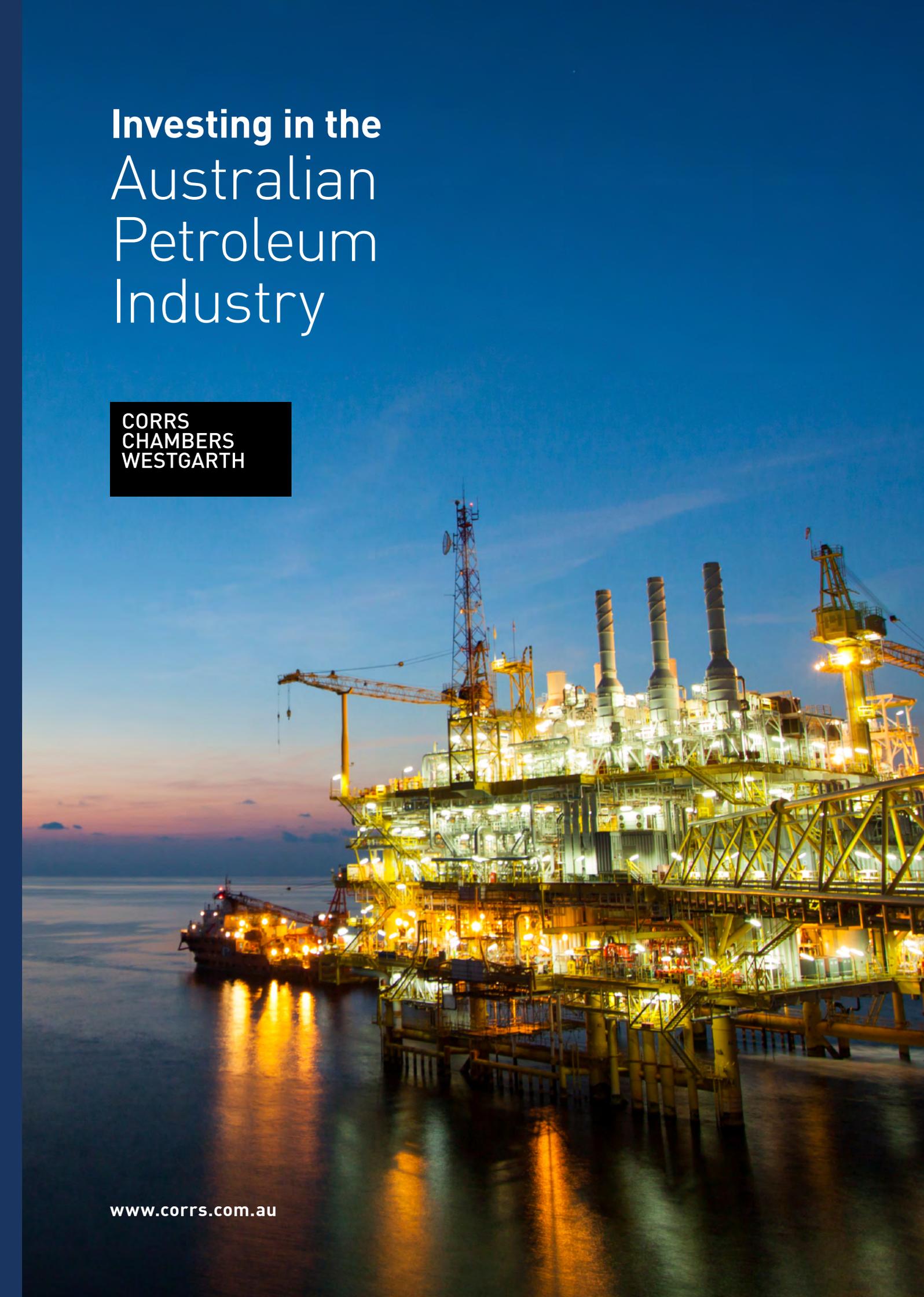


Investing in the Australian Petroleum Industry

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This publication is introductory in nature. Its content is current at the date of publication. It does not constitute legal advice and should not be relied upon as such. You should always obtain legal advice based on your specific circumstances before taking any action relating to matters covered by this publication. Some information may have been obtained from external sources, and we cannot guarantee the accuracy or currency of any such information.

The information contained in this publication was current as at May 2019.

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1 Foreword

The petroleum industry has always been characterised by its unique blend of risk and opportunity. It is an industry of pioneers and innovators, as well as visionaries and dealmakers. But the Australian resources sector is facing a new era, one marked by regulation that comes with true globalisation of the industry.

The market's focus is on major oil and gas opportunities with particular emphasis on unconventional gas and LNG, and those seeking to take advantage must operate in this increasingly regulated international market.

Corrs Chambers Westgarth offers a deep understanding of the oil and gas sector and the wider international and political issues affecting cross-border business. As Australia's premier 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. We are known for our strong international alliances and are widely represented in national and global business affairs.

Opportunities in the Asia-Pacific region and globally will continue to grow. Australia is well placed to make the most of this evolving business environment.

Our Energy and Natural Resources team has produced this second edition of the Investing in the *Australian Petroleum Industry* as a useful source for those interested, or considering strategic investment, in this fast-growing industry.

If you would like any further information in relation to the Australian petroleum 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

Michael MacGinley

Partner (Energy and Natural Resources)



2 Overview

The energy and resources sector continues to take centre stage with regard to Australia's economy and global competitiveness. Australia's upstream oil and gas industry has continued a period of unprecedented growth and transformation, with more than A\$350 billion being invested in oil and gas projects, including seven major LNG projects.¹ Over the next few years, Australia is expected to remain as one of the world's largest exporters of LNG.²

These major developments in the petroleum industry have taken the spotlight in recent years, provoking great interest from foreign investors. With a stable political, legal and economic environment, a highly skilled workforce and a welcoming attitude to foreign investment, Australia is a favoured destination for foreign investors.

For companies looking to acquire a stake in the Australian oil and gas industry, this publication provides important background information on the sector, and explores key legal considerations for investing in or developing an oil and gas project in the country.



3 Introducing Corrs Chambers Westgarth



Corrs Chambers Westgarth is Australia's leading independent law firm.

We provide exceptional legal services across the full spectrum of matters, including major transactions, projects and significant disputes, offering strategic advice on our clients' most challenging issues.

With more than 175 years of history and a talented and diverse team of over 1000 people, we pride ourselves on our client-focused approach and commitment to excellence. Our fundamental ambition is the success of our clients, and this is reflected in everything we do.

We advise on the most significant global matters and connect with the best lawyers internationally to provide our clients with the right team for every engagement. We are also at the forefront of some of the most high-profile public international law matters in our region, assisting governments and corporations with the resolution of highly complex cross-border disputes.

We are the firm of choice for many of the world's most significant organisations, with our people consistently recognised for providing outstanding client service and delivering exceptional results.

3.1 Corrs and the Petroleum Industry

Corrs' Australian Energy and Natural Resources team is made up of more than 65 lawyers located in Brisbane, Perth, Sydney and Melbourne, who specialise in this area and who between them have an unsurpassed depth of experience in the oil and gas industry.

(a) 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 energy sector including:

- BP Australia
- Carnarvon Petroleum
- Inpex
- Santos
- Senex Energy
- Shell
- Tokyo Gas
- Tri-Star Petroleum
- Woodside

(b) Advising across the project lifespan

Corrs offers a team of leading lawyers who have an intimate knowledge of all legal aspects of the petroleum industry and can advise on:

- project approvals, including petroleum titles, environmental approvals and maritime approvals
- land access and property
- infrastructure access arrangements and arrangements for sharing of facilities and infrastructure
- acquisitions and divestments
- joint ventures
- finance
- workplace relations
- major construction and procurement contracts, including EPC contracts, drilling contracts and floating production storage and offloading (FPSO) contracts
- gas supply, gas balancing and gas lifting arrangements
- contract disputes

We advise clients across the lifespan of their oil and gas projects:

(i) Upstream

Corrs has a strong track record advising national and international clients on all aspects of exploration, production development and operation, including acquisitions, bidding agreements, exploration agreements, cost sharing agreements, drilling contracts, concessions, licences, revenue and production sharing arrangements, joint operating agreements, unitisation agreements, construction contracts, FPSO developments, balancing and lifting agreements, tie in agreements and marketing agreements.

