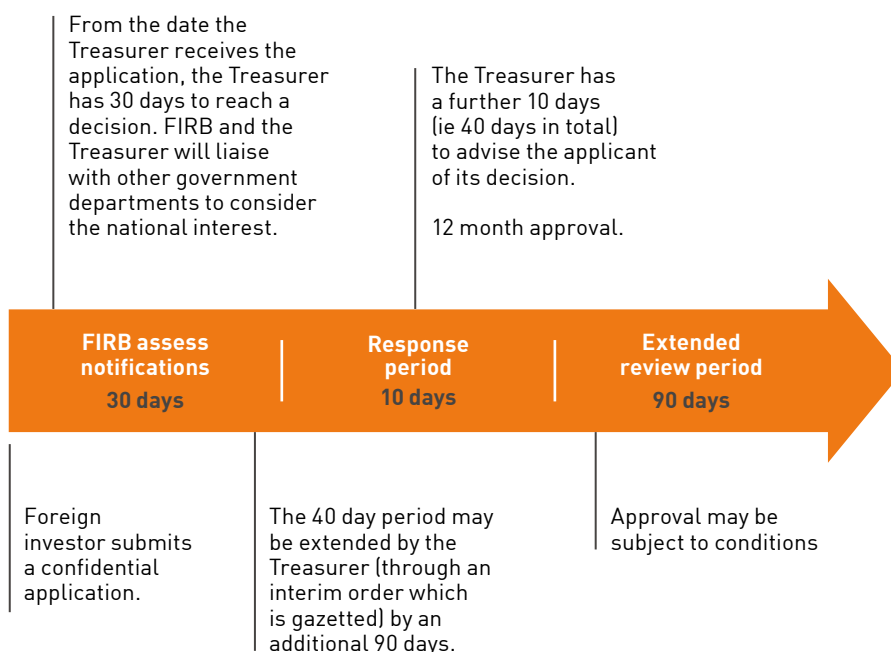
However, even if a proposal is approved under FATA or the Policy, other legislation must also be complied with, including the takeover provisions of the *Corporations Act 2001* (Cth), the *Trade Practices Act 1974* (Cth) and other legislation and Government policy applicable to special industry sectors, including broadcasting, insurance, banking, airlines and transport, shipping and telecommunications.

The process for obtaining FIRB approval is represented in following flowcharts.

Investor	Exploration tenement*	Mining lease	Mining joint venture (incorporated or unincorporated)	Operating mine
Foreign investors	x	✓ Must be notified regardless of value	✓ Must be notified regardless of value	✓ A\$55 million
Foreign government investors (SOEs or SWFs)	✓ Must be notified regardless of value	✓ Must be notified regardless of value	✓ Must be notified regardless of value	✓ Must be notified regardless of value
Prescribed foreign investors (US, NZ, Japan, Korea, Chile)	x	✓ Must be notified regardless of value	✓ Must be notified regardless of value	✓ A\$1,094 million

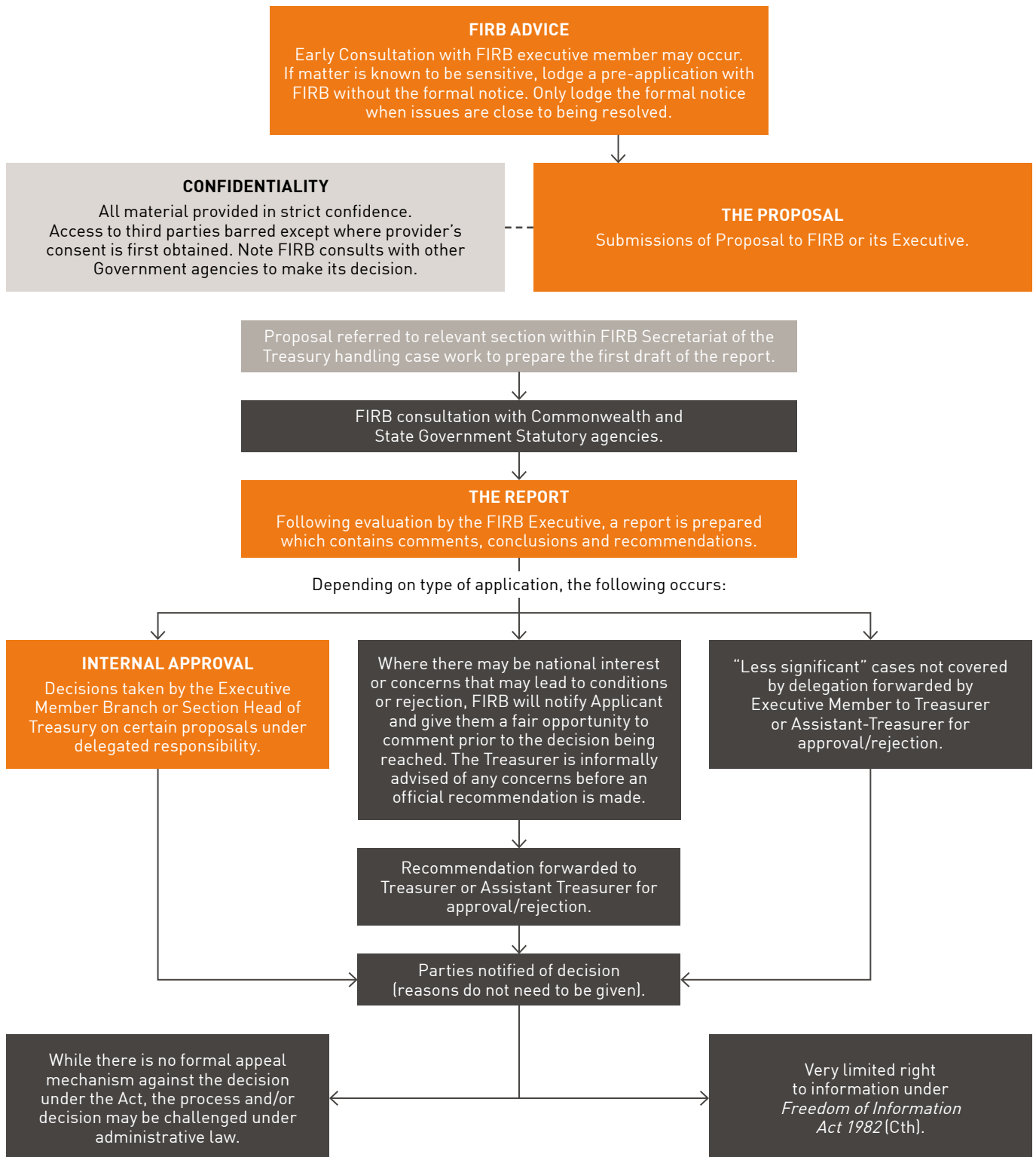
* If an exploration tenement gives the holder an exclusive right to occupy land and is likely to exceed a term of 5 years, FIRB notification and approval will be required.

Figure 33 – Timeframe for FIRB review



KEY LEGAL CONSIDERATIONS WHEN BUYING OR DEVELOPING AUSTRALIAN MINING PROJECTS

Figure 34 – FIRB process for applicants



Flexible approach

FIRB works with investors to guide them through the examination process and encourages early engagement (particularly when first proposing to invest into Australia and for significant investment proposals or investment into sensitive sectors). FIRB also welcomes questions if an investor is unsure as to whether prior notification is required. Providing complete and accurate information about a proposal when lodging applications will minimise potential

delays. If a proposal raises potential national interest concerns, FIRB will discuss these concerns with the applicant and provide them with an opportunity to comment and/or to propose potential mitigating actions. This flexible approach maximises investment flows while at the same time enabling the Government to consider and respond to community concerns about foreign ownership.

It is unusual for the Government to prohibit a transaction. To facilitate the process, it is important that a foreign investor who is looking at a significant proposal:

- respect the process and consult with FIRB and the Treasurer prior to any public announcement;
- appreciate and manage community sensitivities as needed;
- develop a whole of stakeholder strategy which engages key political and community players; and
- proactively identify and seek to address potential national interest concerns (if any).

EXPLORATION AND MINING RIGHTS

In Australia the right to explore for and mine minerals arises under statutory licences which are granted by the relevant State or Territory Government.

While the mining laws of each State and Territory of Australia are different, they do have many similarities.

EXPLORATION RIGHTS

The right to explore for minerals is granted pursuant to an exploration permit or licence¹⁵⁷ and the associated environmental authority, which authorise the holder to go onto the land specified in the permit or licence for the purpose of exploring for minerals.

In some Australian jurisdictions, exploration permits or licences can only be granted following the call for tenders from the Minister, while in other jurisdictions, an “over the counter” application process applies.

Exploration permits or licences are usually granted for five years, but they can be renewed. There is no cap on the total length of the term of an exploration permit or licence and any renewals except in the Northern Territory, where there is a ten year limit, and Victoria, where there is a 15 year limit.

Exploration permits or licences often cover very large areas of land, but the holder is usually required to periodically relinquish parts of the exploration area so that the area of the exploration permit or licence gets smaller over time.

Exploration permits or licences will usually contain conditions which require the holder to carry out certain specified exploration works, to a certain value, for each year of the exploration permit or licence. These work obligations and expenditure commitments are usually set by the relevant Government Department in consultation with the holder of the permit or licence.

The holder of an exploration permit or licence is required to give the owner / occupier of the underlying land prior notice of entry onto the land, including details of the exploration activities to be carried out and the timing of those activities. The holder of the exploration permit or licence will also be required to compensate the owner / occupier of the land for any impacts of the exploration activities.

Sometimes compensation must be determined in advance of the exploration activities taking place, and in other cases after the activities have taken place. There are certain sensitive areas of land (such as land close to a homestead or water storage facility) which the holder of an exploration licence is not entitled to enter without the consent of the owner of the relevant land.

There is an annual fee payable for an exploration permit or licence which is usually based on the area of the permit or licence. The fee is

KEY LEGAL CONSIDERATIONS WHEN BUYING OR DEVELOPING AUSTRALIAN MINING PROJECTS

a nominal amount. There is also a nominal fee for an application for the initial grant, or subsequent renewal, of an exploration permit or licence.

The holder of an exploration permit or licence will be required to provide to the relevant government department security for the performance of the holder's obligations under the exploration permit or licence and environmental authority (including obligations under relevant mining and environmental laws). The security is usually in the form of a bank guarantee, and is for a relatively nominal amount.

The holder of an exploration permit or licence will need to comply with its rehabilitation obligations in relation to land affected by its exploration activities.

Exploration permits or licences can be held by one or more parties and interests in exploration licences can be transferred, subject to obtaining the prior consent of the relevant Government department/s.

Subject to obtaining any necessary FIRB approval, foreign parties are entitled to hold interests in exploration permits or licences, both on their own and as joint holders with others. In New South Wales, the Minister's written approval is required where a foreign investor will acquire the capacity to control at least 15% of the directors on the board, becomes entitled to exercise more than 15% of the vote in the general meeting, or holds more than 15% of the issued share capital of the permit or licence holder.

MINING RIGHTS

An exploration permit or licence does not give the holder a right to mine. If the holder of an exploration permit or licence discovers a commercially viable mineral deposit and wishes to mine, then the holder must apply for a mining lease.

A mining lease¹⁵⁸ and its associated environmental authority permits the holder to go onto the land stated in the mining lease for the purpose of mining. Mining leases are usually granted for longer periods of time (such as 15 to 30 years), and they can be renewed. There is usually no cap on the total length of the term of a mining lease and any renewals.

Before a mining lease can be granted, a number of legal issues will need to be addressed, including landholder compensation and consents (if applicable), native title, cultural heritage, environmental approvals and competing resource rights. Some of these issues are also relevant in relation to the grant of an exploration licence. These issues are discussed in further detail later in this publication.

It can take anywhere from nine months to several years to obtain the grant of a mining lease, depending on the particular circumstances.

There is an annual rental fee payable for a mining lease. The fee is a relatively nominal amount. There is also a nominal fee for an application for the initial grant, or subsequent renewal, of a mining lease.

