

# MINING SECTOR UPDATE

AUSTRALIA AND PAPUA NEW GUINEA

SEPTEMBER 2018

## INTRODUCTION

Welcome to the September 2018 edition of the Mining Sector Update from Corrs Chambers Westgarth. Published each month, this briefing keeps you up-to-date with recent mining deals, market rumours, potential opportunities and relevant regulatory updates.

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## IN THIS EDITION

- The Land and Environment Court appeal regarding the Rocky Hill Coal Mine Project
- Wesfarmers' sale of its Bengalla coal mine interest to New Hope
- New ASIC restrictions on public announcements of resource reserves
- Australia's recently released India strategy and how it affects the resources sector

## RECENT ANNOUNCEMENTS

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### Queensland's new exploration program released

The Queensland government has recently released its new exploration program, making more than 1,100km<sup>2</sup> available for coal exploration over the next 18 months.

The first of two coal releases will see four areas in the Bowen Basin and one area in the Eromanga Basin go to tender in Q4 of this year, with outcomes scheduled for Q2, 2019. The second coal release will comprise five more areas in the Bowen Basin, with the call for tender scheduled for Q2, 2019 and outcomes announced Q4, 2019. The timing of the program seeks to assist bidders by announcing the successful applicant for the first tender before the second tender is released.

There will be an ongoing Q&A process with answers provided via the QTenders platform.

More information on the Queensland Exploration Program is available [here](#).



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## RECENT DECISIONS

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### Merits appeal of Rocky Hill Coal Mine Project - Climate change to be argued in NSW Land and Environment Court

An appeal is currently taking place in the NSW Land and Environment Court (**Court**) brought by Gloucester Resources Limited (**GRL**) against the refusal of the proposed Rocky Hill Coal Mine Project (**Project**) by the former Planning Assessment Commission (**PAC**) (now the Independent Planning Commission), as delegate of the NSW Minister for Planning (**Minister**) in December 2017.

#### Background

The Project was referred to the PAC for determination by the NSW Department of Planning and Environment (**Department**) after the Department received 1,700 submissions during the public exhibition period. The PAC considered the proposed development of a new open cut coal mine located approximately 5 km south of the Gloucester town centre involving the extraction of 2 million tonnes of coal annually from three open-cut pits for a period of 21 years.

The PAC refused to approve the Project for the following reasons:

1. it would not be sympathetic to the Gloucester Valley's character and, due to the proximity to residential areas, would likely have significant visual impacts;

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2. incompatibility with the underlying zoning of the land as primary production and environmental management zones, despite being a permissible land use under the *State Environmental Planning Policy (Mining Petroleum Production and Extractive Industries) 2007 (Mining SEPP)* and potential land use conflicts with existing established uses (including rural-residential and tourism); and
  3. it was not in the public interest as any economic and social benefits were outweighed by the reduction in the quality of life of residents caused by visual, noise and air quality impacts.

The PAC simultaneously refused consent to an associated modification application lodged by Yancoal that would have facilitated the processing of coal from the Project at the Stratford Mining Complex, on the basis that the modification would have no purpose or utility in the absence of the Project.

### The appeal

GRL initiated an appeal in Class 1 of the Court's jurisdiction, requesting review by the Court of the merits of the PAC's decision. The hearing commenced on 13 August 2018 and is expected to run for a number of weeks. The Court will concurrently consider an appeal against the merits of the related refusal of the Stratford Extension Project.

While the Minister is a Respondent in both appeals, a community group called Groundswell Gloucester (**Groundswell**) is the Second Respondent. Groundswell is expected to run additional arguments, including that the Project refusal should be upheld because of the detrimental impacts of the Project on climate change, as well as social impacts on the community of Gloucester.

### Climate change argument

The Environmental Defenders Office (**EDO**) (on behalf of Groundswell) will likely assert that the decision maker must be satisfied that the Project, in combination with other proposed developments around the world, would not infringe the commitments made in the Paris Agreement to limit the rise in global temperatures by 2°C above pre-industrial levels.