(ii) Midstream

Our team advises on access to the land on which collection and transmission facilities are located (including the acquisition of easements), approvals and licensing, construction agreements and operation and maintenance agreements, shipping and transportation agreements and developing and advising on open access and negotiated access regimes.

(iii) Downstream

We advise on processing, treatment and liquefaction facility developments, refining, tolling agreements, shared facility agreements, gas and feedstock supply agreements, sale and purchase agreements, trading agreements, terminal use agreements and on shipping, marketing and distribution generally.

3.2 Recent Recognition

Our team members are recognised as leaders in the oil and gas industry. A number of Corrs' partners are ranked amongst the best energy and resources lawyers in the world, as evidenced by some of our recent independent industry awards.

(a) Best Lawyers

Law firm of the Year – Oil & Gas, 2020

Individual recognition

Michael MacGinley – Best Lawyer – Oil & Gas, Energy, Natural Resources and Mining, 2009-2020; Lawyer of the Year – Oil & Gas Law, Brisbane 2018

Peter Jarosek – Best Lawyer – Oil & Gas, Energy and Natural Resources, 2009-2020; Lawyer of the Year – Oil & Gas Law, Perth 2018-2019

Bruce Adkins – Best Lawyer – Oil & Gas, Energy, Natural Resources and Mining, 2013-2020

Paul Careless – Best Lawyer – Oil & Gas and Natural Resources, 2012-2020

Henry Prokuda – Best Lawyer – Oil & Gas, Energy and Natural Resources, 2009-2020

(b) Chambers Asia Pacific and Global Guides

Michael MacGinley – Leading Lawyer – Energy & Natural Resources: Mining, 2008-2019

Peter Jarosek – Leading Lawyer – Energy & Natural Resources: Oil & Gas, 2008-2019

Bruce Adkins – Leading Lawyer – Energy & Natural Resources: Mining, 2013-2019

Paul Careless – Leading Lawyer – Energy & Natural Resources: Oil & Gas, 2008-2019

(c) Asia Pacific Legal 500

Peter Jarosek – Leading Lawyer – Energy (Transactions and Regulatory), 2016-2019

Bruce Adkins – Leading Energy and Resources Lawyer, 2012-2019

3.3 What Our Clients and Legal Commentators Say About Us

As demonstrated in the commentary provided by our clients and commentators as part of the independent industry awards programs, the advice and reputation of Corrs' oil and gas team is highly esteemed.

(a) Chambers Global Guide 2019

Gavin MacLaren is "highly regarded for his expertise within the oil and gas sector."

Michael MacGinley is "acknowledged for large mining transactions as well as acting on supply agreements and financing arrangements."

Peter Jarosek is "considered a heavyweight in the industry, where he advises on structuring large transactions, ventures and regulatory requirements."

Paul Careless is "highly experienced and knowledgeable in the Australian oil and gas sector. He is modest, thorough and very reliable. His response times are excellent and he is polite and pleasant to deal with."

Bruce Adkins is "great, a go-to for transactions. For buying and selling, he's awesome".

(b) Chambers Asia Pacific 2019

"Delivery of a comprehensive range of services to a high standard. We find the firm's advice to be commercial, practical and always on point."

"The team brings credibility to the firm through its depth of experience and by having the right partners because, in this sector, it is about experience and what is achievable."

4 The Australian Economy, Legal System and Government



4.1 Economy

Australia has a strong and stable economy, based largely around primary industries such as mineral and petroleum resources and agriculture, but with an increasing focus on information technology, tourism and education. In its 2018 *World Economic Outlook Report*, the International Monetary Fund projected that Australia's GDP would grow by 2.8% in 2019, in front of the average of 2.1% among other advanced economies.³

Australia ranks 14th in the world in the Global Competitiveness Index published in the World Economic Forum's *Global Competitiveness Report 2018*.⁴ The nation has a healthy macroeconomic situation (ranked equal first for macroeconomic stability) and receives very good ratings for its product market (ranked 8th), and financial system (ranked 13th).⁵

Relatively low unemployment, transparent public and private institutions, a strong resources industry, contained inflation and sustainable fiscal policy all 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 that provides certainty for business, and is open to investment without undue delay.

Australia is party to Free Trade Agreements with a number of countries, including the United States, China, Japan, Korea, Singapore, Chile, Malaysia

and New Zealand.⁶ Australia is also signatory to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, which entered into force on 30 December 2018.⁷

In March 2019, Australia signed a Free Trade Agreement with Hong Kong⁸ and a Comprehensive Economic Partnership Agreement with Indonesia.⁹ Australia is engaged in negotiations with India to conclude a Comprehensive Economic Cooperation Agreement (the last round of negotiations was in September 2015).¹⁰ Once ratified, these agreements have the potential to facilitate even greater investment opportunities in Australia.

4.2 Legal System and Government

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 Commonwealth Parliament, located in Canberra in the Australian Capital Territory, and the eight State and Territory Parliaments. The Constitution gives the Commonwealth 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 those matters reserved to the Commonwealth Parliament. Commonwealth law prevails over State or Territory law to the extent of any inconsistency.

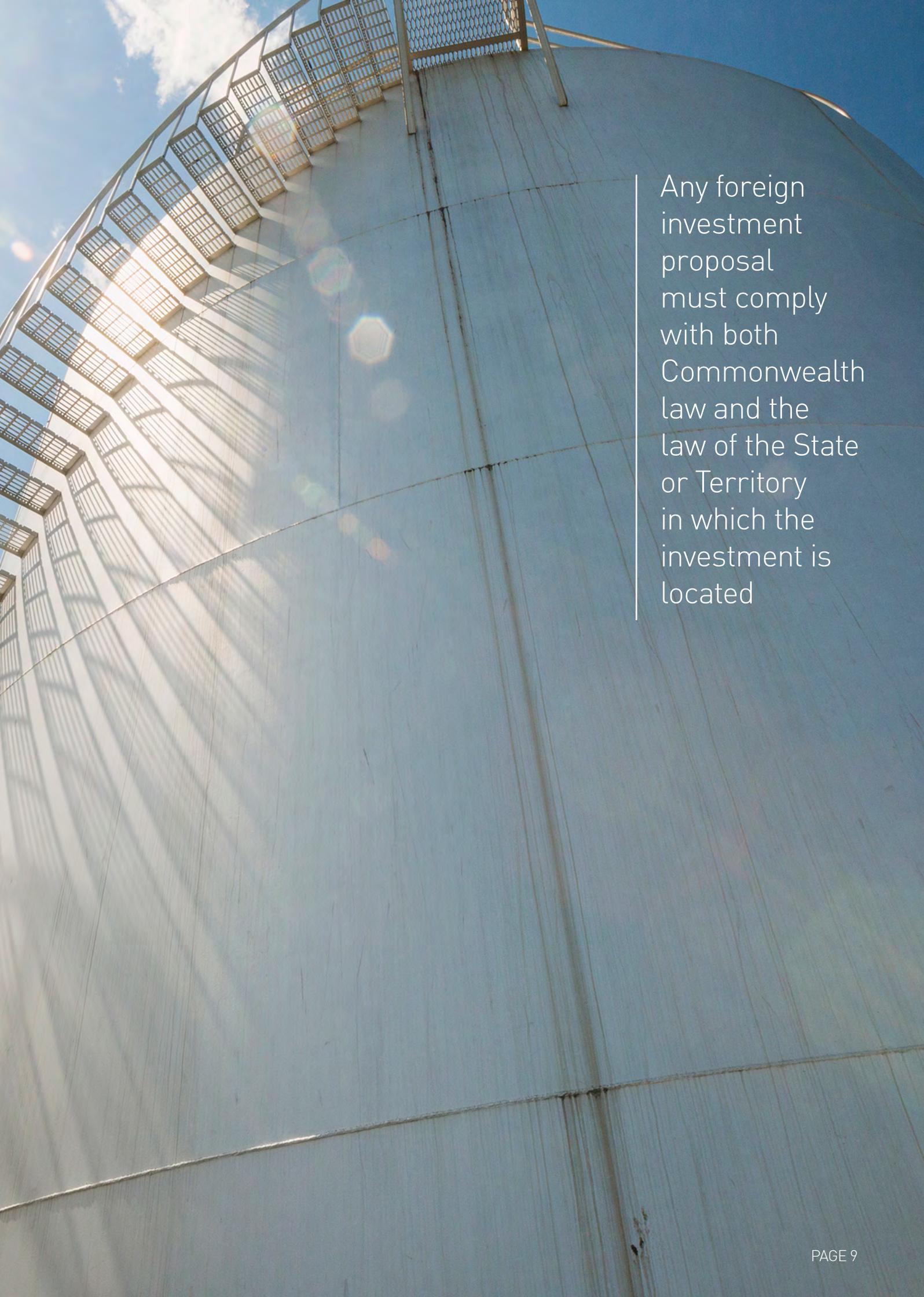
Federal, State and local governments are democratically elected at general elections held every three or four years. These elections are generally contested by candidates from two or three major political parties and several smaller parties and independent politicians.

