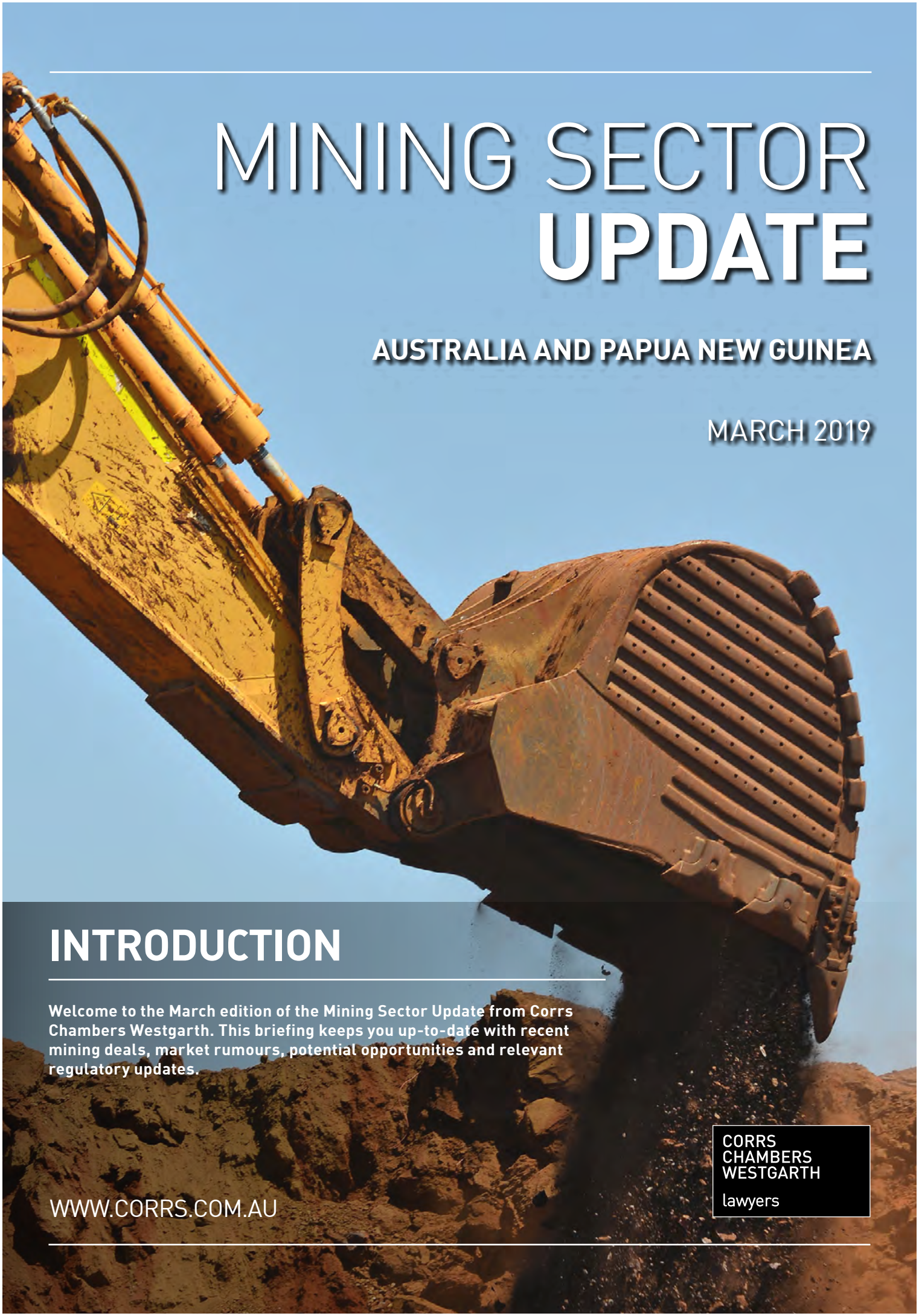

MINING SECTOR UPDATE

AUSTRALIA AND PAPUA NEW GUINEA

MARCH 2019

INTRODUCTION

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

CORRS CHAMBERS WESTGARTH
lawyers

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IN THIS EDITION

This month we look at:

- the NSW Land and Environment Court's refusal of development consent for the Rocky Hill Coal Mine Project
- the Australian Government's response to the India 2035 Economic Strategy Report (with a focus on the implications for the resources sector)
- new guidance from the Australian Taxation Office on what constitutes a use of a mining, quarrying and prospecting right
- upcoming requirements for companies to have a whistleblower policy following the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2019
- the Native Title Legislation Amendment Bill 2019
- the new Land Access Ombudsman in Queensland
- changes to the National Gas Law to implement the capacity trading reform package

RECENT ANNOUNCEMENTS

AUSTRALIA

19.9% stake in Cokal to be acquired by Aahana Global Resources & Investment

Singapore-based **Aahana Global Resources & Investment** has entered into a conditional agreement to acquire approximately 19.9% (on a diluted basis) of ASX listed **Cokal Limited**, a company with projects largely based in Indonesia. On 16 January 2019, Cokal announced that Aahana would be purchasing shares and options currently owned by the **Platinum funds** (in receivership and liquidation).

Aahana's agreement with the Platinum funds was conditional upon Cokal consenting to two Aahana directors being appointed to its board and the boards of its Indonesian subsidiaries. Cokal has given this consent.

The Cokal ASX announcement can be viewed in full here.

Sandfire Resources confirms takeover approach of MOD Resources

On 21 January 2019, ASX listed **Sandfire Resources NL** confirmed media reports that it had approached ASX listed **MOD Resources Limited** in relation to a potential takeover offer. Sandfire expressed an interest in 'exploring a potential combination of the two companies' but noted that any transaction would be conditional upon satisfactory due diligence and the recommendation of the MOD board.

On the same day, MOD confirmed receipt of Sandfire's proposal, stating that the board 'believes th[e] proposal undervalues MOD's unique and extensive assets' but the company is 'willing to engage with Sandfire... if a compelling price is presented and capable of being supported by the Board and MOD shareholders.'

The Sandfire ASX announcement can be read here and the MOD ASX announcement can be read here.

Frontier Diamonds Limited has entered into sales agreement to sell Star Mine

ASX listed **Frontier Diamonds Limited** announced on 11 February 2019 that it has executed a binding sales agreement with **The Blom Diamond Group** to sell its **Star Mine** in South Africa.

If the transaction is completed, Frontier indicates that the US$5 million in sales proceeds will in part be used to develop its **Sedibeng Mine** in South Africa during its development ramp up stage.

The Frontier ASX announcement can be read in full here.