It is understood that the EDO will introduce expert evidence from a climate change specialist and an expert in market measures to minimise greenhouse gas emissions. Although the Court has previously considered the relevance of climate change policies and the Paris Agreement in judicial review proceedings related to the Wilpinjong open cut coal mine,<sup>1</sup> the Rocky Hill merits appeal will be the first time an Australian Court of superior jurisdiction will hear expert testimony regarding climate change since ratification and entry into force of the Paris Agreement.

We will provide an update on the outcome of the appeal in a future edition.

The first time  
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<sup>1</sup> As reported in the July 2018 edition of Corrs' mining sector update, in the decision of *Wollar Progress Association Incorporated v Wilpinjong Coal Pty Limited & Anor* [2018] NSWLEC 92, the Court considered the application of clause 14(2) of the Mining SEPP, which requires a consent authority determining a development application for mining, petroleum production or extractive industry development to consider the greenhouse gas (**GHG**) emissions (including downstream emissions) of the development, having regard to applicable State or national policies, programs or guidelines concerning GHG emissions. The Court determined that "aspirational" or political targets of the kind set out in the Paris Agreement and the 2016 NSW Climate Change Policy Framework, were not "applicable" policies, within the meaning of this clause because they could not provide meaningful guidance to the PAC in assessing the GHG emissions of the proposal.

# RECENTLY COMPLETED DEALS

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The last of Wesfarmers' operating coal assets

## AUSTRALIA

### Wesfarmers sells 40% of Bengalla thermal coal mine to New Hope

ASX listed **New Hope** has reached an agreement with ASX listed **Wesfarmers** to acquire a further 40% of the **Bengalla thermal coal project**, located in the Hunter Valley for A\$860 million.

This transaction will bring New Hope's total interest in the operation to 80%, having acquired an initial 40% interest in 2016 in a A\$865 million deal with **Rio Tinto**.

The *Australian Financial Review* has reported that the transaction is subject to pre-emption rights held by joint venture partners **Taipower** and **Mitsui** which, if exercised, may reduce New Hope's total interest to approximately 66%.

We understand that the transaction is expected to complete at the end of this year.

The Bengalla mine is the last of Wesfarmers' operating coal assets, with Wesfarmers having sold the Curragh coal mine to Coronado earlier this year.

### EMR Capital sells 95% of Martabe gold and silver mine to United Tractors

The *Australian Financial Review* has reported that private equity house **EMR Capital** has agreed to sell 95% of its **Martabe** gold and silver mine to Indonesian construction machinery, mining services and coal company **United Tractors**.

EMR and other syndicate members agreed to purchase the mine in November 2015 for US\$775 billion, with the sale price indicating that the mine is currently valued at US\$1.21 billion, an increase of 56%.

The transaction marks EMR's fourth deal in the past nine months.

### Oz Minerals completes acquisition of Avanco Resources Limited

ASX listed **Oz Minerals** announced on 8 August 2018 that its A\$418 million off-market takeover of **Avanco Resources**, featured in our April 2018 edition of the Mining Sector Update, has now reached completion.

The acquisition was able to occur after more than 90% of Avanco's shareholders accepted the takeover bid in June.

Oz Minerals now has the opportunity to expand its operations in the Carajas copper province and Gurupi gold belt in Brazil.

### Ausdrill signals A\$271 million takeover of Barmenco

ASX listed company **Ausdrill Limited** announced on 15 August 2018 that it has agreed to acquire 100% of the shares in specialist hard-rock mining contractor **Barmenco Holdings Pty Ltd**.

Ausdrill has identified that the A\$271 million transaction would see it become Australia's second largest mining services company.

The deal is subject to conditions, and completion is anticipated to occur in October 2018.

# AUSTRALIA AND INDIA

## Australia's India 2035 Economic Strategy

On 27 April 2018, Peter Varghese, Chancellor of the University of Queensland presented his report *"An India Economic Strategy to 2035: Navigating from potential to delivery"* to former Prime Minister, Malcolm Turnbull, and Member of Parliament, Steven Ciobo. The report sets out a strategy to transform Australia's relationship with India, elevate its understanding of India's trajectory to 2035 and take the economic partnership with India to a new level.