The holder of a mining lease will be required to provide to the relevant government department security for the performance of the holder's obligations under the mining lease and environmental authority (including rehabilitation obligations

and other obligations under relevant mining and environmental laws). The security is usually in the form of a bank guarantee, and may be for a very significant amount.

The holder of a mining lease is required to progressively rehabilitate the land that has been affected by the mining activities in accordance with certain prescribed requirements and the terms of the holder's environmental authority.

Just like exploration permits and licences, mining leases can also be held by one or more parties and interests in mining leases can be transferred, subject to obtaining the prior consent of the relevant government department. Consent is usually easy to obtain.

Foreign parties are entitled to hold interests in mining leases, both on their own and as joint holders with others, subject to obtaining any necessary FIRB approval. Furthermore, in Queensland a foreign party can only hold a mining tenement through an Australian incorporated subsidiary or a foreign company registered as such under the Corporations Act.

If a foreign buyer wishes to buy an interest in an exploration permit or licence or a mining lease, or in a project or company which has an exploration permit or licence or a mining lease, then the buyer will need to carry out legal due diligence to confirm matters such as:

- the identity of the holder of the permit / licence / lease;
- the status of the permit / licence / lease (including the fact that it has been granted and is in good standing);
- the term of the permit / licence / lease and the date when it is due to expire;

- the conditions which attach to the permit / licence / lease (including, in the case of an exploration permit or licence, any work obligations and expenditure commitments);
- the land covered by the permit / licence / lease;
- the amount and form of the security held by the Department in relation to the permit / licence / lease; and
- the encumbrances (if any) which affect the permit / licence / lease.

COMPETING RESOURCES – OVERLAPPING TENEMENTS

For any project proponent, the issues that need to be considered when dealing with overlapping tenures are:

- whether the presence of an overlapping tenure means that additional processes need to be followed in a future tenure application; and
- whether the presence of an overlapping tenure imposes any limitations on the carrying out of activities.

The answer to each of these questions depends on the particular tenures involved.

COAL AND CSG OVERLAPPING TENURES

A number of Australian States have legislation which specifically allows exploration and production rights for coal to overlap with exploration and production rights for petroleum (including CSG). The purpose of this legislation is

to facilitate and encourage the commercial production of both coal and CSG wherever possible and to regulate the interaction where an overlap occurs.

For example, in September 2014, the Queensland Parliament passed the *Mineral and Energy Resources (Common Provisions) Act 2014* (Qld) (**MERA**) which sets out a new overlapping tenure regime for coal and CSG in Queensland. As noted above in the “Current Hot Topics” segment, the MERA:

- establishes a **direct path to the grant** of coal and CSG production tenures. This means that, provided all other requirements are satisfied, an application for a production tenure will be granted even if it overlaps an existing exploration or production tenure for the other resource. However safety management and development plans will need to be agreed between the competing production tenure holders before operations commence in the overlapping area;

- provides a **right of way for coal** which operates by temporarily suspending the rights of a CSG tenure holder within pre-determined areas of a coal mining lease where sole occupancy is required for safe and efficient coal mining operations. If the mining lease holder wants to accelerate mining, compensation for lost CSG production and the costs of relocating infrastructure may have to be paid to the CSG tenure holder. The MERA also eliminates the requirement under the preceding regime for a preference decision to be made by the Minister to “pick a winner” between coal and CSG production and decide whether to grant the production tenure or give priority to production of the other resource;
- facilitates **information exchange** by requiring overlapping tenure holders to exchange information reasonably necessary to allow them to optimise the development and use of coal and CSG resources in the overlapping area.

LANDHOLDER ISSUES

LANDHOLDER COMPENSATION

The statutory rights which allow the exploration and mining of minerals granted under the laws of the various States and Territories of Australia by way of exploration licences and mining leases are concurrent with (and do not displace) normal land ownership rights.

The ability to access private land to conduct exploration activities is closely regulated, and compensation must be paid to owners and occupiers of land for any damage or inconvenience caused by the exploration activities sometimes in advance of the activities being carried out.

In most cases owners and occupiers of land must be given prior notice of an intended entry onto the land to conduct exploration activities. In some jurisdictions an access and compensation agreement will need to be agreed with the landowner (or determined by the relevant Court) before disruptive exploration activities may be undertaken. In other cases the issue of compensation is left for determination until after the exploration activities have been carried out.

Generally, before a mining lease can be granted, the applicant for the mining lease must either:

- make compensation arrangements with the owners of the underlying land; or
- have compensation determined by the relevant State or Territory Court or Tribunal.¹⁵⁹

Mining companies will sometimes seek to buy the land underlying the project area as a means of simplifying all issues with landowners.

Compensation does not have to be agreed or determined in advance of the mining lease application being made.

Compensation must be agreed or determined with the landholder for every parcel of land which falls wholly or partly within the mining lease area, including any public roads.

Where compensation is agreed with a landholder, this will sometimes result in the mining company purchasing all or part of the landholder's land, depending upon the area of the landholder's land required for the mining lease.

If agreement cannot be reached with a landholder for the purchase of the land or compensation in respect of the use of the land, then the issue of compensation will be determined by a court. In most instances, courts cannot require the landowner to sell their land and so it is only the issue of compensation to be determined by a court.

It is quite common for mining companies to purchase the land, or pay landholders compensation under a compensation agreement, in an amount that is in excess of the fair market value of the affected land.

Where compensation is determined by a court, rather than by agreement between the parties, the large premiums over fair market value that are a feature of negotiated sales would not come into play. However, the need to have compensation

determined by a court may lead to significant delays and significant costs of the court proceedings.

MINING LEASES OVER RESERVES AND "RESTRICTED LAND" IN QUEENSLAND

In Queensland, the consent of landowners will generally be required if the mining lease application covers land which is a reserve (such as dedicated roads or other Crown reserves, or rail corridor land) or land within a certain distance of structures such as dams for water storage and permanent buildings (**restricted land**).

A foreign buyer interested in investing in a project or company which does not yet have a mining lease should identify whether landowner consent needs to be obtained. If the owner of restricted land does not consent to the grant of a mining lease, then that land cannot be included in the lease.

OBJECTIONS TO THE GRANT OF A MINING LEASE

In Queensland, when a mining company makes an application for a mining lease, it must give notice of that application to the public and to certain interested parties, such as the owners and occupiers of all underlying land.

At a certain point in the mining lease application process, interested parties including underlying landholders, neighbours and third parties, are given an opportunity to

lodge objections to the grant of the mining lease. Where objections are lodged, they will be reviewed by the Court before the Court recommends to the Government whether or not the mining lease should be granted.

It is possible that, even if compensation agreements are reached with the owners of all underlying land, other persons (such as the owners of neighbouring properties, environmental groups or other third parties) may still object to the grant of a mining lease. The making of objections to a mining lease application will, at the very least, have the effect of delaying the grant of the mining lease and often leads to additional conditions being imposed on the mining lease.

Where no objections are lodged in relation to a mining lease application (and certain other requirements are also met), the Court may dispense with a formal hearing of the mining lease application and in doing so expedite the grant of the mining lease. However, where an objection is lodged, a formal hearing of the mining lease application must take place, consequently delaying the grant of the mining lease.

Similar processes exist in the other states and territories requiring public notification of mining tenement applications and providing the right to object.

Amendments to the mining lease application procedure in Queensland have been made under MERA but not yet proclaimed in force. Essentially the amendments will:¹⁶⁰

- replace public notice of a mining lease application with notice only to owners and occupiers of the land over which the lease is to be granted (**subject land**), owners of access land, infrastructure providers for the subject land and the relevant local authority;
- limit the persons who are able to object to the owners of subject land, owners of access land or owners of adjacent land and the relevant local authority; and
- limit grounds of objection to a specified number of limited categories such as land use and management and the affect on current and prospective land use.

NATIVE TITLE AND CULTURAL HERITAGE

In order to conduct exploration or mining activities, it is necessary to address two separate legal requirements in relation to Aboriginal and Torres Strait Islander rights. They are:

- native title; and
- cultural heritage.

NATIVE TITLE

Native title is defined as the rights and interests that are possessed under the traditional laws and customs of Aboriginal and Torres Strait Islander peoples, and that are recognised by Australian law. In some areas, native title has been deemed to be “extinguished”, such as freehold land, but in other areas

native title continues to exist. Native title is protected and regulated primarily through the Native Title Act 1993 (Cth) (**NTA**), State native title legislation and the common law.

If native title exists in an area of land over which a mining lease application has been made, certain native title parties are given the “right to negotiate” with the mining lease applicant about how the applicant’s activities will affect the rights and interests of the affected native title parties. The mining lease cannot be granted until the applicant and the relevant native title party have come to an agreement as contemplated under the NTA or the National Native Title Tribunal (**NNTT**) has made a ruling about whether the mining lease

should be granted (and if so, on what conditions).

Exploration tenures can all be subject to the “right to negotiate” process although expedited procedures can sometimes apply.

Although the process is regulated by the NTA, the “right to negotiate” gives significant leverage to registered native title claimants to negotiate commercially advantageous outcomes.

Typically the agreements reached under the “right to negotiate” process will require payments to the registered native title claimants (such as annual payments during the life of the mining lease, or payment of royalties based on tonnage of mineral extracted), and

KEY LEGAL CONSIDERATIONS WHEN BUYING OR DEVELOPING AUSTRALIAN MINING PROJECTS

may also include terms relating to Aboriginal cultural heritage and Aboriginal employment quotas, training and scholarships.

Under the “right to negotiate” process, if agreement cannot be reached, the NTA provides for determination of the matter by the NNTT. However an application for referral of the matter for determination cannot be made for at least six months from the commencement of negotiations. Although the NNTT is required to resolve the matter as soon as practicable, it is not required to make a determination before six months from when the matter was referred to it. Therefore, resolution of the “right to negotiate” process, if it applies, can be lengthy, whether negotiated or resolved by the NNTT. An important feature of these negotiations is the statutory requirement to undertake the negotiations “in good faith”.

An expedited procedure may also be available to address native rights and interests in a manner that is quicker than the full “right to negotiate” process. Acts attracting the expedited procedure are those acts that are unlikely to interfere directly with community or social activities of the relevant native title parties, or to interfere with areas or sites of particular traditional significance to the relevant native title parties.

An applicant for a mining lease may also satisfy the requirements of the NTA through an Indigenous Land Use Agreement (ILUA) with the applicable native title parties. ILUAs are very flexible and can encompass a broad range of considerations. The NTA does not prescribe what can be included in an ILUA. Critically, ILUAs often provide for the native title party’s consent to possible

“Future Acts” (as defined in the NTA), such as the future grant of mining leases, or the construction of facilities. However, the ILUA process is entirely voluntary and there is no statutory timeframe for an agreement to be reached or recourse to an authoritative body to make a determination.

To some extent, the existence of a current registered native title claim over an area of land is not relevant to an assessment of the potential significance of native title for a mining lease application over the land in question. This is because the existence of native title is not dependent on a claim being made – the making of a claim is only a process by which native title is formally recognised. It must therefore be presumed that native title may exist in areas where it has not clearly been extinguished, unless a formal determination has been made by the Court that native title no longer exists in that area. Similarly, the existence of a native title claim over the area of an existing project is not relevant to the validity of the project approvals as native title would have been resolved at the time of grant of those approvals. Subsequent native title claims do not impact on project approvals that have already been validly granted (though they may have impact on the grant of any future approvals sought).

In the event of a mining lease application being made over an area where native title has not clearly been extinguished (and there has been no determination of native title by the Court), the NTA provides for a process of notification to enable claims to be made and registered. In those circumstances, the purpose of native title parties registering the claim would be to gain

access to the “right to negotiate” process. All registered native title claimants have a right to be a party to this process.

ABORIGINAL CULTURAL HERITAGE

Aboriginal cultural heritage is protected by State legislation (and to a lesser extent Commonwealth legislation) which imposes a broad “duty of care” on proponents of activities to take all reasonable and practicable measures not to damage Aboriginal cultural heritage. The protection afforded is separate from native title and applies irrespective of whether native title exists.