PNG

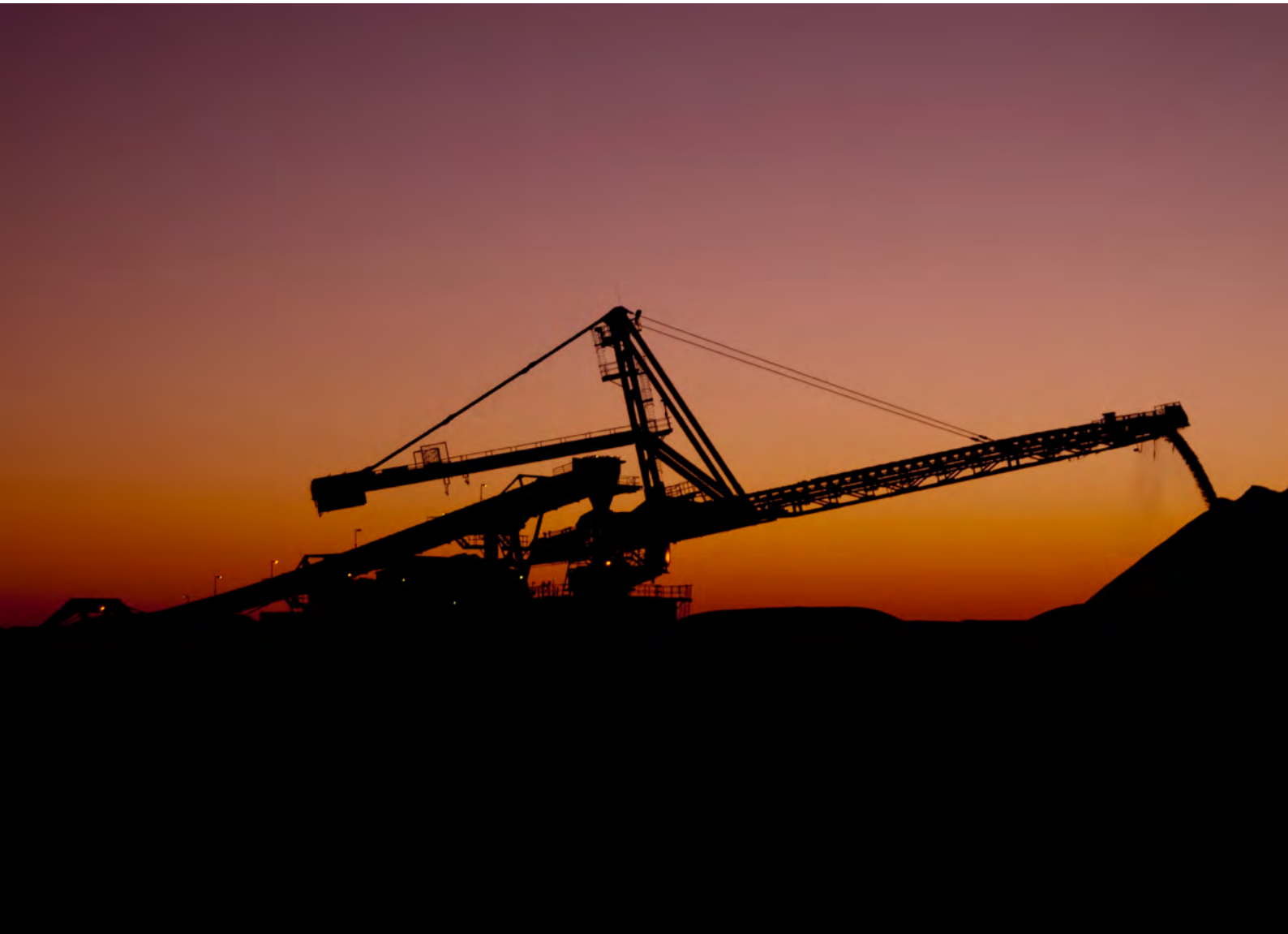
Highlands Pacific enters into scheme of arrangement with Cobalt 27 Capital Corp

On 2 January 2019, ASX listed **Highlands Pacific Limited** announced that it had entered into a scheme implementation agreement with **Cobalt 27 Capital Corp** under the PNG Companies Act. Under the proposed scheme, Cobalt will acquire all of the shares in Highlands that it does not already own.

The consideration currently offered is A$0.105 per share, valuing Highlands at approximately A$115 million. Shareholders together holding 30.1% of the company have stated that their intention is to accept the offer.

The Highlands ASX announcement can be viewed in full here. Cobalt has also released a presentation in regard to the scheme which can be viewed here.

Under the proposed scheme, Cobalt will acquire all of the shares in Highlands that it does not already own.



RECENTLY COMPLETED DEALS

The A$7 million proceeds from the sale will be used to fund Kalamazoo's exploration and drilling program

AUSTRALIA

Kalamazoo Resources Limited sells Snake Well Gold Project

ASX listed **Kalamazoo Resources Limited** announced on 12 February 2019 that it has completed the sale of its **Snake Well Gold Project** in Western Australia to **Adaman Resources Pty Ltd**.

The A$7 million proceeds from the sale will be used to fund Kalamazoo's exploration and drilling program at its **Wattle Gully Gold Project** and **Cork Tree Copper Project** and at its Pilbara gold tenements in Western Australia.

Kalamazoo will also receive a 2.5% Net Smelter Royalty on any base metals mined at the Snake Well Gold Project site.

The Kalamazoo ASX announcement can be read in full here.

Winfield Energy Pty Ltd acquires an interest in the Rolleston Mine

On 14 February 2019, **Winfield Energy Pty Ltd** announced its acquisition of a 12.5% interest in the **Rolleston Mine** in Queensland's Bowen Basin.

John Canavan, Managing Director, commented that "[t]he Rolleston Mine is a well-capitalised, well managed coal mine with a dedicated and enthusiastic workforce and we are excited to work with our JV partners in sustaining the impressive and well-deserved safety, environmental, and economic reputation of the mine".

The Winfield Energy announcement can be read in full here.

Evolution Mining Limited acquires shares in Tribune Resources Limited

ASX listed **Evolution Mining Limited** announced on 25 February 2019 that it has acquired a 19.9% shareholding in ASX listed **Tribune Resources Limited** for A$41.3 million. Tribune is one of the parties currently involved in a joint venture for the **East Kundana** mining operation in Western Australia.

The Evolution Mining ASX announcement can be read in full here.

MARKET RUMOURS AND OPPORTUNITIES

Coronado Global Resources considers more mine acquisitions

The *Australian Financial Review* reported on 20 February 2019 that ASX listed **Coronado Global Resources** is considering acquiring more mines following its acquisition of the **Curragh Mine** in Queensland's Bowen Basin from ASX listed **Westfarmers** last year.

Managing director Gerry Spindler indicated that the company would be targeting growth through a combination of mine acquisitions and boosting production at the Curragh Mine.

Terramin Australia Limited may soon call for binding bids

According to an *Australian Financial Review* article published on 27 February 2019, ASX listed **Terramin Australia Limited** will call for binding bids on the sale of its gold business late next month.

Undisclosed sources cited in the article suggest that there are four parties currently reviewing Terramin's data room, including ASX listed **Kirkland Lake Gold**, **Yaoo Capital Pte Ltd** and **Arete Capital**. A large offshore buyer is also reported to be involved.