The report was developed over the course of a year and drew on analysis and contributions from a wide range of sources, including 232 consultations in Australia and 20 submissions. Corrs Chambers Westgarth was the only law firm to make a public submission.

The question "why India?" is answered by the report's finding that no single market over the next 20 years will offer more growth opportunities than India. By 2035, the country will overtake China as the world's most populous, and is poised to become the third largest economy, after China and the US.

There is no doubt that India will need goods and services that Australia is well-positioned to supply, and can offer Australia an opportunity to spread its trade and investment risk in Asia.

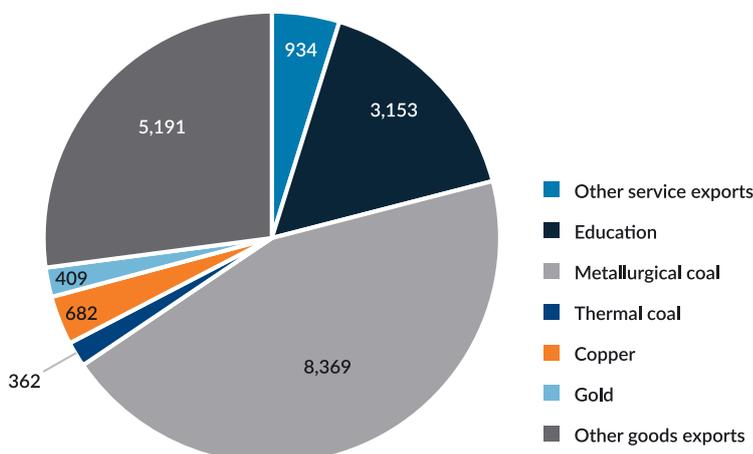
That said, the report notes that timing has always been a challenge in Australia's relationship with India, and Varghese points out that momentum is important and Australia cannot simply rely on the logic of complementary interests to spur this momentum – an ambitious strategy is needed – and it is what the report aims to provide.

The report is structured to address ten key sectors where Australia's competitive advantages match India's needs and sets out recommendations for each sector going forward. The ten key sectors include the Energy and Resources and Mining Equipment and Technology Services (METS) sectors.

## Resources

Australian resource exports of metallurgical and thermal coal, copper and gold already make up more than half of Australia's merchandise trade with India, and the mineral resources relationship will continue to be dominated by exports rather than outbound Australian investments:

### Australia's goods and services exports to India 2016-17 (\$ Million)



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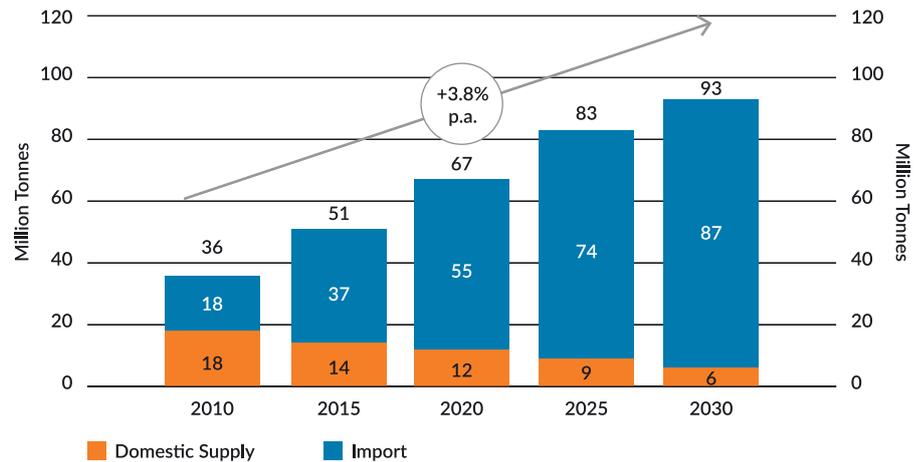
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# AUSTRALIA AND INDIA CONTINUED

## Metallurgical Coal

By 2030, over 90% of India's metallurgical coal demand will likely be met by imports due to limited domestic production. Although India is looking to diversify its import sources, Australia is well-positioned to meet India's demand given its high quality coal and current status as India's top supplier of metallurgical coal by a considerable margin.