Generally, the Aboriginal “cultural heritage” that is protected by legislation includes matters such as human remains, rock-art and archaeological sites, and any areas or objects of significance to Aboriginal people because of their traditions or beliefs, or the history of the area. It is not necessary for the area to contain any markings or physical evidence of use or occupation; for example it could apply to a hill considered sacred by local Aboriginal people.

The cultural heritage duty of care may be satisfied in a number of ways. The most common methods are to enter into and comply with a cultural heritage management plan (**CHMP**) with the relevant Aboriginal parties, to comply with the “duty of care guidelines” or to enter into another agreement (for example a native title agreement or ILUA) which also deals with cultural heritage.

Generally, resolution of Aboriginal cultural heritage issues is not a prerequisite for the grant of mining tenures. Usually, Aboriginal cultural

heritage only needs to be resolved prior to the commencement of activities. An example of when Aboriginal cultural heritage is required to be resolved prior to the grant of a mining tenure is in the event of an application for a mining lease requiring an environmental impact statement where Aboriginal cultural heritage legislation in Queensland requires that the applicant enters into a CHMP with relevant Aboriginal parties for the area of the mining lease before it can be granted.

The Aboriginal cultural heritage legislation sets out a structured process and requirements for development of approved management plans. Even where the legislation does not require a CHMP, comparable plans or agreements about protecting cultural heritage are now entered into as a matter of course.

Depending on the scale of activities contemplated under the mining tenure applied for, mining companies will frequently conduct (and the Aboriginal parties will frequently expect that mining companies will conduct) a cultural heritage survey of the relevant areas. That will typically require the engagement of an anthropologist or archeologist acceptable to the Aboriginal party and several Aboriginal people with relevant knowledge to conduct the survey, and may take several weeks to a couple of months to complete. The results and recommendations of that survey will then feed into the terms of the management plan, which will typically include:

- relocation of moveable objects of significance and protection of other objects;
- protocols for management of any cultural heritage “finds” during establishment and operation of the mine;
- protocols for management of any finds of human remains;
- cultural training for mine employees;
- engagement of ‘cultural heritage monitors’ to supervise any activities which involve disturbance to the surface of the land or clearing of trees and objects from the surface; and
- possibly, the establishment of “no go zones” being areas in which activities cannot be carried out or an area otherwise left undisturbed.

Management plans can include ‘stop work’ provisions in the event of certain finds being made (such as human remains).

The mining lease applicant will be expected to bear all the Aboriginal party’s expenses in conducting the cultural heritage survey and in negotiating the management plan.

The process of negotiating an approved management plan generally takes a minimum of two months, and could potentially take ten months or more.

The management plan may be rolled-into, and form part of, any native title agreement required for the grant of the mining lease.

Aboriginal cultural heritage requirements for exploration activities

In order to undertake any exploration activities, it will be necessary to comply with the cultural heritage duty of care under which it may be necessary to negotiate a CHMP with relevant Aboriginal parties. However, a management plan may not be required for certain low-impact activities, activities within a relatively small confined area or activities in already highly disturbed areas, so long as various guidelines are complied with. However, any more intrusive activities such as larger scale drilling or bulk sampling are likely to require (at the least) consultation with local Aboriginal groups, and probably engagement of “cultural heritage monitors” to oversee the activity.

Duty of care in relation to Aboriginal cultural heritage

Because the Aboriginal cultural heritage legislation generally imposes a “duty of care” to take “all reasonable and practicable measures” not to harm Aboriginal cultural heritage, it is up to the person carrying out activities to ensure that this duty is discharged. A search of a Cultural Heritage Register (kept by relevant State and Territory Authorities) alone will not be sufficient to discharge that duty.

Failure to adequately discharge the duty of care can result in large penalties and ‘stop orders’ to prevent further harm. This can mean potentially significant delays to activities on the land and may adversely affect the reputation of the company.

ENVIRONMENTAL APPROVALS AND ASSESSMENT

Each Australian State has its own environmental legislation which requires that all resource activities in that State must be covered by an environmental approval or authority (**EA**) of some kind. In some States, (ie Western Australia), EAs can be administered by the same agency or government department that issues exploration and production tenures.

In addition, if the resource activities for a project are likely to impact on environmental matters classified as being of National Environmental Significance, then the project must be referred to the Federal Government under the national *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**). If the Federal Government determines that the project is a 'controlled action' (on the basis that it is likely to have a significant impact on Matters of National Environmental Significance (**MNES**), it will require assessment and approval under the EPBC Act.

Recently, the EPBC Act has been amended to include a new MNES, specifically for large coal mining development and coal seam gas development. The new MNES "trigger" is "Water Resources" which includes both surface and groundwater systems. Federal assessment of such projects can also involve review of assessment material relating to water resources by an Independent Expert Scientific Committee appointed under the EPBC Act. The State Governments can also seek advice from the Independent Expert Scientific Committee in their assessment.

The application and approval process for a State EA involves an assessment of the environmental impacts of the proposed resource activities and will generally involve, as part of the application, the preparation of an environmental management plan, a development plan, or operations plan which, together with the conditions of the EA, will govern the environmental aspects of the mining operation.

ENVIRONMENTAL IMPACT ASSESSMENT

In Australia, environmental assessment of a major resources project will invariably be undertaken through an Environmental Impact Assessment (**EIA**) process involving an Environmental Impact Statement (**EIS**). An EIS will generally only be required for larger scale mining operations or where there may be significant impacts. An EIS will generally not be required for exploration activities.

An EIS may be required in conjunction with an application for an EA or the obtaining of Federal Government approval under the EPBC Act. In some cases, the project proponent may prepare an EIS on a voluntary basis. There are a number of reasons why a proponent would elect to prepare an EIS voluntarily, including to ensure the approvals process proceeds with as much certainty as possible.

The EIS process and preparation of the EIS can however take a significant period of time to complete (up to two years). All EIS

processes involve public notification of the draft EIS which enables anyone to make submissions in relation to the draft EIS.

An EA application can proceed at the same time as the application for a mining lease but the EA cannot be granted until the EIS process is completed.

The purpose of an EIS is to assess likely impacts of the mining project on environmental values in the area (including, for example, any endangered regional ecosystem, any fauna habitat in the area, the effects of stream diversion and surface and groundwater systems) and to consider management measures to address those impacts. Ultimately the EIS will be used to assist the relevant Government Department in setting conditions for the EA or approval under the EPBC Act.

Each of the State Governments has bilateral agreements in place relating to the EIA processes. The agreements accredit the State-based EIA processes as an assessment process under the EPBC Act. Consequently, there would usually only be one EIS undertaken for a project, which would satisfy both State and Federal requirements. In general, both State and Federal Governments do try to coordinate their responses to project assessment to avoid duplication and inconsistent conditions.

An "approvals bilateral", by which State approvals processes may also be accredited for Commonwealth purposes may also be in operation.

ENDANGERED REGIONAL ECOSYSTEMS

The existence of 'endangered' and 'of concern' regional ecosystems has the potential to impede the obtaining of a mining lease and associated EAs over the areas covered by the endangered and of concern regional ecosystems.

However, the presence of an endangered regional ecosystem does not automatically mean that mining activities will be prohibited in these areas.

The extent to which interference with any endangered regional ecosystem may be permitted will be a matter entirely for assessment of the particular importance of

the vegetation, the management measures proposed by the proponent including possibly, re-vegetation with the same species or other 'offset' arrangements. No definite position can be confirmed in advance of the relevant assessment. However, mining activities have been permitted in areas of endangered regional ecosystems in the past.

PRESERVING AGRICULTURAL LAND AND REGIONAL PLANNING

Another issue that can be dealt with in the EIA process involves the potential conflict between the agricultural use of land under which mineral resources exist and the resource extraction. State laws have been developed to deal with these potential conflicts in different ways.

QUEENSLAND

Increasingly, regional planning initiatives are being adopted to better regulate potentially conflicting land uses. An example is the recent *Regional Planning Interests Act 2014* (Qld).

This legislation, which commenced operation from July 2014, establishes a new approval requirement, namely a "regional interest development approval" which is a pre-requisite to carrying out development in areas identified as being of "regional interest" under the legislation. Areas previously identified under the *Strategic Cropping Act 2011* (Qld) are included as areas of regional interest.

Areas of "regional interest" can include areas that contain priority

agricultural land, urban areas, and strategic environmental areas. These areas are required to be identified and mapped. Some exemptions apply to the need to obtain a regional interests development approval, for example where the impact is not expected to be significant and agreement with the relevant landowner can be reached.

NEW SOUTH WALES

The NSW Government recently "finalised" the implementation of its Strategic Regional Land Use Policy through further amendments to the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* (Mining SEPP).

The reforms require all proponents of proposed State significant mining and petroleum developments on Strategic Agricultural Land to obtain a "gateway certificate" from the Independent Mining and Petroleum Gateway Panel before a development application may be lodged.

There are two kinds of Strategic Agricultural Land:

- **biophysical strategic agricultural land** being land identified as having high quality soil and water resources capable of sustaining high levels of productivity. This land plays a critical role in sustaining the State's agricultural industry; or
- **critical industry cluster land** being land where there is a concentration of highly productive industries within a region that are related to each other, contribute to the identity of that region, and provide significant employment opportunities, such as viticulture and equine land.

Applications for gateway certificates must be referred to the Commonwealth Independent Expert Scientific Committee and the NSW Minister for Primary Resources for advice regarding the impact of the proposal on water resources. In considering applications, the Panel must have regard to advice provided by the Minister and the Committee. However, the Panel cannot refuse to grant gateway certificates; instead

KEY LEGAL CONSIDERATIONS WHEN BUYING OR DEVELOPING AUSTRALIAN MINING PROJECTS

it may only grant a certificate conditionally or unconditionally. A conditional gateway certificate is to include recommendations of the Panel and specify further studies to be undertaken by the proponent.

Following the grant of a gateway certificate, a project proponent may lodge an application for a development consent. Recent legislative amendments, which only apply to mining (not to petroleum

or CSG) applicants, mean the “significance of the resource” in terms of economic benefits to the State and the region is the “principal” consideration when assessing a development consent application.

ELECTRICITY AND WATER

ELECTRICITY

A reliable source of competitively priced electrical energy is important for any mining operation.

In many cases mining operations in Australia are connected to Australia’s national electricity grid via high voltage transmission and distribution powerlines.

New mining operations will often require new mine specific electricity distribution infrastructure to be constructed to deliver electricity to the mine site. In some cases upgrades to existing transmission infrastructure, or even new generating capacity, may also be required.

In more remote locations, on-site diesel generators may be used to provide the necessary electrical energy.

WATER

Australia is one of the driest continents on Earth, and ensuring a reliable long term supply of water is vital for any mining operation.

Depending upon the location of a mining project there may be various sources of water for mining purposes. This might include water from nearby dams or rivers, water from underground aquifers, or even waste water from coal seam gas operations or recycled water from sewerage treatment plants.

In order to take water from dams, rivers or underground aquifers, a permit is required from the relevant State authority, and it may also be necessary to enter into arrangements with a water pipeline operator to arrange for transportation of the water to

the mine site. Water permits will provide an entitlement to take up to a stated volume of water each year (in megalitres), but different water entitlements may have different priorities in times of water shortage, and a water permit often does not provide any guarantee that the stated volume of water will in fact be available in times of drought.

Waste water from coal seam gas operations and recycled industrial or sewerage water might be secured under contract with the relevant parties.

Water rights are generally tradeable, and can be bought and sold.

COMPETITION LAW

Australia's competition laws and regulations are relevant to many businesses participating in the Australian mining industry. Mergers and acquisitions, joint ventures, infrastructure investments and marketing arrangements may raise competition issues.