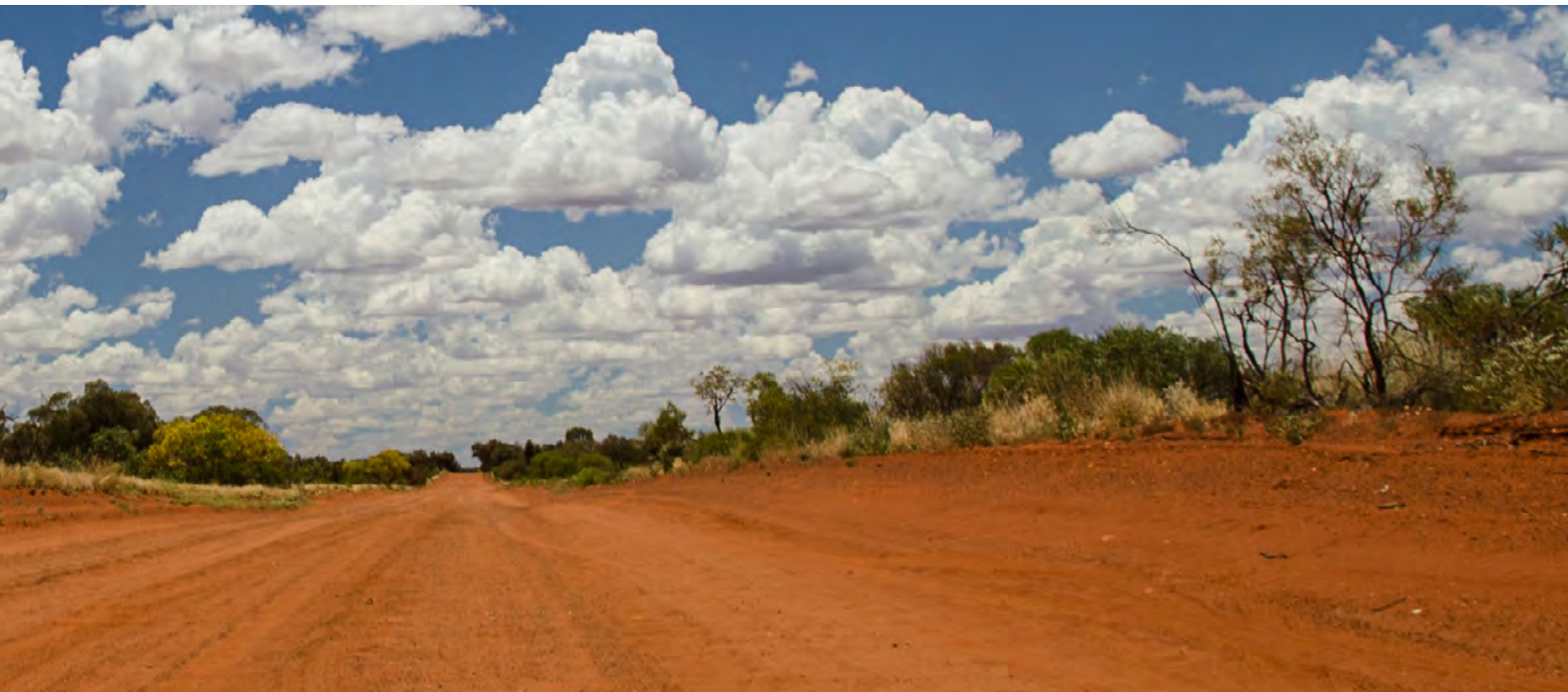
New FA regime in Queensland commences 1 April

The new financial assurance regime for resources projects in Queensland is scheduled to commence on 1 April 2019. We have previously written in detail about the new regime, and you can read about it here.

While certain aspects of the new regime will be phased in over time, one opportunity that will exist from day one is to replace existing bank guarantees with insurance bonds. Indications are that there may be significant cost savings to be made.

Please contact us if you have any questions about the new FA regime, or if you would like an introduction to an insurance bond provider.

ASX listed Terramin Australia Limited will call for binding bids on the sale of its gold business



REGULATORY UPDATES

BREAKING NEWS

NSW Land and Environment Court refuses development approval for Rocky Hill Coal Mine Project on climate change grounds

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The NSW Land and Environment Court (**Court**) has refused development consent for the Rocky Hill Coal Project in the Gloucester Valley, citing the mine's likely contribution to climate change as a key reason.

The decision will have wide-reaching consequences and will likely affect the viability of coal and other fossil fuel-dependent industries in Australia. The growth in international jurisprudence directly linking fossil fuel developments with climate change may also lead banks and others who would traditionally invest in these industries to consider alternatives.

Background

Gloucester Resources Limited (**GRL**) sought development consent for a new open cut coal mine approximately 5km south of the Gloucester town centre in New South Wales. Extraction of 2Mtpa of coal was proposed for a period of 21 years (**Project**).

The NSW Department of Planning and Environment referred the Project to the Planning Assessment Commission (**PAC**) (now the Independent Planning Commission) for determination, after receiving 2,570 submissions (2,308 objections).

On 14 December 2017 the PAC refused consent for the Project, citing:

- 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**). Also, the potential land use conflicts with existing established uses, including rural-residential and tourism;
- that the Project would likely have significant residual visual impacts and would not be sympathetic to the Gloucester Valley's character; and
- that the Project was not in the public interest, as any economic and social benefits were outweighed by the reduction in the residents' quality of life due to visual, noise and air quality impacts.

The PAC did not cite climate change impacts as a reason for consent being refused.

Court appeal

GRL appealed to the Court on 19 December 2017.

The proceedings were later joined by a local community action group, Groundswell Gloucester Inc (**Groundswell**). In joining the proceedings, Groundswell sought to bring additional arguments centred around the climate change impacts of the Project and its incompatibility with Australia's commitments under the United Nations Framework Convention on Climate Change (**UNFCCC**) and the Paris Agreement.

Summary of the Court's decision

The Court's decision in *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 was handed down on 8 February 2019. His Honour Chief Justice Preston dismissed GRL's appeal and upheld the PAC's decision to refuse consent to the mine.

The Court's reasons for refusal included that:

- the mine would have significant adverse impacts on the visual amenity and rural and scenic character of the valley, and social impacts on the community;
- the mine would have significant impacts on the existing, approved and likely preferred uses of land in the vicinity of the mine;
- the costs of the mine, exploiting the coal resource at this location in a scenic valley close to town, would exceed its economic benefits; and
- **construction and operation of the mine, and transportation and combustion of the coal from the mine, would result in the emission of greenhouse gases (GHGs), which would contribute to climate change and would not assist in achieving agreed emissions targets**.

Ultimately his Honour held:

> *'In short, an open cut coal mine in this part of the Gloucester valley would be in the wrong place at the wrong time. Wrong place because an open cut coal mine in this scenic and cultural landscape, proximate to many people's homes and farms, will cause significant planning, amenity, visual and social impacts. Wrong time because the GHG emissions of the coal mine and its coal product will increase global total concentrations of GHGs at a time when what is now urgently needed, in order to meet generally agreed climate targets, is a rapid and deep decrease in GHG emissions. These dire consequences should be avoided. The Project should be refused.'*

'In short, an open cut coal mine in this part of the Gloucester valley would be in the wrong place at the wrong time.'

Incompatibility with other land uses

The primary arguments against approval of the Project centred around clause 12 of the Mining SEPP. This required the consent authority to consider the compatibility of the proposed mine with other land uses in the vicinity.

The Court had regard to existing uses, approved uses and likely preferred uses in the vicinity of the Project in determining that:

- because of its visual, amenity and social impacts, the Project would be incompatible with the rural character of the land and the residential and rural-residential, agricultural and tourism uses in its vicinity;
- visual impacts would not be ameliorated by the amenity barriers proposed by GRL or the rehabilitated post-mining landforms;
- although the Project was compliant with relevant development standards for noise and air quality, residual noise and air quality impacts on residents would have adverse social impacts, including perceived impacts on health and wellbeing;
- the Project was likely to have major negative social impacts including impacts on the composition, cohesion and character of the community and local people's sense of place, adverse impacts to the culture and Country of Aboriginal people, and issues of distributive inequity which would not be adequately addressed by way of the mitigation measures proposed by GRL; and

there is a causal link between the Project and climate change and its consequences, as all of the Project's direct and indirect GHG emissions would contribute cumulatively to total GHG emissions

- the alleged public benefits of the Project (suggested by GRL to include an economic benefit to NSW of $224.5 million over the life of the mine) were substantially over-stated and did not outweigh either the public costs of the proposed mine or the public benefits of the existing, approved and likely preferred uses in the vicinity of the Project, if those uses were left unaffected by the Project. Significantly, while the benefits of the Project would be present only for the life of the Project, the negative impacts would endure.