### Indian Coal Demand



Source: Work commissioned by the India Economic Strategy Secretariat to support this report.

## Iron Ore

Despite its 30 billion tonnes of iron ore reserves India has recently become a net importer of iron ore. There are a number of reasons behind this, including uncertainty around government regulations and challenges in product quality. While this is good news for Australian exporters in the short to medium-term run, in the long run, technical developments in India's steel industry could see bolstered domestic production of iron ore.

## Copper

India's copper ore reserves are limited, making up only 2% of the global supply. As a result, India imports around 95% of its copper requirements as concentrates. India's demand for copper is likely to see strong growth driven by urbanisation and an increased rollout of electrical transmission networks and the manufacturing sector. This could give Australia an opportunity to exponentially increase its 11% market share in India's market.

## Gold

Australia competes with South Africa as the primary producer of gold imported by India. As India has the largest private gold holdings of any nation, almost 80% of the demand comes from end-use in jewellery and as household investments, as India has the largest private gold holdings of any nation.

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## Resources and mets key commodities out to 2030

Resources	Units	Indian Demand		Indian Domestic Supply		Indian Imports	
		2016	2030	2016	2030	2016	2030
Metallurgical coal	Million tonnes	52	90–100	15	6–8	87%	90–95%
Iron ore	Million tonnes	154	290–300	156	290–300	5%	0–3%
Copper	Thousand tonnes	511	1000–1200	26	70–100	95%	91–94%
Gold	Tonnes	735	1000–1100	1	2–3	~100%	~100%

### Recommendations

It is obvious that there is both an existing and strongly burgeoning demand from India for resources that Australia is well-placed to provide, and scope for a mutually beneficial trade relationship to be built. In order to make the most of it, Varghese makes the following recommendations to the sector:

1. **Leverage our status as a key supplier of resource commodities to support ongoing advocacy for improvements to the business environment.** Australia needs to grasp its standing as a major resource commodities trading partner with India and a country that is seen as a leader on mine management, and use this to build the Australian brand and further entrench engagement through strengthening regular Ministerial-level engagement (including through the Australia India Energy Dialogue).
2. **Expand support mechanisms for Australian business in METS** by pushing the branding of Australian METS sectors within India, exploring options to set up an Australian industrial cluster at a demonstration mine in India to showcase our practices and to be used for training, and facilitating study tours for Indian mining executives to visit Australian mine sites.
3. **Support the knowledge partnership in resources and mining**, including through establishing the demonstration mine outlined in point 2 above.



# AUSTRALIA AND INDIA CONTINUED

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By 2035 India should be one of Australia's top three export markets

## Energy

India's demand for energy is set to make the largest contribution to global energy demand growth by 2035 (30%), but it will remain reliant on energy imports, particularly for fossil fuels.

### *Thermal Coal*

- A strong demand for coal in India will be driven by the power sector – where it is anticipated to double in use by 2030 – and by the cement sector. While India is expected to be largely self-reliant in thermal coal in the longer term, it will need to import it well into the medium term.
- Falling costs of renewable energy and storage could mean India gets cheaper baseload power from renewables before 2035, but existing and under construction coal fired power stations point to sustained demand for thermal coal.
- Australia is well-placed to capture a share of India's thermal coal imports because, despite its efforts to be self-sufficient, to meet its demands India will need to raise its environmental and clearance limits drastically. In the past, India has sought its thermal coal from Indonesia and South Africa, whose coal meets India's current quality specifications at a lower price point.
- The report states that there could be an increase in Australia's coal exports to India if Adani's Carmichael coal project commences production.

### *Recommendations*

Varghese's recommendations include promoting Australia as a destination for Indian investment in the energy sector, building targeted relationships with decision makers and seeking to align regulatory efforts, supporting India's participation in global energy organisations and consolidating private sector engagement mechanisms to help unify Australian branding.

## Conclusion

The report sets out an ambitious strategy, recommending that by 2035 India should be one of Australia's top three export markets, the third largest destination in Asia for Australian outward investment, and be brought into the inner circle of Australia's strategic partnerships and personal ties.