Cartel conduct is generally prohibited under the *Competition and Consumer Act 2010* (Cth). However, there are very specific circumstances in which cartel

arrangements may be allowed. For example, there is a limited exception in relation to certain types of joint venture arrangements. Alternatively, an entity may apply to the ACCC for formal authorisation of a proposed cartel agreement or arrangement. The ACCC's conditional authorisation of the joint marketing and sale of natural gas produced by the North West Shelf Gas Project is an example of such authorisation.¹⁶¹

Access to regulated infrastructure, including certain railway lines in Australia, may also raise competition issues which may need to be considered when investing in Australian mining projects.



TAXATION AND ROYALTIES

When examining any investment in the Australian mining industry, whether it is by way of the acquisition of an interest in a company which owns a mining project, or the acquisition of a direct interest in the assets and business of the mining project, it is necessary to consider the impact of the Australian taxation and royalty regimes in relation to the acquisition and the ongoing conduct of the mining activities.

TAXATION IN AUSTRALIA

The Australian taxation system is sophisticated and complex in terms of both its coverage and administration and cannot be explained briefly without omitting some details. The taxation system in Australia has also undergone, and is likely to continue to undergo, significant reform. Accordingly, the following comments should only be used as a guide to the range of tax imposts that are commonly relevant in conducting business operations in Australia. Foreign investors also need to consider the tax regime in their home jurisdiction and any Double Taxation Agreement (DTA) between Australia and that jurisdiction.

The current Coalition Federal Government has proposed further taxation reforms and is producing a White Paper on the Reform of Australia's Tax System, which is expected to be released by the end of 2015. The progress of any such reforms should also be monitored.

Each level of Government (Federal, State and Territory and Local Government) imposes its own taxes. The Federal Government imposes the most significant taxes such as income tax, Fringe Benefits Tax (FBT), Goods and Services Tax (GST), customs duties and excise duties.

State, Territory and Local governments do not impose taxes on income or capital gains. However, each State and Territory Government raises revenues by imposing various charges such as stamp duty, payroll tax and land tax as well as imposing royalties on the production of minerals from within its borders (see below). Each Local Government levies annual charges (rates) on the owners of real property in its jurisdiction.

INCOME TAX

The Federal Government imposes income tax.

Non-residents of Australia (including foreign companies) are, ordinarily, only taxed on income derived from sources in Australia and capital gains made from dealing with certain assets that have a substantial connection with Australia such as the sale of Australian real property (held directly or, in some cases, indirectly).

Residents of Australia (including Australian companies) are taxed on their worldwide income (that is, from sources both in and outside Australia).

A company incorporated in Australia, or which carries on business in Australia and has its central management and control in Australia, or its voting power controlled by shareholders who are residents of Australia, will be a resident of Australia for tax purposes.

Income tax is levied on "taxable income". Taxable income is the product of a taxpayer's assessable income less any allowable deductions. Assessable income includes "ordinary income" (eg. business and investment income) and "statutory income" (eg. capital gains). In broad terms, allowable deductions include any expenditure incurred in gaining or producing assessable income or in carrying on a business for that purpose. Where allowable deductions exceed assessable income for a year of income, a taxpayer incurs a tax loss. In general, tax losses from prior years can be carried forward indefinitely. In determining the future taxable income of a company, a tax loss may only be deducted against future assessable income if the company satisfies the "continuity of ownership" test or, in some cases, the "same business" test. Capital losses can only be offset against capital gains arising in the same or future tax years (but not carried back).

The utilisation of tax losses may be impacted by a company's entry into the tax consolidation regime (see below).

Rates of income tax

The current rate of tax for both resident and non-resident companies is 30 per cent. The Federal Government has proposed that the company tax rate be reduced to 28.5 per cent with effect from 1 July 2015. It has also been proposed that a 1.5 per cent levy be imposed on certain large companies to fund particular Federal Government initiatives, with the result that the effective tax rate for those companies will be unchanged. The progress of this proposal should be monitored.

Consolidation regime

Wholly-owned groups of Australian resident entities (including companies, partnerships and trusts, but excluding branches) may elect to form a consolidated group for Australian income tax purposes. The election is a "one-in-all-in" election, meaning that each wholly-owned subsidiary will automatically become a member of that group, and is irrevocable. The formation of a tax consolidated group will not have any impact on the status of the group members for the purposes of other Australian taxes (eg FBT).

The principal benefits of forming a tax consolidated group include the lodgement of only one Australian income tax return on behalf of the group, the ability to effectively disregard (for income tax purposes) any intra-group transactions (ie asset transfers, loans, payments of dividends, returns of capital) and the effective offset of losses attributable to the operations of a group member against the income

generated by other group members.

There are special rules that give foreign-owned groups which have entry points into Australia via multiple Australian holding companies flexibility in defining the consolidated group.

The Australian head company for the tax consolidated group is responsible for lodgement of the income tax return for the group and for paying the group's income tax liability. However, other members can be jointly and severally liable for the tax liabilities of the group if the head company defaults in paying those liabilities to the Australian Taxation Office (**ATO**). The risk of joint and several liability can be mitigated if all the members of the group execute a valid tax sharing agreement which (notionally) allocates the tax liabilities of the group to each of its members on a reasonable basis. In such circumstances, an individual member's liability if the head company defaults will be limited to its allocation of the income tax liability of the group as determined under the tax sharing agreement.

Tax on capital gains

The capital gains tax (**CGT**) rules set out prescribed events that may give rise to a capital gain or a capital loss. Net capital gains (after offsetting any available capital losses) are included in assessable income.

A capital gain will generally arise if the capital proceeds from the relevant CGT event exceed the cost base of the underlying asset. A capital loss will arise if the capital proceeds are less than the asset's reduced cost base (effectively the cost base of an asset excluding certain items, such as deductible

expenditure). Capital losses can only be offset against capital gains arising in the same year or carried forward to offset capital gains in future tax years (but not carried back) subject to satisfying certain conditions.

One event that may give rise to a capital gain or a capital loss is the disposal of a CGT asset. However, non-residents will only be subject to tax in Australia on capital gains derived from the sale of a limited class of assets known as "Taxable Australian Property".

In broad terms this includes Australian real property, leases of real property and mining, quarrying or prospecting rights and Australian business assets. The disposal of shares in a company or units in a unit trust by a non-resident investor may also be taxable in Australia if the investor (together with its associates) has a greater than 10 per cent interest in the company/trust and more than 50 per cent of the value of the company/trust is attributable to Taxable Australian Property.

Australian residents are generally subject to tax on capital gains derived in relation to their worldwide assets. However, the CGT rules will not apply to capital gains on shares held in non-resident companies, to the extent that the non-resident company has an underlying active business.

Generally, individuals and trustees of trusts (other than a trust that is a complying superannuation entity) may be entitled to discount the amount of their capital gain from a CGT event (ie. after taking into account current year or carry forward capital losses) by 50 per cent. A complying superannuation entity may reduce net capital

gains by 33.3 per cent. However, the CGT discount will only be available if the eligible entity has held the relevant asset for at least 12 months. Companies are not entitled to apply the discount.

As the CGT rules operate to include net capital gains in assessable income, companies are assessed on their capital gains at ordinary income tax rates (ie currently 30 per cent).

Thin capitalisation

Deductions for interest incurred by inbound investment vehicles (which can include an Australian company 40 per cent or more of whose shares are owned by a non-resident) and outbound investment vehicles (Australian entities investing overseas) may be limited under what are known as the Australian thin capitalisation rules.

Broadly speaking, a portion of interest (and related expenses) is denied as a deduction if the average debt of the Australian entity or operations exceeds 60 per cent of the average assets of that entity, or the entity's Australian operations, that is, a 1.5:1 debt to equity ratio (the "safe harbour" test). However, deductions relating to debt in excess of this level may be allowed if the entity can establish that an arm's length lender would have lent a higher amount to the entity, considered on a stand-alone basis (the "arm's length debt" test) or the entity is geared up to 100 per cent of the actual gearing of its worldwide group (the "worldwide gearing" test). Different tests apply to non-bank financial entities and Authorised Deposit-taking Institutions. It is important to note that even if the level of debt satisfies the safe harbour test, interest deductions may still be denied

under the transfer pricing rules if the interest rate is not arm's length (see below).

In mid-2013, the Federal Government commissioned a review by the Board of Taxation of the thin capitalisation arm's length debt test. The Board delivered its report to the government in December 2014. The Government has yet to release its response to the report but reforms may be announced in the future.

Debt / equity rules

Complex rules affect the taxation treatment of a variety of financial instruments. Under these rules, taxpayers are required to apply certain tests to determine whether an instrument will be classified as debt or equity for taxation purposes. The rules are designed to replicate the economic characterisation of an instrument and may, in some circumstances, differ from the accounting treatment of an instrument as being debt or equity.

Instruments which take the legal form of debt may be classified as equity for Australian taxation purposes and, as a result, payments of interest could be treated as dividends and may not be deductible. There may also be implications under the rules relating to the imputation of dividends (see below).

Alternatively, instruments which take the legal form of equity might be classified as debt for Australian tax purposes. In such circumstances dividends paid will be treated as interest (and potentially deductible), but will not be able to be franked. The classification of an instrument as either debt or equity will also be a relevant consideration for a taxpayer's thin capitalisation analysis.

The debt/equity rules have been the subject of a review conducted by the Board of Taxation. The Board provided the Federal Government with an accelerated report on a number of discrete aspects of the debt/equity rules in December 2014. The Government has yet to release its response to the report but reforms may be announced in the future.

Transfer pricing

Australia's transfer pricing regime has recently undergone considerable reform and is broadly aligned with the OECD transfer pricing guidelines. Taxpayers need to self-assess how the transfer pricing rules apply in respect of their dealings with foreign counterparties which will require analysis of whether those arrangements are on arm's length terms. Where the Commissioner of Taxation considers that an Australian taxpayer is not dealing with a foreign party (related or unrelated) at arm's length (including as to pricing), the transfer pricing rules allow reconstruction to replace all or part of the actual arrangements with an arm's length arrangement which may require an adjustment to the profits of the taxpayer.

The transfer pricing rules can apply to arrangements in respect of the provision or acquisition of services, goods and financing (eg loans). Importantly, taxpayers cannot have a "reasonably arguable position" – which is relevant to the application of penalties – unless they have appropriate transfer pricing documentation in place before the time by which the taxpayer lodges its tax return.

There are special rules allowing adjustments to be made to interest deductions under the transfer pricing rules even where the level of debt is within the thin capitalisation safe harbour. Adjustments can also be made under a DTA, particularly in relation to the allocation of income and expenses as between the head office and Australian branches of foreign companies.

Imputation of dividends

An imputation system applies to the taxation of companies resident in Australia and their shareholders.

Under this system, the payment of company tax gives rise to credits in the company's "franking" account. These credits can be attached to dividends paid by the company. Australian shareholders in receipt of these "franked" dividends can generally claim the credits against their own income tax liabilities.

Non-resident shareholders are not entitled to any credit or refund of the imputation credit in respect of franked dividends, but the fact that a dividend is franked does impact on whether Australian dividend withholding tax would apply to the payment of that dividend to non-resident shareholders (see below).

Withholding tax

Australian withholding tax can be imposed on dividends, interest and royalties paid by residents of Australia to non-residents. Under domestic law, the withholding tax rates are generally 30 per cent on dividends and royalties and 10 per cent on interest. However, if Australia has a DTA with the country in which the non-resident recipient resides, any lower rate specified in the DTA applies.

Under most DTAs, the rate on dividends is at least reduced to 15 per cent (China, Korea and India) and may be reduced further to nil or 5 per cent in others (United States and United Kingdom) depending on the circumstances. The rate on royalties may be reduced to 5 per cent (Japan, United States and United Kingdom), 10 per cent (China and India) or 15 per cent (Korea). Notwithstanding the above, no Australian dividend withholding tax will apply to the extent a dividend paid to a non-resident is franked under the Australian imputation system.

There is no branch profits remittance tax in Australia.

Certain other payments made to foreign residents that do not have a permanent presence in Australia may also be subject to Australian withholding tax. These include payments for entertainment, sports activities and construction, installation and upgrade of buildings, plant and fixtures.

Employers must also make PAYG withholding deductions from salaries or wages paid to employees, which are then remitted to the ATO.