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 Commonwealth, State and Territory courts.

Each State, the Northern Territory and the Australian Capital Territory, 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 hears appeals (if leave is granted) from the Federal Court and the State and Territory Supreme Courts, and has exclusive jurisdiction to hear particular matters (including challenges to the constitutional validity of laws). In addition, there are numerous panels and tribunals administering particular areas of law, such as industrial relations and takeovers.

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





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5 The Australian Petroleum Industry

5.1 Oil and Gas Resources and Production

(a) Resources – Conventional and unconventional

Australia has vast gas resources with over 257 trillion cubic feet (**Tcf**) of identified resources.¹¹ These resources include conventional gas resources and unconventional gas resources (such as coal seam gas (**CSG**), tight gas and shale gas).

Most of Australia's conventional gas resources are found in the giant Carnarvon, Browse and Bonaparte basins, which are located in a geological region off the northwest coast of Australia known as the North West Shelf (see **Figure 1**). There are also conventional gas resources in south-west, south-east and central Australia.

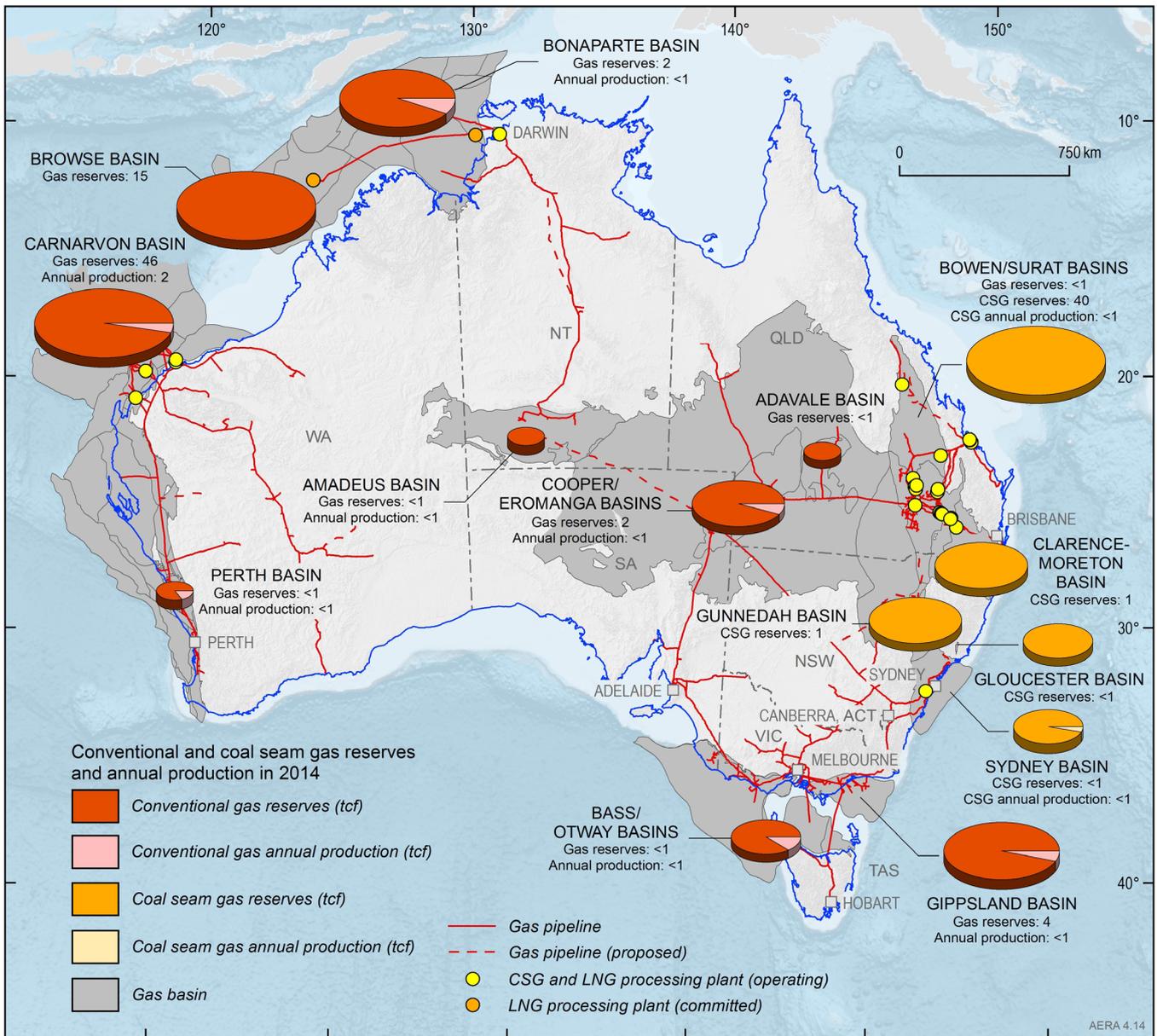
Australia's total identified conventional gas resource is estimated at 169 Tcf.¹³ These resources are located across 15 basins, with 95% of the conventional gas resources situated in the north-west and south-east coasts of Australia.¹⁴ There is estimated to be an additional 114 Tcf of inferred conventional gas resources in the Carnarvon, Bonaparte, Browse and Gippsland basins.¹⁵ At current production rates there are sufficient economic demonstrated reserves of conventional gas (70 Tcf) to last another 34 years.¹⁶

Australia also has significant unconventional gas resources with CSG reserves at 43 Tcf, shale gas resources at 11 Tcf and identified tight gas resources less than 2 Tcf.¹⁷ Australia has an estimated 437 Tcf of technically recoverable shale gas resources.¹⁸ The distribution of gas resources in 2035 is expected to shift as discoveries of conventional gas resources offshore plateau, CSG exploration and production continues to increase and new tight gas and shale gas resources are identified and developed.¹⁹

Australia has about 0.3% of world oil reserves,²⁰ with economic reserves (including proved and probable resources) of approximately 5.4 billion barrels (22 percent crude oil, 52% condensates and 26% liquefied petroleum gas (**LPG**)).²¹

Three quarters of Australian liquids production is sourced from Commonwealth waters adjacent to Western Australia.²² Production from waters adjacent to Victoria accounts for the next highest share.²³ Oil resources have also been identified in the Perth, Canning, Amadeus, Cooper/Eromanga, Bowen/Surat, Otway, Bass and Gippsland basins.²⁴ However, onshore resources, mostly found in the Cooper/Eromanga basin, account for only 10% of Australia's oil resources.²⁵ Further, a 2016 assessment by the United States Geological Survey found that the Cooper/Eromanga basin held only 0.5% of Australia's total undiscovered conventional oil potential.²⁶