Climate change

Groundswell argued that the Project should be refused because the GHG emissions from the Project, both direct and indirect, would be inconsistent with Australia's commitments under the UNFCCC and the Paris Agreement to keep global temperature increases to below 1.5º to 2ºC above pre-industrial levels, and would have a cumulative impact on climate change in the long term.

GRL argued that:

- although it did not contest the scientific evidence behind climate change, consent for the Project did not need to be refused to meet Australia's commitments. There are no governing structures under the UNFCCC and the Paris Agreement, or under State or Federal laws, that predetermine how GHG emissions reductions should occur. Therefore, *'to adopt a policy of no new coal mines would be to impermissibly legislate a strict rule of general application without jurisdiction to do so'*;
- scope 3 emissions (indirect emissions arising from sources not owned or controlled by GRL, such as from a third party purchaser burning coal) should not be considered when assessing the Project's impact, because Australia should not be held responsible for emissions caused by the burning of coal in other countries;
- preventing new coal mines might be consistent with reducing GHG emissions, but this is not the only way to achieve the desired emission reduction targets. Increasing the rate at which carbon is extracted from the atmosphere through carbon sequestration and preservation of carbon sinks could be an alternative means by which commitments are met; and
- most of the coal produced by the Project would be coking coal, an essential component in the making of steel, with limited substitutes. This critical role should justify the approval of the Project despite any climate impacts.

The Court found that the Project's GHG emissions would be sizable over the life of the mine. In response to each of GRL's arguments, the Court held that:

- scope 3 emissions should be taken into account, in accordance with clause 14(2) of the Mining SEPP and precedents set in other decisions of the Court, as well as in the United States;
- there is a causal link between the Project and climate change and its consequences, as all of the Project's direct and indirect GHG emissions would contribute cumulatively to total GHG emissions. His Honour cited *Australian Conservation Foundation v Latrobe City Council, Massachusetts v Environmental Protection Agency and the Urgenda Foundation v The State of the Netherlands* decisions in stating that this point has now been recognised in many courts;

- as there was no specific proposal to offset the Project's impacts by removing GHGs from the atmosphere, the argument regarding carbon sequestration as an alternative measure should be rejected; and
- the argument that coking coal is critical for the production of steel was overstated by GRL, as the demand for coking coal from steel production in Australia could be met by existing and approved mines.

His Honour referred to statements made in evidence by Professor Will Steffen on behalf of Groundswell, that in order to reach emissions reductions targets "most fossil fuels will need to remain in the ground unburned". Deciding which fossil fuel reserves should be allowed to be exploited and burned requires evaluating the merits of each potential fossil fuel development by considering its GHG emissions and the likely contribution to climate change, as well as the development's other impacts.

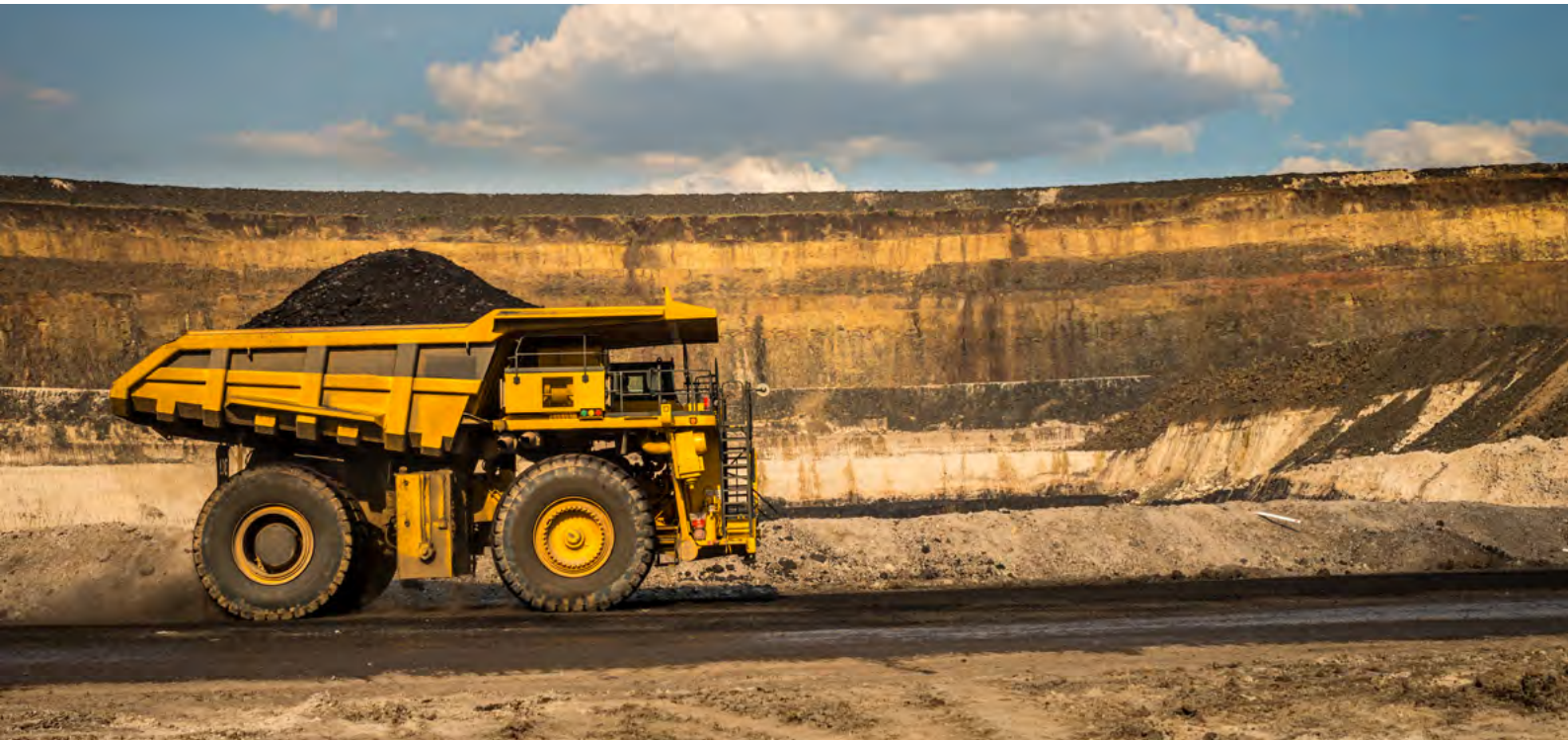
In this case:

> *'Refusal of consent to the Project would prevent a meaningful amount of GHG emissions, although not the greater GHG emissions that would come from refusal of a larger coal mine. However, the better reason for refusal is the Project's poor environmental and social performance in relative terms. As I have found elsewhere in the judgment, the Project will have significant and unacceptable planning, visual and social impacts, which cannot be satisfactorily mitigated. The Project should be refused for these reasons alone.'*

Implications

Building upon a growing international jurisprudence directly linking fossil fuels and climate change, this decision is likely to have wide reaching consequences for the viability of coal and other fossil fuel-dependent industries in Australia. Future proponents will need to seriously consider the decision, as will banks and others who would traditionally invest in or support coal and other fossil fuel-dependent industries.

It is possible that the increasing recognition of causative links between fossil fuel developments and climate change could pave the way for future compensation claims of the kind now being seen in the United States.



REGULATORY UPDATES (CONTINUED)

COMMONWEALTH

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Australian Taxation Office issues new guidance on what constitutes 'use' of a mining, quarrying and prospecting right?

On 13 February 2019, the Australian Taxation Office (**ATO**) issued *Taxation Determination 2019/1* (**TD 2019/1**) to outline the Commissioner of Taxation's view of what constitutes 'use' (and potentially first use) of a mining, quarrying and prospecting right (**MQPR**) for the purposes of subsection 40-80(1) of the *Income Tax Assessment Act 1997* (Cth) (**ITAA 1997**).