Double taxation agreements

Australia has a comprehensive DTA network covering most of its major trading partners, including China, Korea, India, Japan, the United States and the United Kingdom. A notable exception is Hong Kong which is not covered by the agreement with China.

GST

In general, the supplier of goods or services is required to remit GST to the ATO equal to 10 per cent of the value of the goods or services supplied. An “input tax credit” will generally be available to a business that purchases goods or services for the GST component of the purchase price where both the recipient and supplier of the goods or services are registered for GST and a “tax invoice” has been provided to the recipient.

GST is also payable upon the importation of goods into Australia (usually by the importer).

A business is required to register for GST if it has an annual turnover of A\$75,000 or more. A branch of a foreign company is entitled to be registered for GST purposes. Businesses are required to account for GST to the ATO by lodging a Business Activity Statement monthly or quarterly (depending on the turnover of the business).

The liability for paying the GST is generally imposed on the supplier. Therefore, the supplier should determine its prices to take account of GST, or there should be a GST clause in all contractual arrangements which allows the supplier of a taxable supply to pass on its GST liability to the recipient.

Some supplies are “GST-free” and do not give rise to a GST liability to the supplier. Subject to satisfying prescriptive conditions, examples of supplies that may qualify as being GST-free include the export of goods or services from Australia, the supply of a business as a “going concern” and supplies of some farm land. Other supplies may be “input taxed” (eg financial supplies such as loans and the transfer of shares) such that no GST liability

arises for the supplier but there are limitations on the supplier’s ability to claim input tax credits on acquisitions it makes in order to make the supply.

Groups of related entities may be eligible to form a GST group and nominate a “representative member” to be responsible for recognising the GST liabilities and input tax credits in respect of supplies and acquisitions to and from entities outside the GST group. The representative member for the group is primarily responsible for the group’s GST liability. Other members can be jointly and severally liable for the GST liability of the group if the representative member defaults in making a payment to the ATO. A group may mitigate the risk of joint and several liability arising by each member of the group entering into a valid indirect tax sharing agreement.

STAMP DUTY

Stamp duty is levied in each State and Territory on certain transactions, such as:

- the granting of security in NSW, ie mortgage duty;
- the purchase of business assets in NSW, WA, Qld, SA and the NT, ie business transfer duty;
- the purchase of shares in unlisted NSW and SA registered companies or the purchase of units in unlisted trusts where the unit register is maintained in NSW or SA, ie marketable securities duty;
- in some jurisdictions, the purchase of interests in partnerships and trusts where the partnership or trust holds property located in that jurisdiction; and

- in all States and Territories, the direct transfer of land and interests in land (which can, depending on the jurisdiction, include fixtures, chattels, mining leases and rights).

(NSW proposes to abolish its mortgage duty, business transfer duty and marketable securities duty on 1 July 2016.)

In addition, an indirect transfer of an interest in land may be subject to either land rich duty (in Tasmania) or landholder duty (in the other States and Territories). In general terms, landholder/land rich duty is imposed on the acquisition of shares or units in entities that hold (either directly or indirectly through related entities) land assets of a particular value in that State or Territory. Landholder/land rich duty is effectively a “look through” tax that is imposed on an acquirer’s proportionate indirect interest in the value of the underlying land (and, in some jurisdictions, also goods) held by the target entity. The tests and thresholds that apply for determining when an entity is a landholder and when a liability is triggered varies between each jurisdiction, as well as by entity type.

SUPERANNUATION GUARANTEE CHARGE (SGC)

Under the SGC scheme, a charge is imposed on all employers who fail to provide a prescribed minimum level of superannuation support (ie retirement income) for employees, including certain foreign employees working in Australia. The superannuation contributions must be paid to a superannuation fund which complies with complex Australian legislation. The minimum

level is now 9.5 per cent of the employee's taxable remuneration (up to a ceiling). There are long term proposals to incrementally increase this rate until it reaches 12 per cent. If employers fail to provide the minimum level of superannuation support to their employees, they will then be liable for an SGC

amount equivalent to the shortfall plus an interest charge and an administration fee that is non-deductible. Foreign employees are able to withdraw any Australian superannuation (net of tax) upon their permanent departure from Australia.

ROYALTIES

In Australia, the production of minerals is governed by the legislation of the State or Territory in which the production occurs.

Each State and Territory has the power to impose State-based royalties on the production of minerals from within its borders. Royalties vary from State to State and, within States, royalties vary from mineral to mineral. Royalties can also vary depending upon the nature of the mining operation, and whether the minerals are for domestic or export consumption.

For most minerals, a fixed rate of royalty per tonne is often specified. Royalties for coal and iron ore, however, are calculated according to more complicated formulae. Petroleum royalties are also payable (eg. in New South Wales the royalty is payable at the rate of 10% of the 'well-head value' of the petroleum) which may be deductible expenditure for determining a project's PRRT liability (refer above).

By way of example, in the case of coal, the State based royalties in the major coal producing jurisdictions are:

- in **Queensland** – a royalty of between 7 per cent and 15 per cent of the value of the coal, with the percentage rate varying according to the sale price of the coal;
- in **New South Wales** – a royalty of either 6.2 per cent, 7.2 per cent or 8.2 per cent of the value of the coal, depending on whether the coal is recovered by deep underground (coal extracted below 400 metres), underground or open-cut mining; and
- in **Western Australia** – a royalty of A\$1 per tonne (indexed) for domestic coal, and 7.5 per cent of the value for export coal.

At the time of writing, the West Australian Government is reviewing its royalty system and it is anticipated that the findings of the review will be announced shortly.

In addition, in December 2014, the West Australian Government announced that it would provide a 50 per cent rebate to junior miners on iron ore royalties for up to 12 months, subject to the iron ore price remaining below a certain amount. The rebate is required to be repaid over up to two years.



EMPLOYMENT RELATIONS AND SKILLED LABOUR

MINIMUM EMPLOYMENT ENTITLEMENTS IN THE MINING INDUSTRY

The *Fair Work Act 2009* (Cth) (**FW Act**) is the primary piece of legislation governing employment in Australia. It applies to most employees in Australia, other than certain State public sector employees. The legislation establishes a number of instruments that determine the terms and conditions of employment for employees, including those engaged in the mining industry.

National employment standards

The FW Act contains ten minimum standards of employment known as the National Employment Standards (**NES**) which apply to all employees covered by the FW Act (including executives). These minimum standards relate to four weeks' annual leave (five weeks for shift workers), 10 days' personal / carer's leave, and compassionate leave, community service leave, unpaid parental leave, public holidays, long service leave, notice of termination and redundancy pay, reasonable maximum working hours, flexible working arrangements and the provision of an information statement to all new employees.

Modern awards

Supplementing the NES are "modern awards" made and updated by the Fair Work Commission (**FWC**) (Australia's principal industrial tribunal). Modern awards apply to employers and employees on an industry or occupation specific basis. The key modern awards in the mining industry are the *Black Coal Mining Industry Award 2010* (which covers coal mining), the *Coal Export Terminals Award 2010* (which covers

coal export terminals) and the *Mining Industry Award 2010* (which covers mining for metals, minerals or ores).

Modern awards are not intended to cover managers or senior employees, though some modern awards contain classifications that may capture such employees. For example, the classifications in the *Black Coal Mining Industry Award 2010* cover employees who hold 'staff' positions including statutory management positions such as Undermanager (in charge).

Enterprise agreements

The FW Act promotes bargaining at an enterprise level, and protects the role of trade unions in that process by allowing employers, employees and trade unions to negotiate terms and conditions of an agreement that applies specifically to the particular enterprise. Enterprise agreements are widely used throughout the mining sector, and provide the flexibility to determine site and/or employer specific terms and conditions of employment. Enterprise agreements have a maximum "nominal" term of four years, but will continue to operate until they are replaced or terminated.

In order to approve an enterprise agreement, the FWC must be satisfied it passes the 'better off overall test'. This requires that each employee covered by the enterprise agreement is, on balance, better off than they would be under the modern award that would otherwise apply to the employee's employment.

Generally, the terms of a modern award will not apply to an employee covered by an enterprise agreement while the agreement is in operation,

unless the parties 'call up' such terms.

Under the FW Act collective bargaining regime:

- employers may be required to collectively bargain for an enterprise agreement with their employees where the majority of their employees wish to do so;
- employees have the right to appoint a bargaining representative to undertake bargaining on their behalf. If an employee does not appoint a bargaining representative and is a member of a trade union, the trade union will be the default bargaining representative for the employee;
- employers, trade unions and employee representatives are required to bargain "in good faith"; and
- employees may lawfully engage in strikes or other industrial action in support of claims made during negotiations (which is known as "protected industrial action"), and employers may respond to such action by "locking out" the employees.

Where a company is establishing a new business or undertaking in Australia, it may be possible to enter into a "greenfields agreement" with one or more trade unions prior to employing any employees needed to conduct the business. This type of agreement allows an employer to conclude its terms without the risk of industrial action disturbing the commencement phase of a new project.

However, one of the major concerns for mining companies in Australia is the deadlock that often arises between employers and unions during the negotiation of

greenfields agreements, delaying the commencement of new projects. The Federal Government has proposed amendments to the FW Act to address this issue, including by providing a three month window within which greenfields agreements must be concluded or the FWC may approve an agreement if it is satisfied the agreement provides for pay and conditions consistent with prevailing pay and conditions within the relevant industry for equivalent work. However, it is unclear when the government will be able to pass these amendments to the FW Act, if at all.

LONG SERVICE LEAVE

In addition to the minimum entitlements set out in the NES, legislation in the States and Territories provide a general entitlement to long service leave for all employees who have completed the specified period of continuous service with their employer (with a pro-rata amount payable after a shorter period in some certain circumstances). Enterprise agreements can also provide for additional long service leave entitlements.

Employees in the black coal mining industry throughout Australia are subject to the *Coal Mining Industry (Long Service Leave) Administration Act 1992* (Cth). Under this Act, eligible employees are entitled to 13 weeks of long service leave after completing eight years of 'qualifying service'. This is a portable scheme, which means periods of qualifying service with different coal mining industry employers count towards an employee's total period qualifying service. The scheme is funded through employer contributions.

This means that for every eligible employee, the relevant employer must pay (on a monthly basis) 2.7% of the employee's monthly wage to the relevant fund.

SUPERANNUATION

Employers in Australia are required to make contributions to complying superannuation funds on behalf of their employees. The minimum contribution is currently 9.5% of each employee's earnings, and is scheduled to increase to 10% by 2021.

Enterprise agreements may contain additional superannuation entitlements.

INDUSTRIAL RELATIONS AND UNION ENGAGEMENT

The FW Act sets out a detailed framework for industrial relations issues, including powers to hear and determine disputes, to make orders suspending or stopping strikes and other forms of industrial action and to take other steps to intervene in and facilitate collective bargaining. The FWC has a key role in enforcing these laws.

Trade unions that are eligible to represent the industrial interests of employees in a workplace will also be entitled to enter that workplace to hold discussions with employees, and to investigate suspected breaches of legislation, awards or agreements. Union representatives also have a right in certain circumstances to enter workplaces where they have concerns regarding the health and safety of employees at the workplace. This "right of entry" is subject to a number of notification and procedural requirements.

EMPLOYMENT PROTECTIONS

The FW Act provides protection from unfair dismissal in certain circumstances, including if a modern award or enterprise agreement covers the employee and the employee has over six months' service, or 12 months' service if their employer is a small business. Senior or high income earners generally cannot access unfair dismissal, unless they are covered by an enterprise agreement or modern award.

There are also a range of protections contained in the FW Act which prohibit adversely affecting employees and others (including prospective employees) for reasons including a person's workplace rights (which is broadly defined to include making a complaint in relation to employment), industrial activity and grounds of discrimination. Prohibitions on discrimination in employment also exist in other Federal and State legislation.