Figure 1: Location of Australia's gas resources and infrastructure¹²



Sources: Geoscience Australia; Encom Gpinfo, a Datamine Australia Pty Ltd
 Whilst all care is taken in the compilation of the petroleum pipelines by Datamine, no warranty is provided re the accuracy or completeness of the information, and it is the responsibility of the Customer to ensure, by independent means, that those parts of the information used by it are correct before any reliance is placed on them. Accurate at August 2017.
 Note: CSG = coal seam gas; LNG = liquefied natural gas

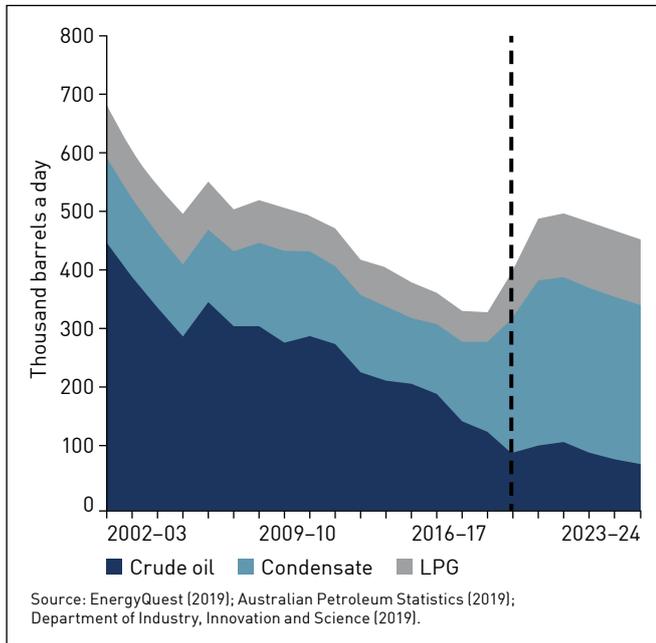
(b) Production – Conventional and unconventional

The majority of Australia's current oil production is in the form of condensates or natural gas liquids.²⁷ Australia's natural gas production increased by 16% in 2018 compared to 2017, meeting growth in domestic and international market needs.²⁸ In 2018, Western Australia was the largest exporter of liquefied natural gas (LNG) (2.36 Tcf or 2358.9 billion cubic feet (Bcf)) and largest producer of conventional gas (2.75 Tcf or 2752.2 Bcf), while Queensland was the largest producer of CSG (1.3 Tcf or 1303.0 Bcf).²⁹ Australian gas production is projected to reach 144.7 billion cubic metres (Bcm)

in 2023-24.³⁰ According to the International Energy Agency, Australia's production growth was 17.9 Bcm in 2017-18 and is expected to increase with output from the Browse basin's Ichthys gas-condensate field.³¹

Australia's condensate production is predicted to increase from 286,000 barrels of oil per day (Bopd) in 2017-2018 to an average of 351,000 Bopd in 2023-24.³² Australia's liquids production has been generally declining since 2000 when the peak production was 287 million barrels.³³ However, in 2018 production reached 126 million barrels, a 3.8% increase compared with 2017.³⁴

Figure 2: Australia's petroleum production outlook³⁵



(c) Export

Australia is a major exporter of LNG, with exports projected to increase rapidly in the short term and stabilise after 2021-22.³⁶ Australia's LNG exports have been growing strongly, with the value of Australia's LNG exports forecast to increase from A\$32 billion in 2017-2018 to A\$51 billion in 2019-2020.³⁷ This increase in LNG exports is due to new LNG plants ramping up to full production rates.³⁸ In November and December 2018, Australia temporarily took Qatar's place as the world's largest LNG exporter.³⁹ In the 2017-2018 period, Australia exported 62 million tonnes of LNG, and is forecast to export 82 million tonnes in the 2019-20 period.⁴⁰ It is projected that Australia will again become the world's largest LNG exporter in 2019 when its exports reach 79 million tonnes, and will remain the largest LNG exporter until 2024.⁴¹

(d) Foreign Investment

Major domestic and foreign companies operating in Australia include Santos, Woodside, Chevron, ConocoPhillips, ExxonMobil, Origin Energy, Inpex Corporation, Total, Shell and Equinor.⁴²

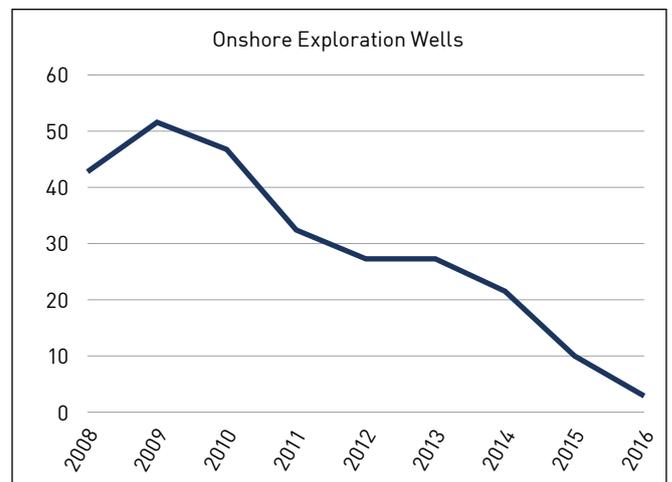
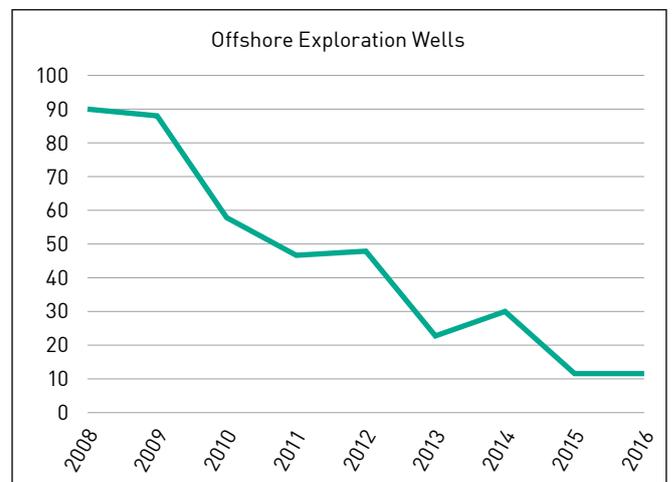
The recent stream of CSG, shale gas and LNG projects in Australia has also attracted Asian companies such as Sinopec, China National Offshore Oil Corporation, Tokyo Gas and China National Petroleum Corporation that are interested in purchasing gas for markets in China and Japan and the upstream assets that will be developed to supply these projects.⁴³

5.2 Conventional Oil and Gas

(a) Offshore Conventional Oil and Gas

Most of Australia's conventional oil and gas resources are associated with giant offshore gas fields in the Carnarvon, Browse and Bonaparte basins.⁴⁴ Other Australian offshore petroleum basins include the Otway, Gippsland and Bass basins. However, only around 20% of Australia's offshore petroleum basins are currently covered by petroleum titles.⁴⁵ As seen in **Figure 3**, during the period of 2008 to 2016, the number of exploration wells drilled both offshore and onshore has been falling.