Section 40-80(1) of the ITAA 1997

MQPR's are included in the definition of a 'depreciating asset' (if it is not trading stock) for the purposes Division 40 of the ITAA 1997 and may therefore be the subject of deductions for the decline in value (i.e. depreciation) of those assets – usually over time.

Section 40-80(1) of the ITAA 1997 provides that a taxpayer can claim the total cost of a depreciating asset as an immediate deduction if certain conditions are satisfied, including:

(a) the taxpayer must first 'use' the asset for exploration or prospecting for minerals, or quarry materials, obtainable by mining and quarrying operations; and

(b) when the taxpayer first uses the asset they do not 'use' it for development drilling for petroleum, or operations in the course of working a mining property, quarrying property or petroleum field.

Both of the above conditions are concerned with the 'use' of the MQPR. However, 'use' is not defined in the ITAA 1997.

Taxation Determinations

From time to time, the ATO issues public rulings (e.g. Taxation Determinations) as a public expression of the Commissioner's opinion about the way in which a relevant provision of the tax legislation applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If a taxpayer relies on a public ruling, generally the Commissioner must apply the law to the taxpayer in the way set out in the ruling. The taxpayer will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by the ruling if it turns out that the ruling does not correctly state how the relevant provision of the tax legislation applies to the taxpayer.

TD 2019/1

To provide clarity on the meaning of 'use' of an MQPR, the ATO issued TD 2019/1 which sets out 6 key principles for determining 'use' or first use of an MQPR.

(a) A taxpayer 'uses' a MQPR when they do something that the MQPR permits or authorises.

(b) Merely holding, or meeting the conditions or requirements to hold, or retain, an MQPR does not constitute a 'use' of it. For example, designing an exploration plan to meet the requirements for holding an exploration right would not amount to a 'use' of that right, whereas exploratory drilling on the tenement would be a 'use' of the right.

(c) The terms of the MQPR must be examined to determine whether a particular action amounts to a 'use' of the MQPR. Ordinarily, this would require activity in the area over which the MQPR is granted.

(d) Activities that are neither permitted nor authorised by the MQPR, or that could be undertaken without holding the MQPR, are not a 'use' of the MQPR.

(e) A holder of an MQPR can 'use' an MQPR where another entity (for example, a joint venture partner or a contractor) who is authorised by the holder does an activity on its behalf that would have been a 'use' if done by the holder.

(f) There is no explicit requirement that the 'use' must exploit the inherent characteristics of the MQPR. However, a trivial act on the tenement will not amount to a 'use' because 'the law does not concern itself with trifles'.

TD 2019/1 also provides specific examples of situations where the use requirement would be met as well as situations where the use requirement would not be met. A key focus seems to be on activities that are either not permitted under the relevant right (e.g. a tenement) or which would be able to be carried independent of the relevant right.

Clients with MQPRs should consider the examples in TD2019/1 and compare the activities they conduct against what is permitted under those rights and what might be considered to be independent of those rights. The outcome may have an impact on the ability to claim an immediate deduction for the cost of the MQPR.

The terms of the MQPR must be examined to determine whether a particular action amounts to a 'use' of the MQPR.

Australian Government responds to India 2035 Economic Strategy Report

On 22 November 2018, the Australian Government released its response to Peter Varghese's 2018 report, *'An India Economic Strategy to 2035: Navigating from potential to delivery'*.

The original report made 90 recommendations in regard to Australia's future economic relationship with India. Part of an ambitious strategy to be led at the highest levels of government, Varghese's plan is that by 2035, India will be one of Australia's top three export markets, the third largest destination in Asia for Australian outward investment and part of the inner circle of Australia's strategic partnerships and personal ties.

Structured around ten key sectors and ten key Indian states with the most potential for development, the report identifies resources as one of four leading sectors, alongside education, agri-business and tourism. In particular, Varghese identifies a particular demand for metallurgical coal, copper and gold, as well as for mining equipment technology and services. Energy and infrastructure were also predicted to be promising sectors for growth.

Corrs considered the original report in detail in the September 2018 issue of the Mining Sector Update which can be read here.

At a high level, the Government has endorsed Varghese's report and given its in-principle support to its 20 priority recommendations. On a practical level, the response sets out a leadership framework which is designed to facilitate implementation, specific measures to mark Australia's strategic investment in India and a first round of implementation actions on a sector-by-sector basis.

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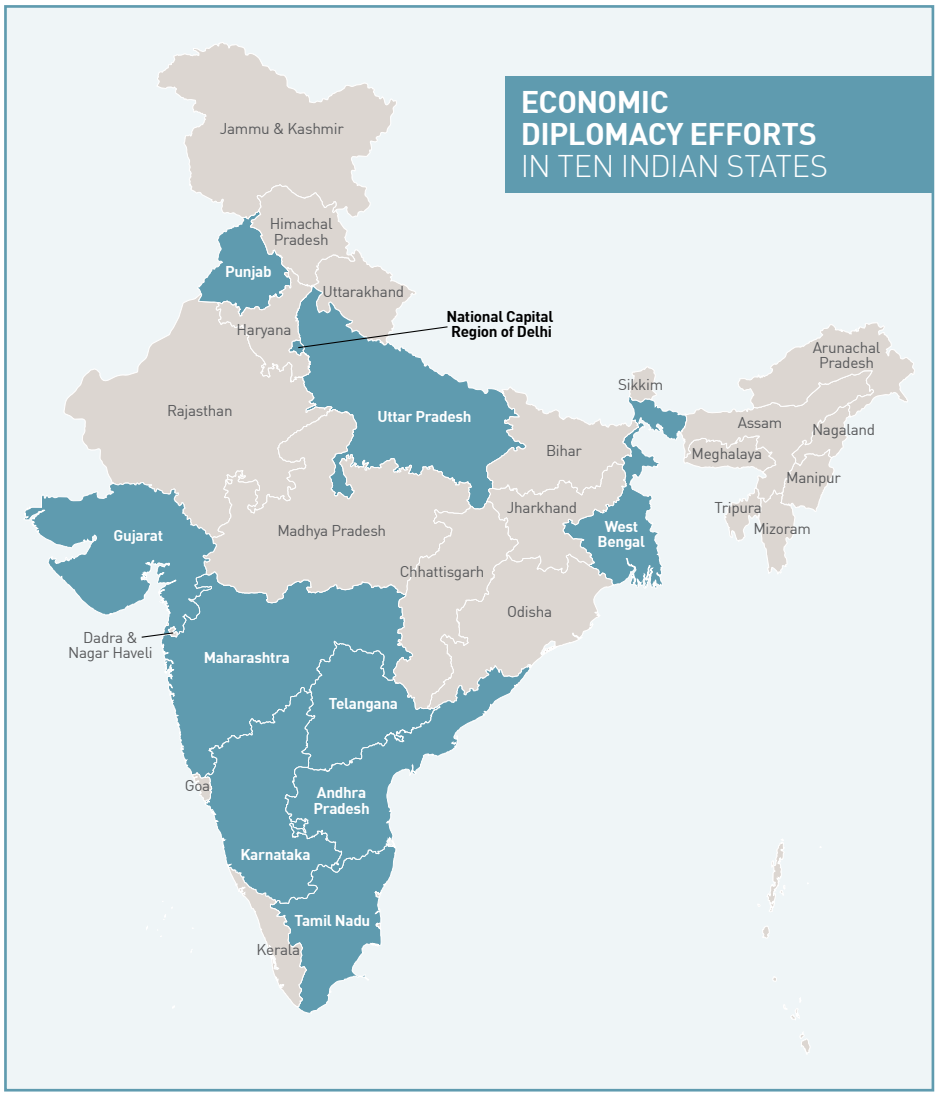
REGULATORY UPDATES (CONTINUED)

Implementation framework

The Government intends to focus its economic diplomacy efforts in the ten key sectors and ten Indian states identified by the report. These sectors and states formed the core of Varghese's recommendations and strategy, representing the areas of alignment where Australian businesses and investment is most likely to succeed in India.