TRANSFER OF BUSINESS

The FW Act contains rules that apply when there is a 'transfer of business', such as when there is a transfer of assets from one employer to another. Generally speaking, if there is a transfer of business, the industrial instruments that applied to an employee who transfers their employment will continue to apply to the employee and bind the new employer, subject to an order from FWC that can be sought on application by an employer, employee or union. The new employer may also be required to recognise the continuous

service and leave entitlements the employee accrued while working for the old employer.

HEALTH AND SAFETY

Health and safety in the mining industry is governed by a range of legislation at both State and Federal levels.

In most States and Territories, the mining industry is subject to recently enacted nationally harmonised work health and safety legislation (**WHS Laws**). Under the WHS Laws, there is a primary duty placed on persons conducting a business or undertaking (**PCBUs**) to ensure the health and safety of people at workplaces (whether employees or other workers, visitors or members of the public), and people affected by the PCBUs business or undertaking, so far as is reasonably practicable. The WHS Laws are backed by criminal penalties for non-complying companies, and in certain circumstances their directors and/or managers.

The mining industry is also subject to mine-specific legislation. For example, in New South Wales, the *Work Health and Safety (Mines) Act 2013* (NSW) and the *Work Health and Safety (Mines) Regulations 2014* (NSW) apply to mining operations. This additional legislation creates particular responsibilities for people in the mining industry and sets out specific powers and administrative arrangements.

WORKERS' COMPENSATION

Legislation in each State and Territory requires employers to hold workers' compensation insurance for their workers, which includes their employees and, in some circumstances, independent contractors. Workers' compensation insurance provides payments of compensation to workers for any time off work as a result of an injury sustained in the course of their employment, and any medical costs that arise as a result of the injury.

EMPLOYMENT OF FOREIGN WORKERS

Australian or overseas businesses can apply to sponsor an overseas skilled worker to fill nominated positions in Australia on a temporary basis if they cannot find an appropriately skilled Australian citizen or permanent resident to fill the position.

The Department of Immigration and Citizenship can issue a Temporary Work (*Skilled*) – *Standard Business Sponsorship (Subclass 457)* visa (**subclass 457 visa**) to skilled workers from outside Australia for this purpose. A subclass 457 visa is valid for a period of up to four years.

The employer sponsor must ensure that the terms and conditions of employment provided to a sponsored person are no less favourable than the terms and conditions the employer provides, or would provide, to an Australian citizen or Australian permanent resident to perform work in an equivalent position in the employer's workplace at the same location.

This includes paying market salary rates to overseas workers. In the mining industry, workers on subclass 457 visas are mostly business and science professionals, managers and engineers, but also include tradespeople such as fitters, machinists, welders and electricians.

In October 2014 the Federal Government announced changes to the 457 process, including less-stringent English language requirements, a fast track approval process for applicants considered "low risk" and a two year freeze on applicable income thresholds.

ENTERPRISE MIGRATION AGREEMENTS

In 2011 the Federal Government announced the implementation of Enterprise Migration Agreements (**EMAs**) as a temporary migration pathway to address skill needs for large-scale resource projects. EMAs are intended to provide quicker and more flexible immigration pathways for businesses looking to employ foreign workers, in return for a commitment to train Australian workers to meet future needs. The scope for EMAs responds to business concerns about the processing times and inflexibility of the 457 visa process. Further proposed guidelines for EMAs were issued by the Government in 2014.

DUE DILIGENCE ON AUSTRALIAN MINING PROJECTS

A large yellow mining truck is driving on a dirt road in a quarry. The truck is carrying a load of dark material, likely coal or iron ore. The background shows a steep, layered rock face. The scene is captured from a high angle, emphasizing the scale of the mining operation.

Due diligence is an important part of any M&A transaction in the mining sector in Australia.

Foreign buyers who have purchased mining interests in other parts of the world will find that due diligence in the Australian context is very similar to due diligence on a mining transaction elsewhere in the world.

Due diligence on a potential acquisition of a mining interest will typically cover:

- technical matters (such as resource quality and quantity, geological and geotechnical conditions, infrastructure, etc);
- commercial / financial matters;
- accounting / tax matters; and
- legal matters.

Buyers will typically draw upon expertise from within their own organisation, and supplement that with suitably qualified external advisers, to assist in the conduct of due diligence across each of the above areas.

LEGAL DUE DILIGENCE

The results of the legal due diligence will rarely be the deciding factor in the final decision to proceed or not proceed with a transaction. However, the conduct of legal due diligence is nevertheless a very important part of an M&A transaction, because legal due diligence will often uncover issues which:

- have a timing, value or risk impact (and therefore need to be taken into account in the financial model);
- need to be addressed in some way in the sale or bid documentation (in the case of

a private M&A deal as a condition precedent, indemnity, warranty or purchase price adjustment and in the case of public M&A as a walk away right); or

- need to be addressed, following completion of the acquisition, as an implementation or integration issue.

A foreign buyer should discuss with its lawyers, and clearly agree upfront, the scope of the legal due diligence that is to be carried out having regard to the objectives of the buyer and the nature of the acquisition. This would include agreement on a materiality threshold (if any), the documents to be reviewed, the searches to be carried out, any legal advice to be provided, and the form of due diligence report to be provided (for example, a short-form “exceptions based” report, or a long-form full legal due diligence report).

Foreign buyers should also agree with their lawyers whether they will be looking after tax, stamp duty and insurance issues. Often foreign buyers will have separate accounting and tax advisers who will look after tax and stamp duty issues, and separate insurance advisers who will look after insurance issues, so it is best to be clear about this up front.

Where the seller has prepared a data room containing information about the relevant mining project, the foreign buyer should agree with their lawyers which documents, or categories of documents, in the data room the lawyers are to review. Where the seller has not prepared a data room, lawyers

should help the buyer prepare a list of the information and documents that the foreign buyer should ask to see as part of their due diligence investigations. It may be in the context of a listed company that any due diligence is limited to publicly available information including information sourced from ASX announcements.

In addition, the foreign buyer’s lawyers should recommend the searches of public registers that should be carried out.

As the legal due diligence progresses, the foreign buyer’s lawyers will typically identify “gaps” in the available information, and will submit questions to the seller or its advisers to obtain additional information to help fill the gaps.

Where possible, the legal structure of the proposed transaction should be resolved before the conduct of the due diligence, because the transaction structure will impact on aspects of the accounting, tax and legal due diligence. However, it is not always possible to resolve the structure before the due diligence commences, and often the results of the due diligence will influence the choice of transaction structure.

When carrying out legal due diligence on a mining project, the foreign buyer’s lawyers will generally need to review materials relating to:

- corporate matters (although the extent of the records that need to be reviewed will depend upon the structure of the sale transaction and the number of corporate entities involved);

- farmin / farmout, joint venture or shareholder arrangements (where the mining project is owned by multiple parties);
- commodity sales / off-take and marketing / sales agency arrangements;
- infrastructure and services (including agreements for the supply and delivery of electricity and water, and access to road, rail and port infrastructure and services);
- private royalty (or commission) agreements;
- the supply of equipment, spares and consumables;
- the construction, operation and maintenance of the mine (including arrangements for drill and blast services, overburden removal, mining, processing, transporting, stockpiling, train loading, etc);
- mining tenure;
- environmental issues;
- other Governmental licences, permits and approvals;
- land tenure and landowner consents and compensation;
- native title;
- cultural heritage;
- employee, safety and superannuation (ie pension) matters;
- existing or threatened legal claims; and
- intellectual property and information technology.

In addition to reviewing materials provided by the seller which cover the areas outlined above, the foreign buyer's lawyers will generally recommend that they carry out a variety of searches, such as:

- company searches (of the seller and each other relevant corporate entity);
- mining tenure searches (for each relevant exploration licence and mining lease, and for overlapping petroleum, greenhouse gas storage or geothermal licenses);
- land tenure searches (for each parcel of land that is owned by the seller or project, or which underlies the mining leases);
- native title searches;
- cultural heritage searches;
- environmental searches; and
- court searches.

Upon completion of the review of the legal due diligence materials the foreign buyer's lawyers will prepare a written legal due diligence report. This might be a short-form "exceptions based" report, or a long-form full legal due diligence report, depending upon what the foreign buyer has agreed with their lawyers.

A full legal due diligence report will be much more detailed, and therefore longer, than an exceptions based report, and will contain more background information which can be helpful to a buyer who is not familiar with the legal and regulatory regime which governs mining projects in Australia.

Irrespective of whether the legal due diligence report is a short form or long form report, it should clearly set out issues identified by the lawyers that the foreign buyer may wish to address in the sale documentation, and the lawyers should recommend how each of those issues can be addressed. For example, in the case of a private M&A deal the lawyers may recommend that a specific condition precedent, indemnity or warranty be included in the sale agreement to address an issue.

GLOSSARY OF TERMS

A\$	Australian dollar
ABARE	Australian Bureau of Agricultural and Resource Economics
ASIC	Australian Securities and Investments Commission
ASX	Australian Securities Exchange
ATO	Australian Taxation Office
AWA	Australian Workplace Agreement
BREE	Bureau of Resources and Energy Economics
CGT	Capital Gains Tax
CHMP	Cultural heritage management plan
Corporations Act	<i>Corporations Act 2001</i> (Cth)
DEHP	Department of Environment and Heritage Protection
DNRM	Department of Natural Resources and Mines
DTA	Double Taxation Agreement
EA	Environmental approval or authority
EDR	Economic Demonstrated Resource
EIA	Environmental Impact Assessment
EIS	Environmental Impact Statement
EM Plan	Environmental Management Plan
EMA	Enterprise Migration Agreement
EPBC Act	<i>Environment Protection and Biodiversity Conservation Act 1999</i> (Cth)
FATA	<i>Foreign Acquisitions and Takeovers Act 1975</i> (Cth)
FBT	Fringe Benefits Tax
FIRB	Foreign Investment Review Board
FTA	Free Trade Agreement
FW Act	<i>Fair Work Act 2009</i> (Cth)
FWC	Fair Work Commission
GST	Goods and Services Tax
ILUA	Indigenous Land Use Agreement
ISP	Independent Scientific Panel
ITSA	Indirect tax sharing agreement
LNG	Liquefied natural gas
M&A	Mergers and acquisitions
MERA	<i>Mineral and Energy Resources (Common Provisions) Act 2014</i> (Qld)
MNES	Matter of National Environmental Significance

MPCCC	Multi-Party Climate Change Committee
MRA	<i>Mineral Resources Act 1989</i> (Qld)
MRRT	Minerals Resource Rent Tax
Mt	Million tonnes
Mtpa	Million tonnes per annum
NCIG	Newcastle Coal Infrastructure Group
NES	National Employment Standards
NTA	<i>Native Title Act 1993</i> (Cth)
NNTT	National Native Title Tribunal
OECD	Organisation for Economic Co-operation and Development
PAYG	Pay-As-You-Go
PCI	Pulverised Coal Injection
PRAIC	Pilbara Rail Access Interdepartmental Committee
SCL	Strategic cropping land
SGC	Superannuation Guarantee Charge
SOE	State owned enterprise
SWF	Sovereign wealth fund
US\$	United States dollar
WHC	UNESCO World Heritage Committee
WHS	Work health and safety
WICET	Wiggins Island Coal Terminal