Figure 3: Petroleum exploration wells drilled⁴⁶



Source: APPEA

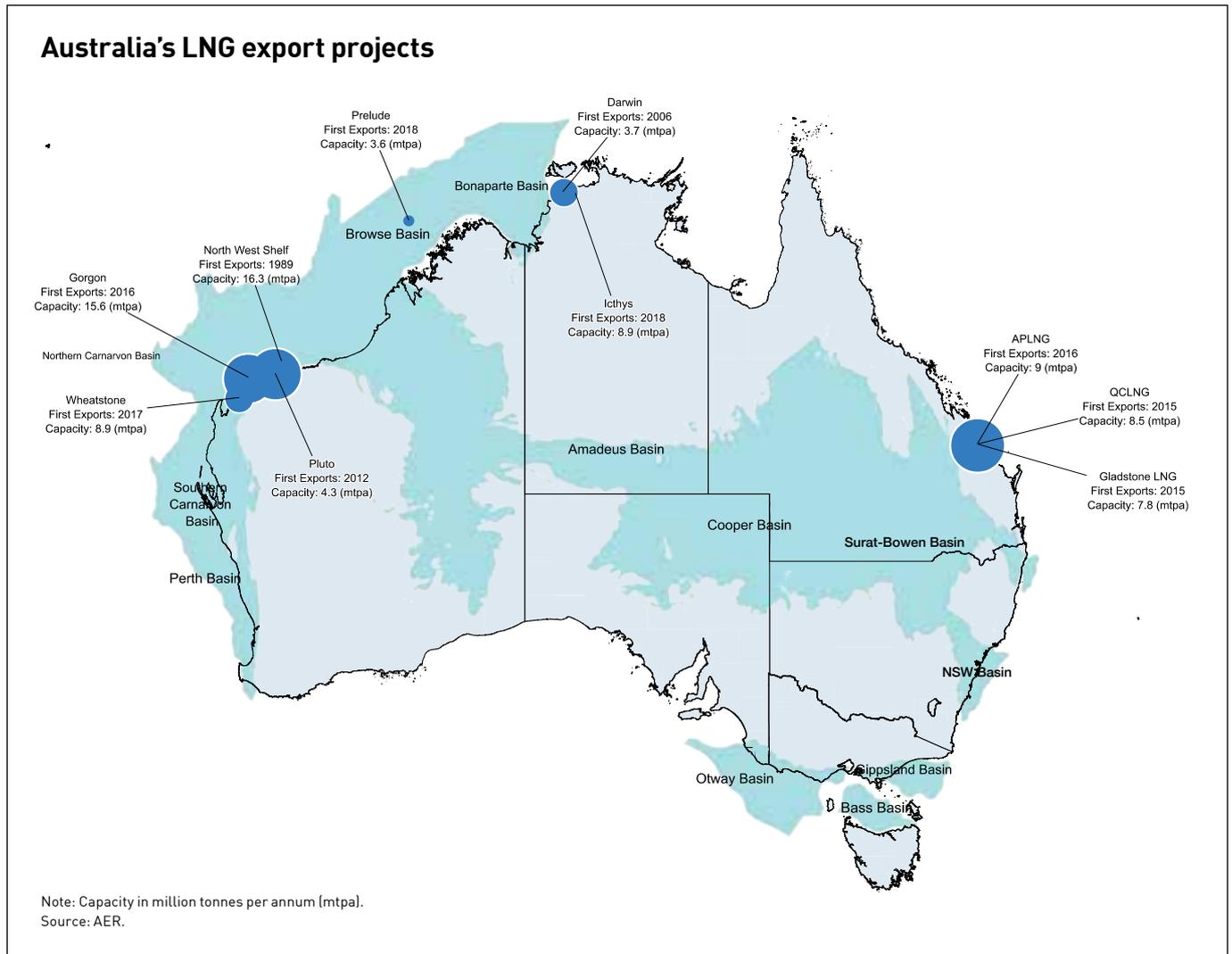
Each year, the Federal government releases additional offshore acreage for petroleum exploration. The Federal government's *2018 Offshore Petroleum Acreage Release* comprised of 21 areas located in the offshore regions of the Western Australia, South Australia, Victoria and the Territory of Ashmore and Cartier Islands.⁴⁷ Of these areas, 16 were available for work program bidding and five areas were available for cash bidding.⁴⁸

Currently, there are seven operating LNG processing plants in Australia that use Australia's conventional offshore gas resources to produce LNG.⁴⁹ These are the Northwest Shelf LNG, Pluto LNG, Gorgon LNG, Wheatstone LNG and Prelude LNG projects in Western Australia and the Darwin LNG and Ichthys LNG projects

in Northern Territory.⁵⁰ The location of these projects is shown in **Figure 4**.

The consumer markets for Western Australia's LNG exports include Japan, China, South Korea, Taiwan and India.⁵¹

Figure 4: Location of Australia's LNG export projects⁵²



*Note: To the extent of any inconsistency between the information in the diagram in **Figure 4** and the information in the tables in **Figure 5**, the latter prevail as those tables contain the most up to date information in relation to Australia's LNG projects.*

A summary of Australia's existing and planned LNG projects using offshore conventional gas resources is set out in **Figure 5** overleaf.

Figure 5: Australia's existing and planned LNG projects using offshore conventional gas

Project	Equity Partners	Status / Online Date	Trains / Terminals	Capacity (Approx)	Capital Cost
Part A: Existing LNG projects using offshore conventional gas					
North West Shelf LNG (WA) (NWS)	Woodside, Shell, BHP Billiton, BP, Chevron, Japan Australia LNG (MIMI) Pty Ltd - 16.67% each ⁵³	Status: Operational ⁵⁴	5 trains ⁵⁵	16.9 Million tonnes per annum (Mtpa) ⁵⁶	A\$34 billion ⁵⁷
Darwin LNG (NT)	ConocoPhillips 56.9%, Santos 11.5%, Inpex 11.4%, Eni 11%, JERA 6.1% and Tokyo Gas 3.1% ⁵⁸	Status: Operational ⁵⁹	1 train ⁶⁰ A feasibility study for an additional train has been jointly funded by the NT government, ConocoPhillips and upstream resource owners. ⁶¹	3.5 Mtpa ⁶²	Not specified
Pluto LNG (WA)	Woodside 90%, Kansai Electric 5% and Tokyo Gas 5% ⁶³	Status: Operational ⁶⁴	1 train ⁶⁵ An additional train is being proposed as part of development plans for the Scarborough gas field in the Carnarvon Basin. ⁶⁶ Front End Engineering Design (FEED) is expected to be completed by the end of 2019. A Final Investment Decision (FID) is targeted for 2020 and Ready for Start Up (RFSU) for 2024. ⁶⁷	Train 1: 4.9 Mtpa ⁶⁸ Proposed Train 2: 5 Mtpa ⁶⁹	A\$15 billion ⁷⁰
Gorgon LNG (WA)	Chevron 47.3%, ExxonMobil 25%, Shell 25%, Osaka Gas 1.25%, Tokyo Gas 1% and JERA 0.417% ⁷¹	Status: Operational ⁷²	3 trains First LNG cargo shipped from Train 1 in March 2016. Train 2 commenced production in October 2016. ⁷³ Train 3 commenced production in March 2017. ⁷⁴	15.6 Mtpa ⁷⁵	A\$55 billion ⁷⁶
Wheatstone LNG (WA)	Chevron 64.14%, KUFPEC (Kuwait) 13.4%, Woodside 13%, Kyushu Electric Power Company 1.46% and PE Wheatstone Pty Ltd (part-owned by JERA) 8% ⁷⁷	Status: Operational ⁷⁸	2 trains ⁷⁹	8.9 Mtpa ⁸⁰	A\$40 billion ⁸¹