To ensure the report maintains a level of political leadership and attention, the Government intends to appoint 'ministerial champions' for the four leading sectors – education, agri-business, resources and tourism.

These champions will have significant engagement with their Indian counterparts and will sit as a part of a committee which meets annually to report on implementation activities and any potential scope for the adoption of further recommendations.

The resources sector will be championed by the Minister for Resources and Northern Australia.

General measures to mark Australia's strategic investment in India

The Government intends to expand its diplomatic presence in the country by opening a new Consulate-General in Kolkata in 2019. As discussed further **below**, this presence is intended to build closer relationships with the state governments and create opportunities for resources investment in India's eastern mineral-rich states of West Bengal, Chhattisgarh, Jharkhand and Odisha.

An Australian secretariat will also be established within the Business Council of Australia in order to lend more weight to the Australia-India CEO Forum, a formal mechanism by which business leaders advise Prime Ministers on how to advance the bilateral economic relationship.

Other key actions to be implemented in the short term include:

- undertaking familiarisation visits between Australian investors and Indian officials with a view to building a mutual understanding of the economic opportunities in India and relaying Australian investment priorities and expectations directly;
- forming a Memorandum of Understanding between Austrade and Invest India to cooperatively promote two-way investment;

- the Australian Bureau of Statistics publishing more statistics on outward foreign investment to increase awareness of the sectoral successes of Australian investors, and to better inform market entry and expansion decisions;
- board members of the Australia-India Council championing the benefits of India literacy to Australian CEOs to improve understanding of the Indian business environment and differences in business culture; and
- developing a new Standards Market Potential report to identify opportunities, challenges and gaps on a sector by sector basis, to better understand the economic alignments between the two countries.

Australia-India Council championing the benefits of India literacy to Australian CEOs to improve understanding of the Indian business environment and differences in business culture

Actions in the Resources sector

The resources sector has always been a key area of alignment between Australia and India. To strengthen and support the growth of this relationship, the Government has put forward two key actions to implement Varghese's recommendations for the sector:

1 **Extending Geoscience Australia's collaboration with India** by forming a Memorandum of Understanding with the Geological Survey of India to assess the potential for minerals deep underground. This pre-emptive action will be the foundation for a greater understanding of regional geology and improve the ability to predict undiscovered mineral deposits. This will become increasingly important as India is urbanised and the demand for mineral resources grows.

2 **Expanding the Australia-India Mining Partnership at the Indian School of Mines** at the Indian Institute of Technology (**IIT-ISM**) in Jharkhand. This arrangement was established in 2014 and is directed to the delivery of joint training, research and development engagement in mining services. Supported by the new Consulate-General in Kolkata, the Government has emphasized that growing this partnership will enhance the connection between Australian companies and India's minerals-rich North Eastern states, and further highlight the adaptability of Australia's mining equipment, technology and services to Indian conditions.

Actions in the Energy sector

In the context of current predictions that India's energy demand will double by 2040, the Government has also outlined two initial implementation actions for the energy sector:

1 **Supporting India's leadership of the International Solar Alliance (ISA) and its engagement in global energy institutions** by establishing an Australian industry working group to support commercial participation, and maintaining the current secondment of an Australian expert to the Secretariat. The ISA promotes solar technologies and investment and aims to create financing mechanisms and increase the use of solar energy.

2 **Commissioning a study on India's east coast gas market** by the Brookings Institution India to examine the changing landscape and draw out the implications of proposed reforms for international suppliers. The intention is for the results of the study to provide an evidence base for Australian Government and Industry stakeholders to consider export and investment cooperation with India.

The Government's initial response to the report has been encouraging, particularly for the proactive developments within the resources sector. If the Government retains this commitment to implementation of Varghese's recommendations, it may be that his ambitious vision is achieved sooner than expected.

REGULATORY UPDATES (CONTINUED)

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Public and large proprietary companies will soon be required to have whistleblower policies

The Australian Parliament recently passed the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2019 (Cth) (**Bill**).

Significantly, the reforms will require public companies (whether listed or unlisted) and large proprietary companies to have in place whistleblower policies containing certain mandatory content. Failure to comply with this requirement will be a strict liability offence.

A large proprietary company is currently defined as a proprietary company that satisfies at least two of the following criteria for a financial year:

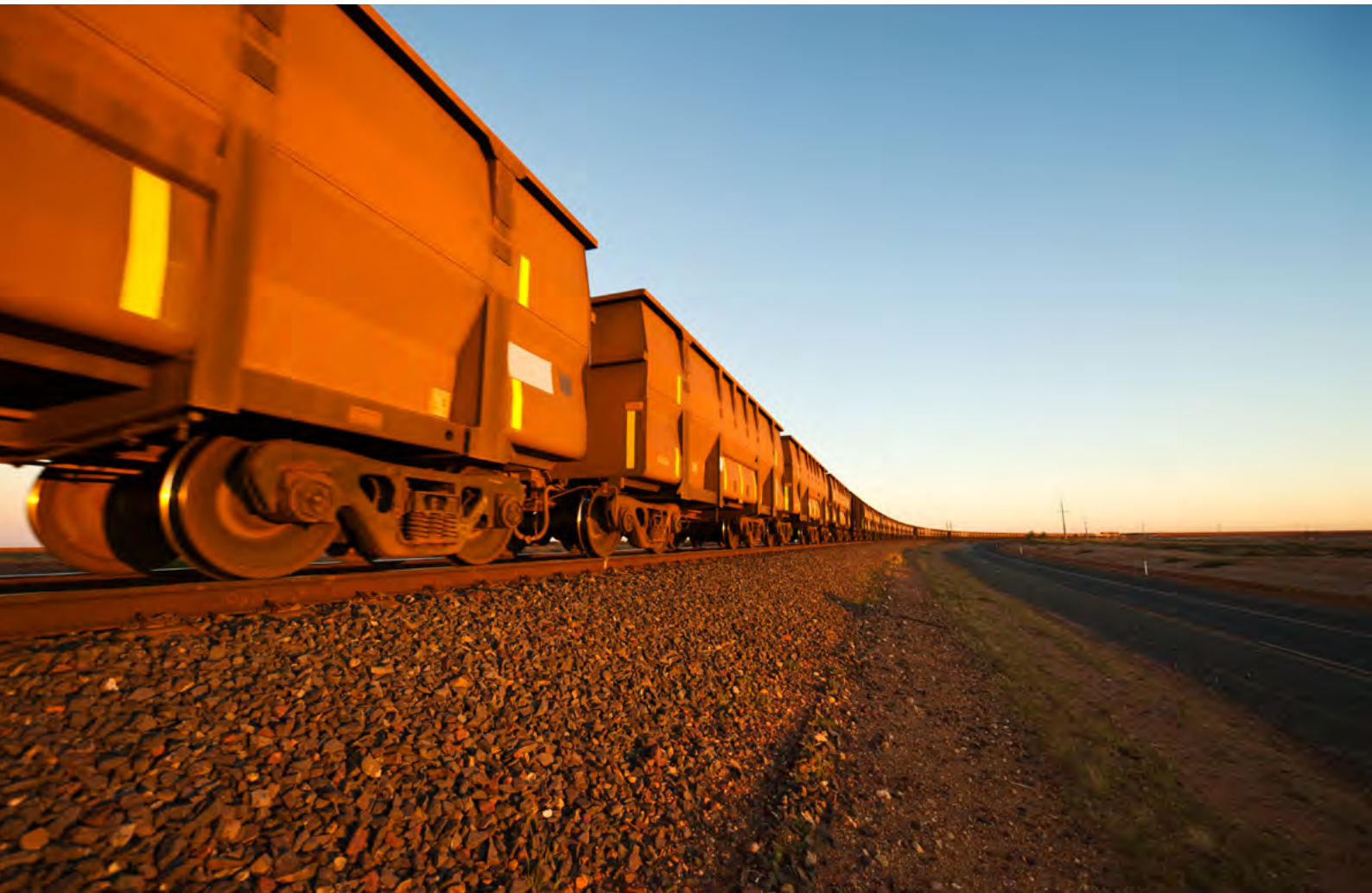
1 consolidated revenue of A$25 million or more;