FOOTNOTES

- 1 International Monetary Fund, *World Economic Outlook* (April 2015), <http://www.imf.org/external/Pubs/ft/weo/2014/01/pdf/text.pdf>, page 55.
- 2 World Economic Forum, *The Global Competitiveness Report 2014-2015* (September 2014), <http://www.weforum.org/reports/global-competitiveness-report-2014-2015>, page 13.
- 3 World Economic Forum, *The Global Competitiveness Report 2014-2015* (September 2014), <http://www.weforum.org/reports/global-competitiveness-report-2014-2015>, page 18.
- 4 Australian Government Department of Foreign Affairs and Trade, <http://www.dfat.gov.au/fta/> (accessed 18 August 2014).
- 5 Geoscience Australia, *Australia's Identified Mineral Resources 2013* (June 2014) page 29.
- 6 Geoscience Australia, *Australia's Identified Mineral Resources 2013* (June 2014) page 27: there are locally important coal mining operations at Collie in Western Australia, Leigh Creek in South Australia and at Kimbolton and the Fingal Valley in Tasmania.
- 7 Geoscience Australia, *Australia's Identified Mineral Resources 2014* (2014) page 4.
- 8 Geoscience Australia, *Australia's Identified Mineral Resources 2014* (2014) page 4.
- 9 BREE, *2014 Australian Energy Update* (July 2014) page 13: 55.9% of Australian energy production comes from the production of black coal.
- 10 BREE, *Resources and Energy Quarterly* (December Quarter 2014) page 10.
- 11 Geoscience Australia, *Australia's Identified Mineral Resources 2014* (2014) page 4.
- 12 Geoscience Australia, *Australia's Identified Mineral Resources 2013* (June 2014) page 32; Geoscience Australia, *Australia's Identified Mineral Resources 2014* (2014) page 4.
- 13 BREE, *Resources and Energy Quarterly* (December Quarter 2014) pages 25 and 30.
- 14 BREE, *Resources and Energy Quarterly* (June Quarter 2014) page 82.
- 15 BREE, *Resources and Energy Quarterly* (September Quarter 2014) page 43.
- 16 BREE, *Resources and Energy Quarterly* (December Quarter 2014) page 25.
- 17 BREE, *Resources and Energy Quarterly* (September Quarter 2014) page 53.
- 18 BREE, *Resources and Energy Quarterly* (December Quarter 2014) page 30.
- 19 BREE, *Australian Bulk Commodity Exports and Infrastructure – Outlook to 2025* (July 2012) page 3.
- 20 BREE, *Energy in Australia 2013* (May 2013) page 65; BREE, *Australian Energy Projections to 2049-50* (November 2014) page 42; BREE, *Resources and Energy Quarterly* (December Quarter 2014) pages 24 and 30: Australia accounts for 27% of world black coal exports.
- 21 BREE, *Resources and Energy Quarterly* (December Quarter 2014), pages 10, 25, 30 and 67.
- 22 BREE, *Resources and Energy Quarterly* (June Quarter 2014), pages 83 and 87.
- 23 BREE, *Resources and Energy Quarterly* (December Quarter 2014), pages 10 and 67.
- 24 BREE, *Resources and Energy Quarterly* (December Quarter 2014) page 24 – forecast.
- 25 BREE, *Resources and Energy Quarterly* (December Quarter 2014) page 30 – forecast.
- 26 BREE, *Resources and Energy Quarterly – June Quarter 2014* page 82.
- 27 BREE, *Energy in Australia 2013* (May 2013) page 66.
- 28 BREE, *Resources and Energy Quarterly* (December Quarter 2014) page 67.
- 29 BREE, *Resources and Energy Quarterly* (December Quarter 2014) page 67.
- 30 BREE, *Resources and Energy Statistics* (2014) page 47; ABS, *International Trade, Australia*, category no. 5465.0, Canberra; Department of Foreign Affairs.
- 31 BREE, *Resources and Energy Quarterly* (December Quarter 2014) page 24.
- 32 BREE, *Resources and Energy Quarterly* (December Quarter 2014) pages 24 and 25.
- 33 BREE, *Resources and Energy Quarterly* (December Quarter 2014) page 25.
- 34 BREE, *Resources and Energy Quarterly* (September Quarter 2014) page 43.
- 35 BREE, *Resources and Energy Quarterly* (December Quarter 2014) page 26.
- 36 BREE, *Resources and Energy Quarterly* (December Quarter 2014) page 26.
- 37 BREE, *Resources and Energy Quarterly* (December Quarter 2014) page 30.
- 38 BREE, *Resources and Energy Quarterly* (December Quarter 2014) page 30.
- 39 BREE, *Resources and Energy Quarterly* (December Quarter 2014) page 26.
- 40 BREE, *Resources and Energy Quarterly* (December Quarter 2014) page 29.
- 41 BREE, *Resources and Energy Quarterly* (September Quarter 2014) page 54.
- 42 BREE, *Australian Energy Projections to 2049-50* (November 2014) page 42.
- 43 BREE, *Australian Energy Projections to 2049-50* (November 2014) page 42.
- 44 BREE, *Australian Energy Projections to 2049-50* (November 2014) page 42.
- 45 BREE, *Promoting Australian Prosperity – Sustaining the Boom with Export Infrastructure* http://www.industry.gov.au/industry/Office-of-the-Chief-Economist/Publications/Documents/other/export_infrastructure_supplemental.pdf (2014) page 9.
- 46 BREE, *Australian Energy Projections to 2049-50* (December 2012) page 53; WICET, *Stage One Fast Facts* <http://www.wicet.com.au/> (accessed September 2013).
- 47 Australian Financial Review (published on WICET website), “WICET ‘on track’ to load despite fall in coal price” <http://www.wicet.com.au/IRM/Company/ShowPage.aspx/PDFs/1102-24272324/WICETontracktoloaddespitefallincoalprice> (31 January 2015) page 1.
- 48 Newcastle Coal Infrastructure Group, Media Release, “Premier Opens Final Stage of \$2.5 billion NCIG Coal Terminal” (20 September 2013) page 1; Newcastle Coal Infrastructure Group, History <http://www.ncig.com.au/Home/History/tabid/89/Default.aspx> (accessed March 2015).
- 49 BREE, *Australian Energy Projections to 2049-50* (November 2014) page 42.

- 50 BREE, *Australian Energy Projections to 2049-50* (November 2014) page 42.
- 51 BREE, *Australian Energy Projections to 2049-50* (December 2012) page 53.
- 52 BREE, *Australian Energy Projections to 2049-50* (November 2014) page 42.
- 53 Geoscience Australia, *Australia's Identified Mineral Resources 2013* (June 2014) page 27.
- 54 Geoscience Australia, *Australia's Identified Mineral Resources 2013* (June 2014) page 27.
- 55 BREE, *Australian Bulk Commodity Exports and Infrastructure – Outlook to 2025* (July 2012) page 3.
- 56 BREE, *Australian Bulk Commodity Exports and Infrastructure – Outlook to 2025* (July 2012) page 3.
- 57 DNRM, "Queensland coal" map http://mines.industry.qld.gov.au/assets/coal-pdf/qld_coal_map_10.pdf accessed March 2015.
- 58 Department of Natural Resources and Mines, Queensland's coal – mines and advanced projects (October 2013) <http://www.edonq.org.au/documents/Alerts/2013/20131213%20Qld%20Coal%20Industry%20Report.pdf> page 6.
- 59 Department of Natural Resources and Mines, Queensland's coal – mines and advanced projects (October 2013) <http://www.edonq.org.au/documents/Alerts/2013/20131213%20Qld%20Coal%20Industry%20Report.pdf> page 4.
- 60 Department of Natural Resources and Mines, Queensland's coal – mines and advanced projects (October 2013) <http://www.edonq.org.au/documents/Alerts/2013/20131213%20Qld%20Coal%20Industry%20Report.pdf> page 5.
- 61 DNRM, *Monthly Coal Statistics* (June 2014) page 1.
- 62 DNRM, *Monthly Coal Statistics* (June 2014) page 1.
- 63 DNRM, *Monthly Coal Statistics* (June 2014) page 5.
- 64 DNRM, *Monthly Coal Statistics* (June 2014) page 5.
- 65 DNRM, *Monthly Coal Statistics* (June 2014) page 4.
- 66 DNRM, *Monthly Coal Statistics* (June 2014) page 10.
- 67 DNRM, *Monthly Coal Statistics* (June 2014) page 6.
- 68 DNRM, *Monthly Coal Statistics* (June 2014) page 4.
- 69 DNRM, *Monthly Coal Statistics* (June 2014) page 4.
- 70 NSW Department of Trade & Investment – Resources & Energy, *New South Wales coalfields* <http://www.resources.nsw.gov.au/resources/coal/coalfields> (accessed March 2015).
- 71 NSW Department of Trade & Investment – Resources & Energy, *New South Wales coalfields* <http://www.resources.nsw.gov.au/resources/coal/coalfields> (accessed March 2015).
- 72 Geoscience Australia, *Australia's Identified Mineral Resources 2012* (3 June 2014) page 29; BREE, *Resources and Energy Statistics* (2014) page 44.
- 73 Coal Services Annual Report (2014) <http://www.coalservices.com.au/annualreports.aspx> pages 9 and 33; BREE, *Resources and Energy Statistics* (2014) page 44.
- 74 Coal Services Annual Report (2014) <http://www.coalservices.com.au/annualreports.aspx> page 9.
- 75 Coal Services Annual Report (2014) <http://www.coalservices.com.au/annualreports.aspx> page 9.
- 76 BREE, *Resources and Energy Statistics* (2014) page 44; *Coal Services Annual Report* (2014) <http://www.coalservices.com.au/annualreports.aspx> pages 33 and 34.
- 77 Coal Services Annual Report (2014) <http://www.coalservices.com.au/annualreports.aspx> pages 33 and 35.
- 78 Coal Services Annual Report (2014) <http://www.coalservices.com.au/annualreports.aspx> page 33.
- 79 Coal Services Annual Report (2014) <http://www.coalservices.com.au/annualreports.aspx> pages 9 and 35.
- 80 Coal Services Annual Report (2014) <http://www.coalservices.com.au/annualreports.aspx> page 9.
- 81 NSW Minerals Council, *NSW Mining 2012 – A Snapshot* (2013) page 5.
- 82 NSW Minerals Council, *NSW Mining 2012 – A Snapshot* (2013) page 6.
- 83 Coal Services Annual Report (2014) <http://www.coalservices.com.au/annualreports.aspx> page 35.
- 84 NSW Minerals Council, *NSW Mining 2012 – A Snapshot* (2013) page 8.
- 85 Coal Services Annual Report (2014) <http://www.coalservices.com.au/annualreports.aspx> page 35.
- 86 Coal Services Annual Report (2014) <http://www.coalservices.com.au/annualreports.aspx> page 35.
- 87 BREE, *Resources and Energy Quarterly* (September Quarter 2014) page 36.
- 88 Iron Investing News, "Types of Iron Ore: Hematite vs. Magnetite" (September 2013) <http://ironinvestingnews.com/5978-types-of-iron-ore-hematite-vs-magnetite.html>.
- 89 Geoscience Australia, *Australia's Identified Mineral Resources 2013* (3 June 2014) page 53; Gindalbie Metals, Investor & Media Centre, "Magnetite vs Hematite" http://www.gindalbie.com.au/investor_media_centre/magnetite_vs_hematite.phtml (accessed April 2015).
- 90 Gindalbie Metals, Investor & Media Centre, "Magnetite vs Hematite" http://www.gindalbie.com.au/investor_media_centre/magnetite_vs_hematite.phtml (accessed April 2015).
- 91 Geoscience Australia, *Australia's Identified Mineral Resources 2013* (3 June 2014) page 53.
- 92 Geoscience Australia, *Australia's Identified Mineral Resources 2014* (2014) page 13.
- 93 Geoscience Australia, *Australia's Identified Mineral Resources 2013* (3 June 2014) http://www.ga.gov.au/corporate_data/78988/78988_AIMR_2013.pdf page 56.
- 94 Geoscience Australia, *Australia's Identified Mineral Resources 2013* (3 June 2014) http://www.ga.gov.au/corporate_data/78988/78988_AIMR_2013.pdf page 56.
- 95 BREE, *Resources and Energy Quarterly* (December Quarter 2014) page 22.
- 96 BREE, *Resources and Energy Quarterly* (March Quarter 2015) page 40.
- 97 BREE, *Resources and Energy Quarterly* (March Quarter 2015) page 40.
- 98 BREE, *Resources and Energy Quarterly* (March Quarter 2015) page 37.
- 99 IBISWorld, *IBISWorld Industry Report B0801: Iron Ore Mining in Australia* (May 2013) page 5.