Project	Equity Partners	Status / Online Date	Trains / Terminals	Capacity (Approx)	Capital Cost
Ichthys LNG (NT)	Inpex 62.245%, Total 30%, CPC Corporation, Taiwan 2.625%, Tokyo Gas 1.575%, Osaka Gas 1.2%, Kansai Electric Power 1.2%, JERA 0.735% and Toho Gas 0.42% ⁸²	Online Date: July 2018 (first production) ⁸³	2 trains ⁸⁴ First LNG cargo shipped from Train 1 in October 2018. Train 2 expected to come online in 2019. ⁸⁵	8.9 Mtpa ⁸⁶	A\$27.2 billion (WA capital expenditure only) ⁸⁷
Part B: Existing LNG projects using offshore conventional gas and FLNG technology					
Prelude LNG (WA)	Shell 67.5%, Inpex 17.5%, Kogas 10% and OPIC 5% ⁸⁸	Online Date: December 2018 (first production) ⁸⁹	1 floating terminal. First LNG cargo shipped in June 2019. ⁹⁰	3.6 Mtpa ⁹¹	A\$18 billion ⁹²
Part C: Planned LNG projects using offshore conventional gas					
Equus Gas (WA)	Western Gas 100% ⁹³	FID targeted for late 2019 RFSU targeted for late 2023-24 ⁹⁴	Phase 1 of the development concept includes three production wells connected by subsea infrastructure to a floating production storage and offloading facility. ⁹⁵	2 Mtpa ⁹⁶	US\$1.5 billion ⁹⁷
Part D: Planned extensions to existing LNG projects using offshore conventional gas					
<i>The projects described below form part of Woodside's 'Burrup Hub vision'. The Burrup Hub involves the proposed development of up to 25 Tcf of gross dry gas resources from Scarborough, Browse and Pluto relying on existing LNG facilities – Pluto LNG and NWS Project.⁹⁸</i>					
Browse to NWS (WA)	Woodside 30.60%, Shell 27%, BP 17.33%, Japan Australia LNG 14.4% and PetroChina 10.67% ⁹⁹	FEED entry targeted for 2019 FID targeted for late 2020 RFSU targeted for 2026 for the associated Calliance and Brecknock fields and 2027 for the Torosa field. ¹⁰⁰	The proposed development concept includes 2 floating production storage and offloading facilities and an approximately 900 km pipeline to existing NWS infrastructure. ¹⁰¹	11.4 Mtpa ¹⁰²	Exceeding A\$5 billion ¹⁰³
Scarborough to Pluto (WA)	Woodside 50% and BHP 50% for North Scarborough, Thebe and Jupiter gas fields; Woodside 75% and BHP 25% for Scarborough gas field ¹⁰⁴	FID Decision targeted for 2020 RFSU targeted for 2023 ¹⁰⁵	The proposed development concept for the Scarborough gas resource includes offshore facilities of up to seven sub gas wells feeding to a 'semi-submersible floating production unit'. The offshore facilities will then be connected to the proposed Pluto Train 2 by a 430 km (approximately) pipeline. ¹⁰⁶	7-9 Mtpa ¹⁰⁷	Exceeding A\$5 billion ¹⁰⁸

(b) Onshore Conventional Oil and Gas

The Cooper Basin and the overlying Eromanga Basin are the major sources of onshore conventional oil and gas in Australia¹⁰⁹ [see **Figure 6**].

By Australian standards, the Cooper and Cooper-Eromanga basins are relatively mature fields, with the first commercial natural gas discovery in 1963 and the first oil discovery occurring in 1970.¹¹¹ The Cooper basin has around 190 gas fields and 115 oil fields, which contain approximately 820 producing gas wells and over 400 producing oil wells that are connected to production facilities via 5,600 km of pipelines and flowlines.¹¹²

Australia’s production of oil, condensate and LPG has been in decline since its peak in 2000.¹¹³ In 2018, Western Australia produced the most crude oil (25.5 million barrels (MMbbl)) and condensate (55.3 MMbbl) and Victoria produced the most LPG (9.6 MMbbl).¹¹⁴

Both conventional and unconventional gas is also being produced in the Cooper and Cooper-Eromanga basins.¹¹⁵

Three of the major players in Australia’s onshore conventional oil and gas industry operating in the Cooper and Cooper-Eromanga basins are Beach Energy, Santos and Senex Energy. **Figure 7** shows the Cooper / Cooper-Eromanga basins oil and LPG production of these three company groups during the 2018 financial year, as well as their proved and probable oil reserves.

Figure 6: Location of Australia’s onshore basins¹¹⁰

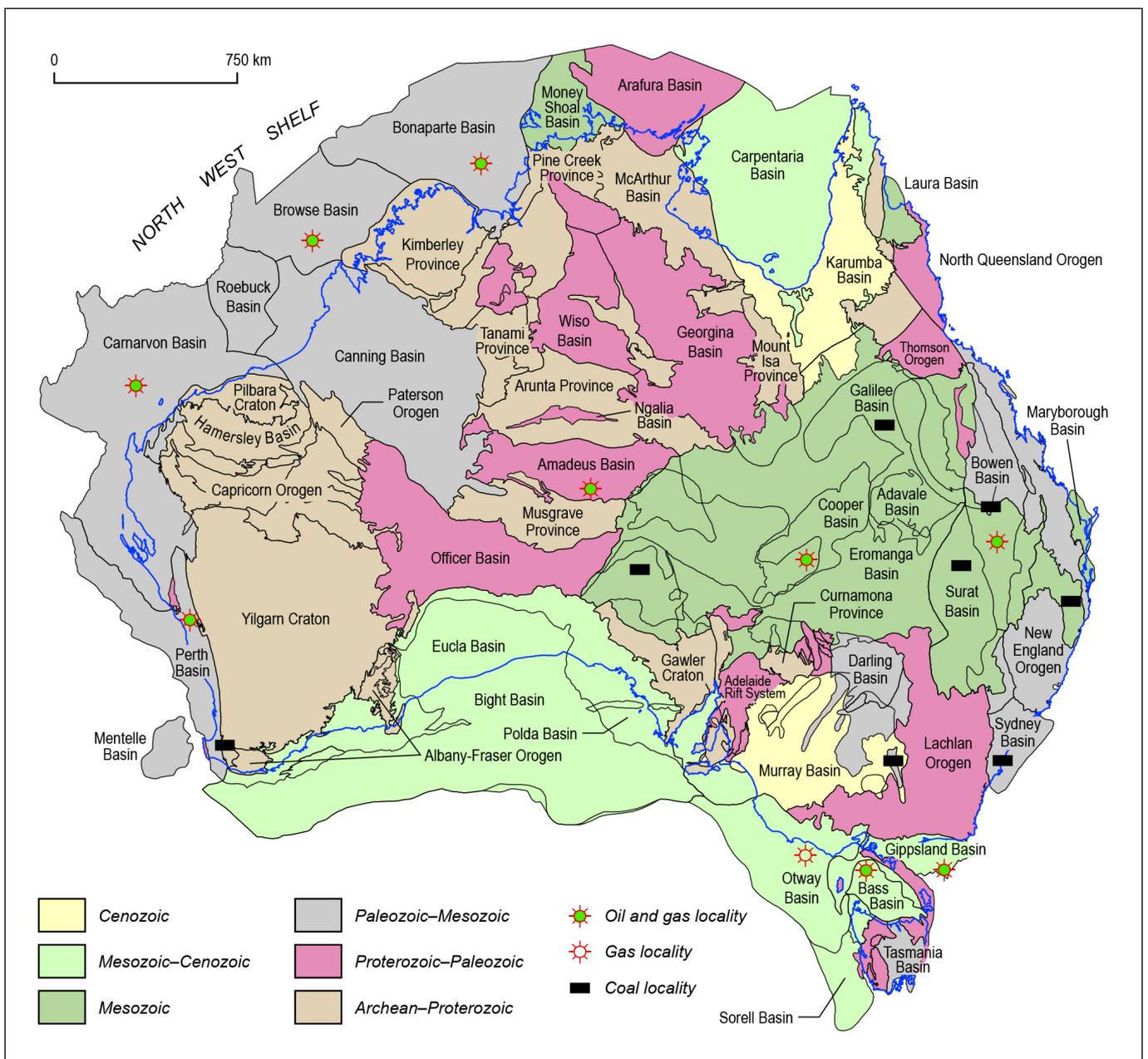


Figure 7: LPG and oil production and reserves for the 2019 financial year

Company	FY19 LPG Production	FY19 Oil Production	FY19 Oil Reserves (2P*)
Beach Energy	23 Thousand tonnes (kt) ¹¹⁶ Quarterly LPG production for Q4 ending 30 June 2019 from the Cooper/Eromanga basin comprising the Cooper Basin JV (13 kt), Western Flank (10 kt) and Other Cooper Basin sites (0 kt)	1,883 Thousand barrels of oil (kbbbl) ¹¹⁷ Quarterly Oil production for Q4 ending 30 June 2019 from the Cooper/Eromanga basin comprising the Cooper Basin JV (388 kbbbl), Western Flank (1,459 kbbbl) and Other Cooper Basin sites (36 kbbbl)	49 Million barrels of Oil (MMbbl) ¹¹⁸ Oil reserves as of 30 June 2019 from the Cooper/Eromanga basin comprising the Cooper Basin JV (7 MMbbl) and Western Flank sites (42 MMbbl)
Santos	30.3 kt ¹¹⁹ Quarterly LPG production for Q2 ending 30 June 2019 from the Cooper Basin (30.3 kt)	859.1 kbbbl ¹²⁰ Quarterly Oil production for Q2 ending 30 June 2019 from the Cooper Basin (859.1 kbbbl)	18 MMbbl ¹²¹ Oil reserves as of 31 December 2018 from the Cooper Basin (18 MMbbl)
Senex Energy	As of 30 June 2019, no 2P reserves of “gas and gas liquids” in the Cooper Basin ¹²²	191 kbbbl ¹²³ Quarterly Oil production for Q4 ending 30 June 2019 (191 kbbbl)	7.3 Million barrels of oil equivalent (MMboe) ¹²⁴ Oil reserves as of 30 June 2019 from the Cooper Basin (7.3 MMboe)

*2P means proved plus probable reserves.