2 gross assets of A$12.5 million or more; and

3 the company and any entities it controls have 50 or more employees.

The Bill could receive Royal Assent as early as 1 July 2019, with the reforms to take effect soon after.

Our full commentary on these changes can be read here.



Potential changes to the Native Title Act 1993

The Native Title Legislation Amendment Bill 2019 (the **Bill**) was introduced on 21 February 2019 and seeks to amend the *Native Title Act 1993* (Cth) (**NTA**) to, amongst other things, confirm the validity of 'section 31 Agreements' that may have been affected by the Full Federal Court's decision in *McGlade v Native Title Registrar* [2017] FCAFC 10.

Indigenous Land Use Agreements (**ILUAs**) are commonly entered into between mining companies and the relevant native title group to ensure compliance with the requirements of the NTA. In February 2017, the Full Federal Court handed down a decision requiring that in order for an ILUA to be registered, and therefore able to be enforced, all registered native title claimants must sign the agreement.

Prior to the decision in *McGlade*, it was generally accepted that a native title group would be bound if a majority of the registered native title claimants had signed an ILUA.

Amendments to the NTA were made to validate ILUAs which had been signed by a majority of the registered native title claimants.

However, there is a concern that the reasoning in *McGlade* could also affect agreements by native title parties made under section 31 of the NTA permitting future mining and exploration activities.

The amendments proposed by the Bill, in effect, will allow for any agreement to which a registered native title claimant is a party (including ILUAs and section 31 Agreements) to be validly signed by the majority of persons who comprise the registered native title group, unless the claimant group has placed conditions on the authority of the applicant, in which case signing must be in accordance with those conditions.

The changes also validate section 31 Agreements which were signed by a majority but not all of the registered native title claimants, and allow for those agreements in the future, after a six month interim period, to be validly signed by a majority of the registered claimants.

There will be a period of at least six months after the commencement of the Bill where section 31 Agreements must be entered into unanimously by all members of the registered native title group.

More than 300 mining leases were potentially affected by the decision in *McGlade* in Western Australia alone. The new legislation will create certainty for mining companies around the validity of their section 31 agreements, and their compliance with the NTA.

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REGULATORY UPDATES (CONTINUED)

STATE

The Land Access Ombudsman: A new player in the land access space in Queensland

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On 14 September 2018, the Office of the Land Access Ombudsman began performing its functions under the *Land Access Ombudsman Act 2017* (Qld) (**Act**), with the Minister for Natural Resources Mines and Energy appointing Ms Jane Pires as the inaugural Land Access Ombudsman.

The Act aims to enhance Queensland's existing land access and make-good frameworks for mining and coal seam gas projects. It establishes a Land Access Ombudsman whose role is to:

- investigate and facilitate the resolution of land access disputes;
- refer contravening conduct to appropriate government departments;
- identify and advise the government on systemic land access issues; and
- promote public awareness of the Ombudsman's functions.

The Act is in response to an independent report in 2015 of the Gasfields Commission in Queensland, in which the report's author Mr Robert Scott identified there was no avenue between negotiations and litigation to resolve disputes under conduct and compensation agreements (**CCAs**) and make good agreements (**MGAs**).

CCAs set out the terms on which mining and resource companies are entitled to access and conduct resource activities on a land owner's property. Under an MGA, a mining and resource company must make good the impacts to a land owner's water bore(s) caused by the resource company.

Resolving Land Access Disputes

The Ombudsman's primary role is to investigate land access disputes (ie disputes about an alleged breach of a CCA or MGA between the parties to the agreement).

Parties must have made a reasonable attempt to resolve the dispute before referring the matter to the Ombudsman. Importantly, the Act excuses parties from any potential liability for breaching a dispute resolution clause by referring the dispute to the Ombudsman, meaning that parties cannot contract out of the Ombudsman's jurisdiction.

However, the Ombudsman must refuse certain referrals, such as:

- where the referral is frivolous or trivial;
- where the dispute is the subject of investigation by a government department; or
- where there are existing proceedings on foot.

If the referral is accepted, the Ombudsman will appoint an investigator. The investigation must, if practicable, involve a non-binding dispute resolution process (e.g. conciliation or mediation). The investigator also has coercive powers, such as the power to require a party to give the investigator particular documents or information or attend a meeting and answer questions. Parties can be represented at a meeting only with the Ombudsman's permission, which cannot be unreasonably withheld.

The investigator may also enter and inspect the relevant land (subject to obtaining consent). In carrying out the investigation, the investigator is not bound by the rules of evidence, although they must comply with natural justice and maintain confidentiality. Mining organisations have expressed concerns that the rules of evidence do not apply – especially given the power of the Ombudsman to recommend enforcement action.

At the end of the investigation, the investigator issues the parties a notice with its proposed outcome. The Ombudsman must circulate a draft of the notice and invite the parties to make submissions, which must be considered before finalising the notice. The notice must include details of the resolution of the dispute if it was resolved by the investigation or, if the dispute was not resolved, advice about the merits of the parties' respective positions and recommendations.

Although not binding on the parties, the notice is admissible in any future Land Court proceeding as evidence of the matters in the notice – even though the investigator is not bound by the rules of evidence. Therefore, parties need to give proper attention to the investigation, because receiving a favourable notice could be an important part of a party's overall dispute resolution strategy. The notice could also save parties the time and expense of having to prove matters in the Land Court.

Referring contravening conduct to government departments

In addition to the investigative and facilitative role, the Ombudsman may recommend to appropriate government departments the investigation of suspected contraventions of:

- a 'Resource Act';
- chapter 3 of the *Water Act 2000* (Qld); and
- the *Environmental Protection Act 1994* (Qld).

The Ombudsman may only do so if they have accepted the relevant land access referral and reasonably suspect that the mining and resource company either has committed a contravention, is committing a contravention or is likely to do so. In addition, before making their recommendation, the Ombudsman must warn the resource company and invite it to make submissions, which the Ombudsman must consider before making their recommendation.

Advising on systemic issues

Over time, the Ombudsman will develop an expert understanding on the common issues relating to land access. Consequently, the Act empowers the Ombudsman to give advice, where appropriate, to chief executives of State government departments and other government entities on systemic issues arising from land access dispute referrals. To preserve confidentiality, any such advice must not include information which the Ombudsman is satisfied is confidential and the disclosure of which may be detriment to a person's commercial interests.

Reporting

The Ombudsman must also produce an annual report for each financial year on the operation of the Ombudsman's office, including details of, as a minimum, the land access dispute referrals made and investigated, notices at the end of those investigations and recommendations to investigate suspected contraventions. The report must not disclose the identity of a party to a land access dispute.