# REGULATORY UPDATES

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## COMMONWEALTH

### ASIC continues to flex its muscles on public company JORC code disclosure

There has been a change in the wind for small to mid-cap ASX-listed companies. Over the last four to five years these organisations have had to rapidly adapt to the evolving regulatory landscape. One of the key challenges lies in what they can or can't say about their projects as they attempt the transition from explorer, to developer, to producer. With a range of legislative changes, information sheets, FAQ's and Listing Rules amendments released by ASIC and ASX,<sup>2</sup> listed mining companies face a range of disclosure issues including:

- the degree of project certainty required before a production target and associated financial forecasts (for example, a project "NPV") can be disclosed;
- if the requisite project certainty is achieved, how those production targets can be used and the required accompanying cautionary disclosure (especially where the production target is based on a portion of inferred resources or exploration target);
- what they can and can't disclose about the content of a scoping study they have spent a considerable amount of shareholder funds on (particularly where no ore reserves have been delineated yet);
- the use of non-JORC terminology (such as the use of the term "mining inventory"); and
- whether a reasonable basis exists to fund any proposed project's development (particularly when the cost of development is significantly in excess of the company's current market capitalisation).

The regulators have been active in this area employing the use of "in-house" geologists to assist in vetting announcements and requiring public retractions of those that fail to comply with these rules. In many cases, those companies have had to seek an extended halt in trading until they are in a position to release a compliant announcement.

<sup>2</sup> See for example updates to the reporting and disclosure obligations set by the Australian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves Code 2012, changes to Chapter 5 of the ASX Listing Rules and guidance issued by both ASX and ASIC (refer to ASIC's Information Sheet 214 and ASX has published interim guidance).



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At the core of ASIC's concern is the early stage at which mining companies make statements that imply their exploration tenements are likely to transition into a producing mine – especially where the current drill results and associated resources are based on some or all of inferred mineral resources and exploration targets which are generally accepted to have a lower level of geological knowledge and confidence associated with them.

The significance of having to retract an offending announcement should not be lost on companies and directors alike. A retraction is an admission on the part of the company that it did not have a reasonable basis upon which to make “forward looking” representations – or put another way, it is a public admission that it released an announcement with misleading information.

In a recent sign that ASIC is continuing to be vigilant in this area, the regulator recently confirmed that Gold Mountain Limited had accepted and paid a \$33,000 fine relating to an ASIC infringement notice after failing to retract in a timely manner certain public statements that did not comply with the JORC Code.

Further ASIC has restricted Gold Mountain Limited from eligibility to issue a reduced-content prospectus until 20 July 2019, thereby reducing the flexibility of its future fundraising initiatives.

The statements in question arose in the context of a company authorised article sent to the entity's shareholders and subsequently re-published on the website Hotcopper. ASIC alleged that the statements in question implied that mineralisation in a target drill zone was capable of producing ounces of gold, was capable of economic extraction and was capable of producing future revenue.

And whilst the gap between release and public retraction was only 10 days, ASIC's media release noted that the obligation to retract misleading announcements is immediate.

ASIC's actions in this case are another reminder to ASX-listed resources companies that they should ensure any public announcement relating to mineral resources and ore reserves, particularly those involving forward-looking statements, comply with the JORC Code and published ASIC and ASX guidance, or else risk intervention by the corporate regulator.

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# FIRB UPDATE

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## New application portal

FIRB's new application portal is live. The new portal is the place to submit all non-residential FIRB applications as well as any applications for variations to approvals.

The portal has a few additional features, including a new and improved fee calculator. It is now easier to modify account settings so multiple people can view, edit or submit applications, and store contacts and details from previous applications.

## Updated application checklist

FIRB has released a [new application checklist](#) which includes more detail on the information to be supplied to FIRB when making an application. One of the main changes has been the addition of more information relating to any cross-border funding, which was previously requested by the ATO after an application was submitted. Another 'new' addition to the checklist is evidence of an open and transparent sale process for agricultural land in accordance with the requirements announced in early 2018.

## Fees indexed

New [indexed fees](#) will apply to applications made and notices given after 1 July 2018.