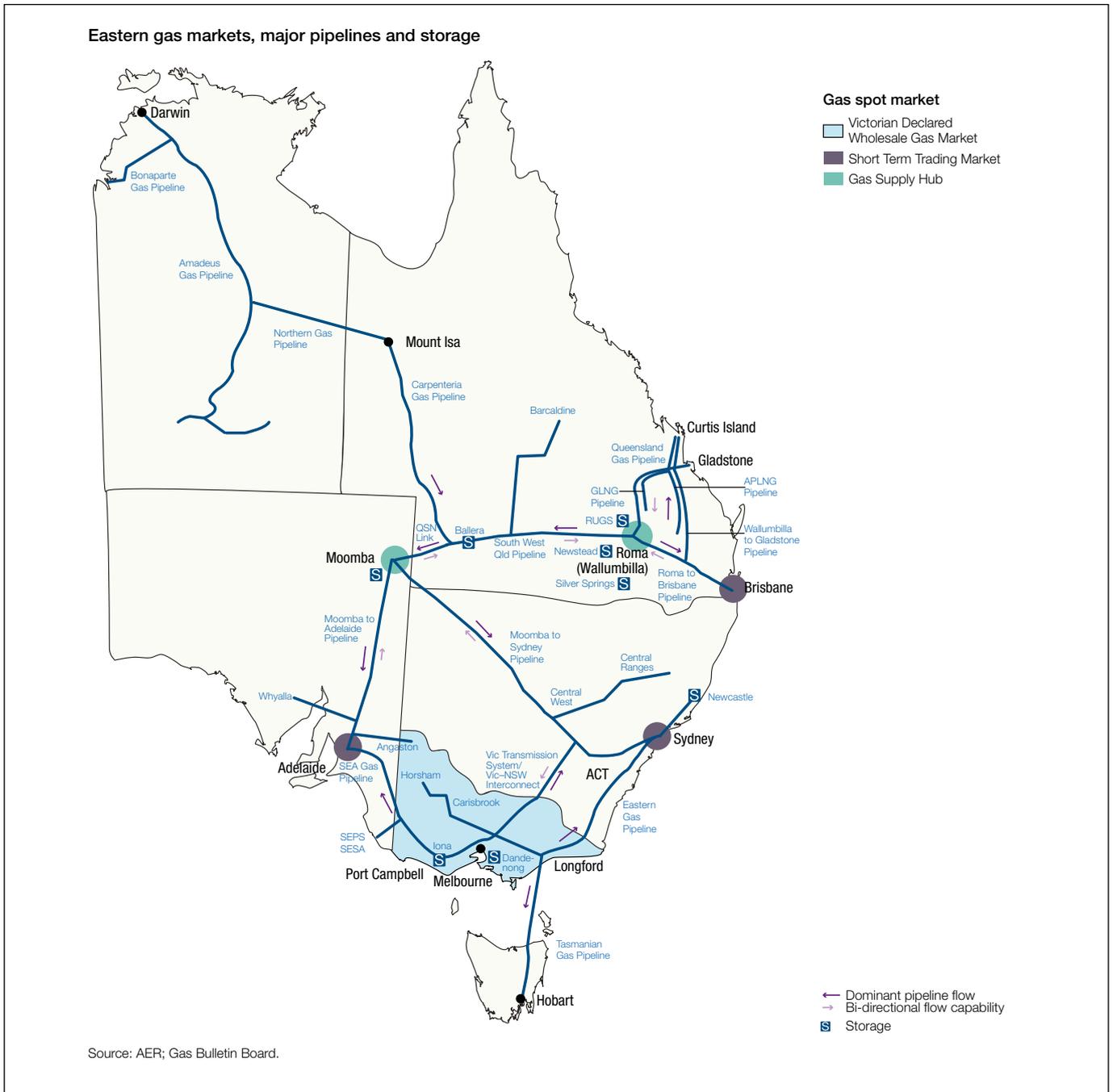
Oil and gas extracted from the Cooper and Cooper-Eromanga basins is transported to processing facilities at Moomba in South Australia or Ballera in south-west Queensland (although no crude oil is processed at Ballera).¹²⁵

Sales gas is then sent from the Moomba processing facilities to Adelaide (via a 790 km pipeline) or to Sydney (via a 1,160 km pipeline). Natural gas liquids, stabilised crude oil and condensate are sent from Moomba to Port Bonython (via a 659 km pipeline) for export.¹²⁶ Approximately 30 ships are loaded at Port Bonython each year, with a maximum size tanker of 110,000 tonnes of capacity.¹²⁷

Sales gas produced at Ballera is sent to Mt Isa and to Wallumbilla for transportation on to Brisbane. The remaining gas, natural gas liquids and condensate from the Ballera production facility is sent to Moomba (via a 180km pipeline) for further processing.¹²⁸

Figure 8 shows Australia’s eastern gas transmission pipeline network which includes the gas transmission lines described above.

Figure 8: Australian gas basins and transmission pipelines ¹²⁹



5.3 Unconventional Oil and Gas

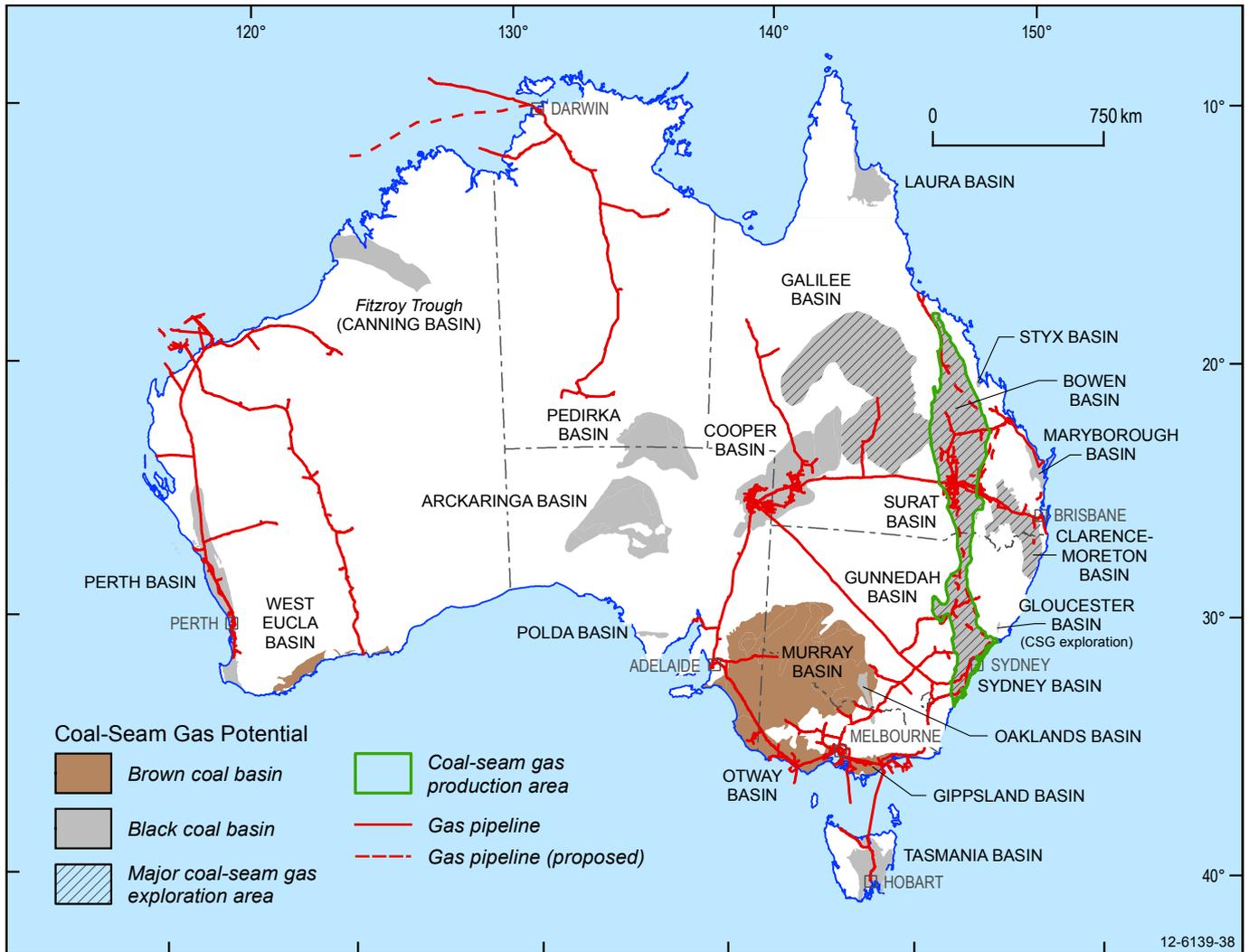
Australia’s unconventional gas resources include CSG, shale gas and tight gas. Estimates indicate enormous potential for Australia’s unconventional gas resources.¹³⁰ Australia has identified resources of more than 75 Tcf of CSG, almost 11 Tcf of shale gas, and 2 Tcf of tight gas.¹³¹