Mining organisations have expressed concerns that the rules of evidence do not apply – especially given the power of the Ombudsman to recommend enforcement action.

REGULATORY UPDATES (CONTINUED)

Looking ahead

As Mr Scott envisioned, referring a dispute to the Ombudsman falls somewhere between negotiations and formal proceedings. Whereas negotiations may prove ultimately fruitless, the notice at the end of the Ombudsman's investigation (although not binding) may have serious legal significance.

On the other hand, the Ombudsman's processes are less prescriptive than litigation and arbitration, which may avoid time delays and reduce costs. Additionally, the Ombudsman's role in assisting other government departments with regulatory compliance, advising on systemic land access issues and educating the government and public on land access generally, should result in future positive policy and legislative changes to the land access regime in Queensland.

Indeed, the Act may be a precursor to further reform to what is an increasingly complex and contentious issue.

The Land Access Ombudsman's official website can be found here.

NEWS FROM A RELATED INDUSTRY

National Gas Law – Capacity Trading Reform Package

Important regulatory changes impacting parties with gas transportation/ processing agreements commenced on 1 March 2019.

In late 2018, changes to the National Gas Law were made to implement the capacity trading reform package developed by the Gas Market Reform Group and endorsed by the COAG Energy Council.

The capacity trading reform package was originally recommended by the Australian Energy Market Commission in its review of the Eastern Australian wholesale gas market and pipelines framework.

The reforms relate to facilitating trading in contracted but un-nominated capacity on transmission pipelines and associated compression services in each State and Territory of Australia excluding Western Australia.

There will be some delays in the application of aspects of the capacity trading reform package in the Northern Territory. Also, the COAG Energy Council intends to direct the AEMC to conduct a review in 2020 at the earliest into whether the reforms should apply in Western Australia.

Key elements of the reforms are:

(a) creation of a capacity trading platform which will form part of the Gas Supply Hub and enable shippers to trade spare capacity prior to the close of trade on the day before gas is due to be transported using either the Gas Supply Hub or a listing service;

(b) a day-ahead auction of contracted but un-nominated capacity on covered pipelines and compression facilities that will be conducted by AEMO shortly after nomination cut-off time on the day before gas is due to be transported. The auction will have no reserve price. Revenue from auctions will accrue to the pipeline/facility provider and not the shipper, thus incentivising shippers to trade spare capacity on the trading platform prior to auction;

(c) a reporting framework for capacity trades that will allow for publication of the price and other related information on a Bulletin Board; and

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(d) a standard market timetable which will provide for:

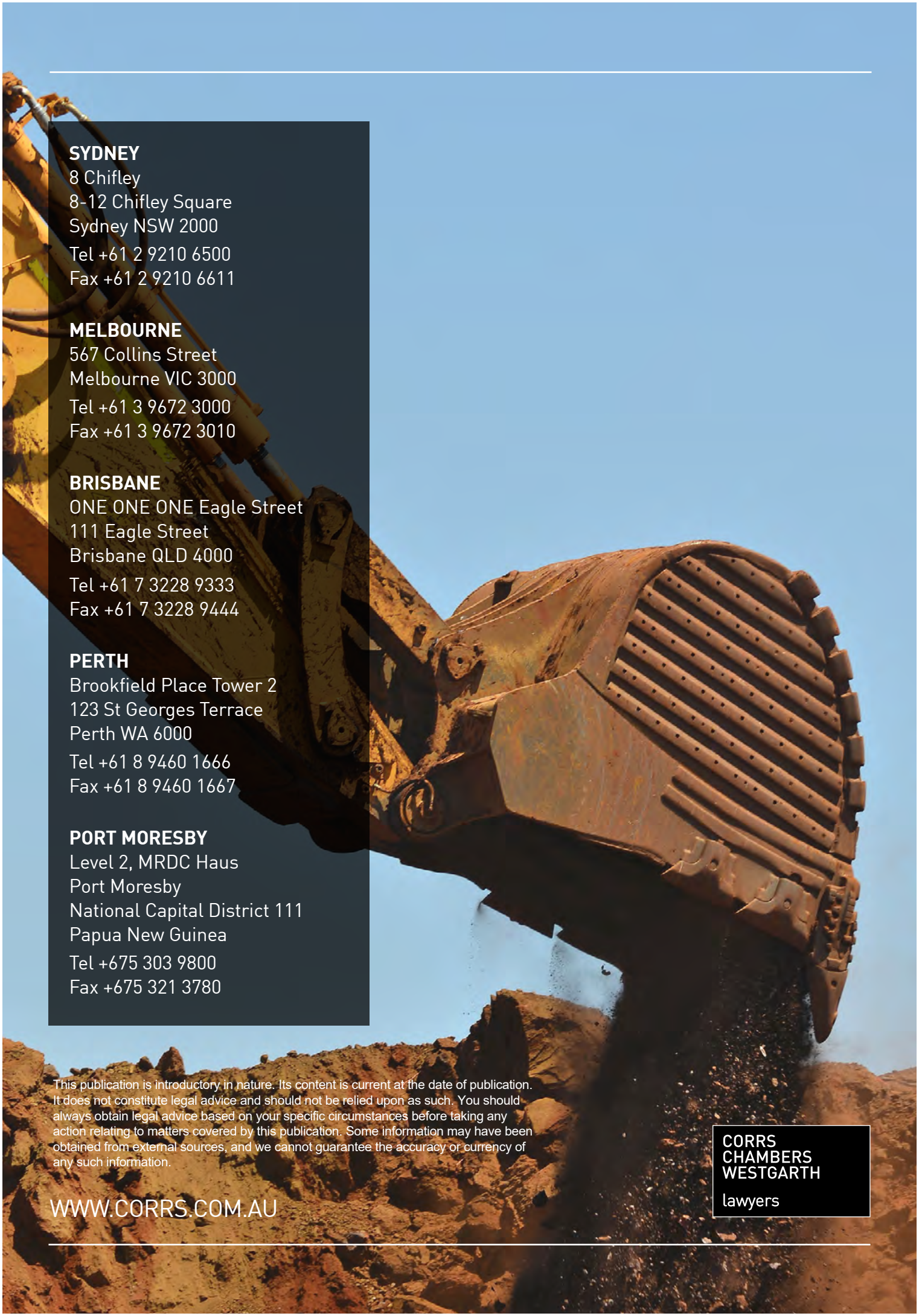
- a harmonised gas day start time of 6.00 am (AEST) for production, transportation and gas storage facilities;
- a common nomination cut-off time of 3.00 pm (AEST) for transportation facilities that are subject to the capacity trading reforms; and
- an auction service nomination cut-off time of 6:45 pm (AEST) for transportation facilities that are subject to the day-ahead auction.

The capacity trading reforms commenced on 1 March 2019, other than the standard market timetable which will commence on 1 October 2019.

The aim of the reforms is to facilitate a more liquid secondary capacity market and thereby improve the efficiency with which capacity in transmission pipelines and associated compression services is allocated. It is expected that this greater liquidity will in turn facilitate increased trade in gas and support the development of a more robust reference price for gas, as well as enabling market participants to make more informed decisions about their use of gas and investments in exploration, production, pipelines and storage facilities.

Some facilities will be exempt either fully or conditionally upon meeting certain criteria. However there is no exemption from the secondary capacity reporting requirements and standard market timetable requirements.

The compression services facilities that have been designated by regulation as subject to the reform package are the Wallumbilla and Moomba compression facilities operated by APA, the Ballera compression facility operated by Santos and the Iona compression facility operated by Lochard.



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