- 100 BREE, *Resources and Energy Quarterly* (March 2015) page 34.
- 101 BREE, *Resources and Energy Quarterly* (March Quarter 2015) page 36.
- 102 FMG, Our Business, "Solomon Hub" http://www.fmg.com.au/our_business/Solomon_Hub (accessed April 2015); BHP Billiton, Investors and Media, "BHP Billiton Opens Jimblebar Iron Ore Mine" [23 April 2014] <http://www.bhpbilliton.com/home/investors/news/Pages/Articles/BHP-Billiton-Opens-Jimblebar-Iron-Ore-Mine.aspx> (accessed April 2015).
- 103 BREE, *Resources and Energy Quarterly* (March Quarter 2015) page 36.
- 104 BREE, *Resources and Energy Quarterly* (March Quarter 2015) page 36.
- 105 BREE, *Resources and Energy Quarterly* (March Quarter 2015) page 36.
- 106 BREE, *Resources and Energy Quarterly* (March Quarter 2015) page 39.
- 107 BREE, *Resources and Energy Quarterly* (March Quarter 2015) page 36.
- 108 BREE, *Resources and Energy Quarterly* (March Quarter 2015) page 38.
- 109 BREE, *Resources and Energy Quarterly* (March Quarter 2015) page 39.
- 110 BREE, *Resources and Energy Quarterly* (March Quarter 2015) page 31.
- 111 BREE, *Resources and Energy Quarterly* (March Quarterly 2015) page 35.
- 112 WA Department of State Development, *Western Australia Iron Ore Profile* (September 2014) page 7.
- 113 Geoscience Australia, *Australia's Identified Mineral Resources 2013* (3 June 2014) page 2: figure for 2012 levels of production.
- 114 Department of State Development, *Western Australia Iron Ore Profile* (December 2012) <http://www.dsd.wa.gov.au/documents/000098.raz.ion.docx> (accessed September 2013).
- 115 Mining Australia, "Rio Tinto ramp up sets new iron ore production record" [20 January 2015] <http://www.miningaustralia.com.au/news/rio-ramp-up-sets-new-iron-ore-production-record>.
- 116 Mining Australia, "Rio Tinto ramp up sets new iron ore production record" [20 January 2015] <http://www.miningaustralia.com.au/news/rio-ramp-up-sets-new-iron-ore-production-record>.
- 117 Mining Australia, "Rio Tinto ramp up sets new iron ore production record" [20 January 2015] <http://www.miningaustralia.com.au/news/rio-ramp-up-sets-new-iron-ore-production-record>; WA Department of State Development, *Western Australia Iron Ore Profile* (September 2014) page 7.
- 118 Australian Financial Review, "BHP Billiton takes 'slower path' to ultimate iron ore expansion target" [22 April 2015] <http://www.afr.com/business/mining/bhp-billiton-takes-slower-path-to-ultimate-iron-ore-expansion-target-20150422-1mqcnj>; Australian Financial Review, "BHP Billiton 'wise' to delay \$US500m port upgrade, says Mitsui" [27 April 2015] <http://www.afr.com/business/mining/iron-ore/bhp-billiton-wise-to-delay-us500m-port-upgrade-says-mitsui-20150426-1mtb18>.
- 119 Mining Australia, Fortescue's opening of the Kings Valley iron ore mine [28 April 2014] <http://www.miningaustralia.com.au/features/fortescue-s-opening-of-the-kings-valley-iron-ore-m>.
- 120 WA Department of State Development, *Western Australia Economic Profile* (February 2013) page 7.
- 121 WA Department of State Development, *Western Australia Iron Ore Profile* (September 2014) page 7.
- 122 WA Department of State Development, *Western Australia Iron Ore Profile* (September 2014) page 7.
- 123 BREE, *Australian Bulk Commodity Exports and Infrastructure – Outlook to 2025* (July 2012), pages 94–97.
- 124 BREE, *Australian Bulk Commodity Exports and Infrastructure – Outlook to 2025* (July 2012) page 79.
- 125 BREE, *Australian Bulk Commodity Exports and Infrastructure – Outlook to 2025* (July 2012) page 80.
- 126 BREE, *Australian Bulk Commodity Exports and Infrastructure – Outlook to 2025* (July 2012) page 80.
- 127 BREE, *Resources and Energy Quarterly* (March Quarterly 2015) page 36.
- 128 BREE, *Australian Bulk Commodity Exports and Infrastructure – Outlook to 2025* (July 2012) pages 33, 60.
- 129 BREE, *Promoting Australian Prosperity – Sustaining the Boom with Export Infrastructure* http://www.industry.gov.au/industry/Office-of-the-Chief-Economist/Publications/Documents/other/export_infrastructure_supplemental.pdf (2014), page 2.
- 130 BREE, *Resources and Energy Quarterly* (December 2014) page 10.
- 131 Aurizon Holdings Limited, Annual Report 2013–14, page 19.
- 132 Asciano Limited, Annual Report 2014 (1 October 2014) page 21.
- 133 Department of State Development, Infrastructure and Planning, *Coal Transport System Map* <http://www.statedevelopment.qld.gov.au/resources/map/cg/coal-transport-system-map.pdf> (accessed October 2014).
- 134 Australian Rail Track Corporation, Annual Report (2014) page 15.
- 135 Australian Rail Track Corporation, Annual Report (2014) page 4.
- 136 Australian Rail Track Corporation, "About ARTC" <http://www.artc.com.au/Content.aspx?p=14> accessed March 2015.
- 137 Asciano Limited, Annual Report 2014 (1 October 2014) page 21.
- 138 Aurizon Holdings Limited, Annual Report 2013–14, page 19.
- 139 Aurizon, *Media Release*, "AMCI and POSCO join Baosteel in infrastructure agreement with Aurizon for West Pilbara Project", <http://www.aurizon.com.au/Media/MediaRelease/Pages/AMCI-and-POSCO-join-Baosteel-in-infrastructure-agreement-with-Aurizon-for-West-Pilbara-project.aspx> (11 September 2014), page 1.
- 140 Brookfield Rail, *About Us*, <http://www.brookfieldrail.com/about-us/> (accessed October 2014).
- 141 Brookfield Rail, *Our Network – Mid West Rail Upgrade*, <http://www.brookfieldrail.com/about-us/our-network/midwest/> (accessed October 2014).
- 142 Port of Newcastle, *Trade*, <http://www.portofnewcastle.com.au/Commercial-Opportunities/Trade.aspx> (accessed March 2015); Port of Newcastle, *Monthly Trade Report* (June 2014) page 1.
- 143 DNRM, *Monthly Coal Statistics* (June 2014) page 4.
- 144 BREE, *Australian Bulk Commodity Exports and Infrastructure – Outlook to 2025* (July 2012) page 95.
- 145 BREE, *Promoting Australian Prosperity – Sustaining the Boom with Export Infrastructure* http://www.industry.gov.au/industry/Office-of-the-Chief-Economist/Publications/Documents/other/export_infrastructure_supplemental.pdf (2014) page 8.
- 146 BHP Billiton, *Results for Announcement to the Market* (24 February 2015) http://www.bhpbilliton.com/home/investors/news/Documents/2015/150224_BHPBillitonInterimResultsfortheHalfYearEnded31December2014.pdf, pages 5 and 6.

- 147 BREE, *Australian Bulk Commodity Exports and Infrastructure – Outlook to 2025* (July 2012) page 79.
- 148 BREE, *Promoting Australian Prosperity – Sustaining the Boom with Export Infrastructure* http://www.industry.gov.au/industry/Office-of-the-Chief-Economist/Publications/Documents/other/export_infrastructure_supplemental.pdf (2014) page 8.
- 149 Pilbara Ports Authority, 2013-14 Cargo Statistics and Port Information (2014) <http://www.pilbaraports.com.au/getattachment/Port-of-Port-Hedland/About-the-port/Port-statistics-and-throughput/Cargo-statistics-and-port-information/Port-Stats-Brochure-2013-14-Port-Hedland-Approved.pdf.aspx> page 2.
- 150 BREE, *Promoting Australian Prosperity – Sustaining the Boom with Export Infrastructure* http://www.industry.gov.au/industry/Office-of-the-Chief-Economist/Publications/Documents/other/export_infrastructure_supplemental.pdf (2014) page 7.
- 151 Rio Tinto, "Our business – Iron ore – Pilbara – Expansions", <http://www.riotinto.com/ironore/expansions-9601.aspx>, (accessed October 2014).
- 152 Rio Tinto, Media Release "Rio Tinto delivers strong first quarter production" <http://www.riotinto.com/investors/results-and-reports-2146.aspx>, (15 April 2014) page 2.
- 153 WA Department of Transport, Ports Handbook Western Australia 2013, http://www.transport.wa.gov.au/mediaFiles/marine/MAC_B_WAPortsHandbook2013.pdf, page 32.
- 154 Australian Government Department of the Environment, "One-Stop Shop for environmental approvals" <http://www.environment.gov.au/topics/about-us/legislation/environment-protection-and-biodiversity-conservation-act-1999/one-stop> (accessed October 2014).
- 155 Recent change in government in Queensland has cast some doubt on the progress of the Queensland agreement.
- 156 Australia Government Productivity Commission, *Mineral and Energy Resource Exploration*, <http://www.pc.gov.au/projects/inquiry/resource-exploration/report> (March 2014) page 32.
- 157 In Queensland, an exploration licence is called an 'exploration permit'. In all other States and territories it is called an 'exploration licence'.
- 158 The right to mine is called a 'Mining Lease' in all Australian States and Territories except for Victoria (where it is called a 'Mining Licence') and the Northern Territory (where it is called a 'Mineral Lease').
- 159 In Western Australia, the relevant body is the Warden's Court. In Queensland it is the Land Court. In New South Wales it is the Land and Environment Court. In Tasmania it is the Mining Tribunal. In Victoria and the Northern Territory it is the Civil and Administrative Tribunal. In South Australia the relevant body, depending on the amount of compensation, is the Environment, Resources and Development Court or Warden's Court.
- 160 It is understood that the new Queensland Government elected in January 2015 may seek to revisit these changes with some, and perhaps, all of them being repealed or further amended.
- 161 Australian Competition & Consumer Commission, *The North West Shelf Project – Authorisations – A91220 – A9122*, <http://transition.accc.gov.au/content/index.phtml/itemId/922104/fromItemId/401858> (accessed 27 August 2013).

KEY CORRS CONTACTS

BRISBANE



BRUCE ADKINS

Partner – Brisbane
Mining, M&A, Project Development
Tel + 61 7 3228 9431
Mob + 61 (0) 418 874 241
bruce.adkins@corrs.com.au



MICHAEL MACGINLEY

Partner – Brisbane
Mining, M&A, Project Development
Tel + 61 7 3228 9391
Mob + 61 (0) 417 621 910
michael.macginley@corrs.com.au

PERTH



PETER JAROSEK

Partner – Perth
Mining, M&A, Project Development
Tel + 61 8 9460 1804
Mob + 61 (0) 420 856 281
peter.jarosek@corrs.com.au

SYDNEY



LIZZIE KNIGHT

Partner – Sydney
Mining, M&A, Project Development
Tel + 61 3 9672 3366
Mob + 61 (0) 402 793 072
lizzie.knight@corrs.com.au

MELBOURNE



JONATHAN FARRER

Partner – Melbourne
M&A
Tel + 61 3 9672 3383
Mob + 61 (0) 414 235 063
jonathan.farrer@corrs.com.au

SYDNEY

8 Chifley
8-12 Chifley Square
Sydney NSW 2000
Tel +61 2 9210 6500
Fax +61 2 9210 6611

MELBOURNE

Bourke Place
600 Bourke Street
Melbourne VIC 3000
Tel +61 3 9672 3000
Fax +61 3 9672 3010

BRISBANE

One One One
111 Eagle Street
Brisbane QLD 4000
Tel +61 7 3228 9333
Fax +61 7 3228 9444

PERTH

Woodside Plaza
240 St George's Terrace
Perth WA 6000
Tel +61 8 9460 1666
Fax +61 8 9460 1667

WWW.CORRS.COM.AU

**CORRS
CHAMBERS
WESTGARTH**
lawyers