## Royalty agreements may require FIRB approval

FIRB has recently indicated that a royalty agreement can be an interest in Australian land and therefore require FIRB approval. An interest in Australian land includes an interest in an agreement involving the sharing of profits or income from the use of Australian land, where the term of the agreement is reasonably likely to exceed five years. Mining tenements are Australian land and a nil value threshold applies to an acquisition of any interest in a tenement. Foreign persons disposing of Australian mining assets where a royalty is being considered as all or part of the consideration should seek guidance on this issue to ensure they obtain any necessary FIRB approval.



# ASIC UPDATE

## ASIC industry funding model

The Australian government has changed the way ASIC is funded. Under the new “industry funding” or “user pays” model, entities regulated by ASIC will pay the costs of the regulatory services ASIC provides.

The model is separated into two parts: cost recovery levies and new fees for services.

- Cost recovery levies

ASIC’s regulatory costs are to be allocated across 48 industry subsectors (such as listed corporations or large proprietary companies) based on ASIC’s actual costs incurred in the previous year. These levies will be paid by Australian companies and other entities regulated by ASIC.

The annual levy each company must pay is calculated based on what it costs ASIC to regulate each subsector, in addition to the data provided by or verified by organisations in the new regulatory portal. Some organisations (such as large proprietary companies) will pay flat levies, where the costs of regulating the subsector are shared equally among the entities operating in that subsector. Other organisations (such as listed corporations) will pay graduated levies, where an entity’s share of costs is calculated on the basis of the minimum amount paid by all entities in that subsector and an additional variable amount based on that entity’s size or level of business activity.

ASIC has published [indicative levies](#) for approximately 80% of the organisations they regulate.

- Fees for services

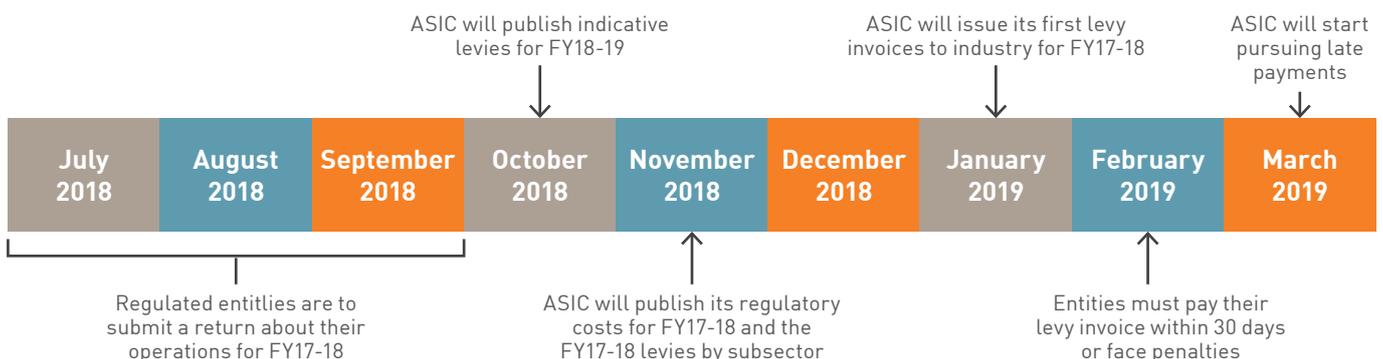
The other component of the user pays model are fees for services (eg, application for variations of the law, lodgement of prospectuses, etc.). From 4 July 2018, prices for ASIC regulatory activity have been adjusted so that they are indicative of the work required by ASIC.

In most cases, this has meant a fee increase.

## What’s happening now?

ASIC is collating the information it needs to calculate the levies. In June 2018, ASIC sent a letter to regulated entities containing a security key for the new ASIC Regulatory Portal. **All organisations that received that letter must submit or validate their business activity metrics via the portal by 27 September 2018.** Certain small proprietary companies that are not operating in one of the 48 subsectors will not need to visit the portal, or submit or validate business activity metrics. They will simply pay an additional A\$4 as part of their annual review fee.

Click [here](#) for more information.





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