(a) Coal Seam Gas

Australia has 45,895 petajoules (PJ) of CSG reserves, while conventional gas reserves account for 77,253 PJ.¹³²

The life of CSG reserves is about 130 years at current rates of production, however, production has increased substantially with the development of the CSG-LNG industry in Queensland.¹³³ Australia also has substantial subeconomic demonstrated resources totaling approximately 60 Tcf and very large inferred CSG resources.¹³⁴ CSG is primarily found in the coal basins in eastern Australia¹³⁵ (see **Figure 9** and **Figure 10**). CSG exploration also occurs (or is to occur) in the Galilee, Arckaringa, Perth and Pedirka basins.¹³⁶

Figure 9: Basins with CSG potential¹³⁷



CSG exploration began in Queensland in the Bowen Basin in the late 1970s, and now accounts for 90% of Queensland’s domestic gas supply.¹³⁸ CSG production in the State underwent rapid growth during the 2000s.¹³⁹

The development of the CSG industry was also promoted by the introduction of the Queensland Gas Scheme in 2005, which initially required 13% of Queensland’s electricity to be sourced from gas by 2005, 15% by 2010 and then 18% by 2020.¹⁴⁰ However, the scheme closed in late 2013 when almost 20% was reached.¹⁴¹

The success of CSG exploration in Queensland and New South Wales has stimulated additional exploration in South Australia, Tasmania, Victoria and Western Australia. However, CSG exploration in Australia as a whole is still relatively immature, due in part to regulatory barriers, for example, the Victorian government’s ban on exploration for and production of CSG until 30 June 2020.¹⁴²

In 2016-17, CSG accounted for one-third of Australia’s gas production and approximately two-thirds of all gas production on the east coast.¹⁴³ **Figure 10** compares Australia’s total energy production between 1976-77 and 2016-17. In this figure, natural gas includes CSG.

Figure 10: Australian energy production¹⁴⁴

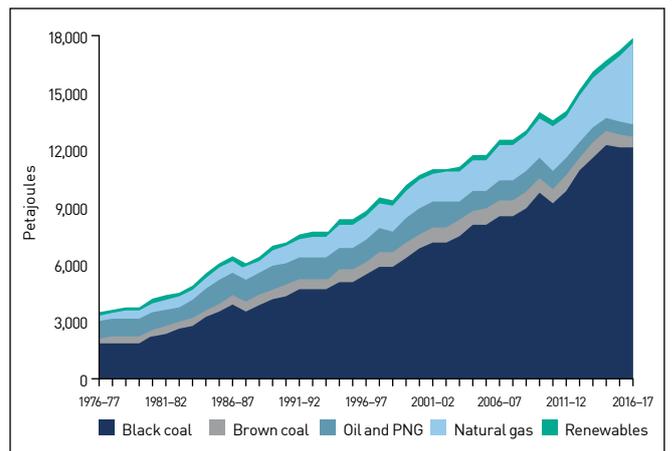
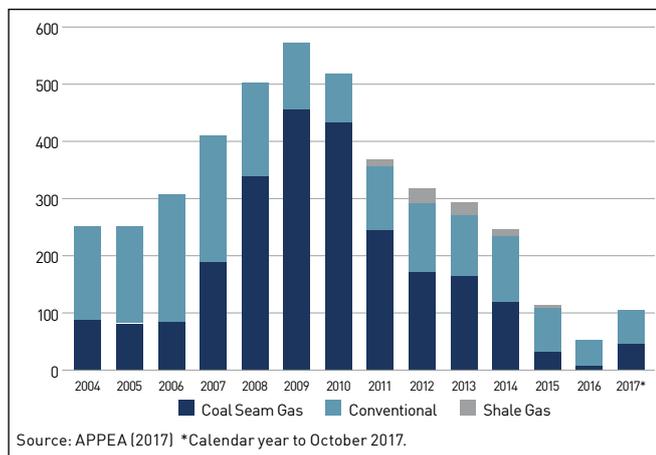


Figure 11 below shows the exploration and appraisal wells from 2004 to 2017 and demonstrates that CSG exploration currently represents a significant proportion of Australia's gas exploration.

Figure 11: Exploration and onshore appraisal wells ¹⁴⁵



(b) CSG to LNG

CSG to LNG production is a mature industry in Australia, with the three Australian CSG to LNG projects (Queensland Curtis LNG, Gladstone LNG and Australia Pacific LNG) being fully operational.¹⁴⁶ These CSG to LNG projects are the first in the world to use CSG as the principal feedstock.¹⁴⁷ Further information about these projects is included in section 5.4.

(c) Shale Oil and Shale Gas

(i) Shale Oil

According to recent estimates, there are in excess of 14 billion barrels of technically recoverable shale oil reserves within Australia, with Queensland possessing the majority of these reserves.¹⁴⁸ Australia ranks sixth globally in terms of recoverable shale oil resources (see **Figure 12**). However Australia is not currently producing shale oil commercially due to technical and environmental challenges.¹⁴⁹

Figure 12: Top 10 countries with technically recoverable shale oil resources ¹⁵⁰

Rank	Country	Shale oil (billion barrels)
1	Russia	75
2	U.S.*	58 (48)
3	China	32
4	Argentina	27
5	Libya	26
6	Australia	18
7	Venezuela	13
8	Mexico	13
9	Pakistan	9
10	Canada	9
World Total		345 (335)

*EIA estimates used for ranking order. ARI estimates in parentheses.

(ii) Shale Gas

The full extent of Australia's shale gas resources is currently unknown. Early exploration for shale gas defined 11 Tcf of contingent resources.¹⁵¹ However, recent estimates conclude that there may be approximately 437 Tcf of technically recoverable shale gas resources throughout the country, ranking Australia seventh globally in terms of technically recoverable shale gas resources¹⁵² (see **Figure 13**). Further, the discovery of prospective shale gas resources in the Beetaloo sub-basin in the Northern Territory has been described as a 'longer-term opportunity for Australia'.¹⁵³

Figure 13: Top 10 countries with technically recoverable shale gas resources ¹⁵⁴

Rank	Country	Shale gas (trillion cubic feet)
1	China	1,115
2	Argentina	802
3	Algeria	707
4	U.S.*	665 (1,161)
5	Canada	573
6	Mexico	545
7	Australia	437
8	South Africa	390
9	Russia	285
10	Brazil	245
World Total		7,299 (7,795)

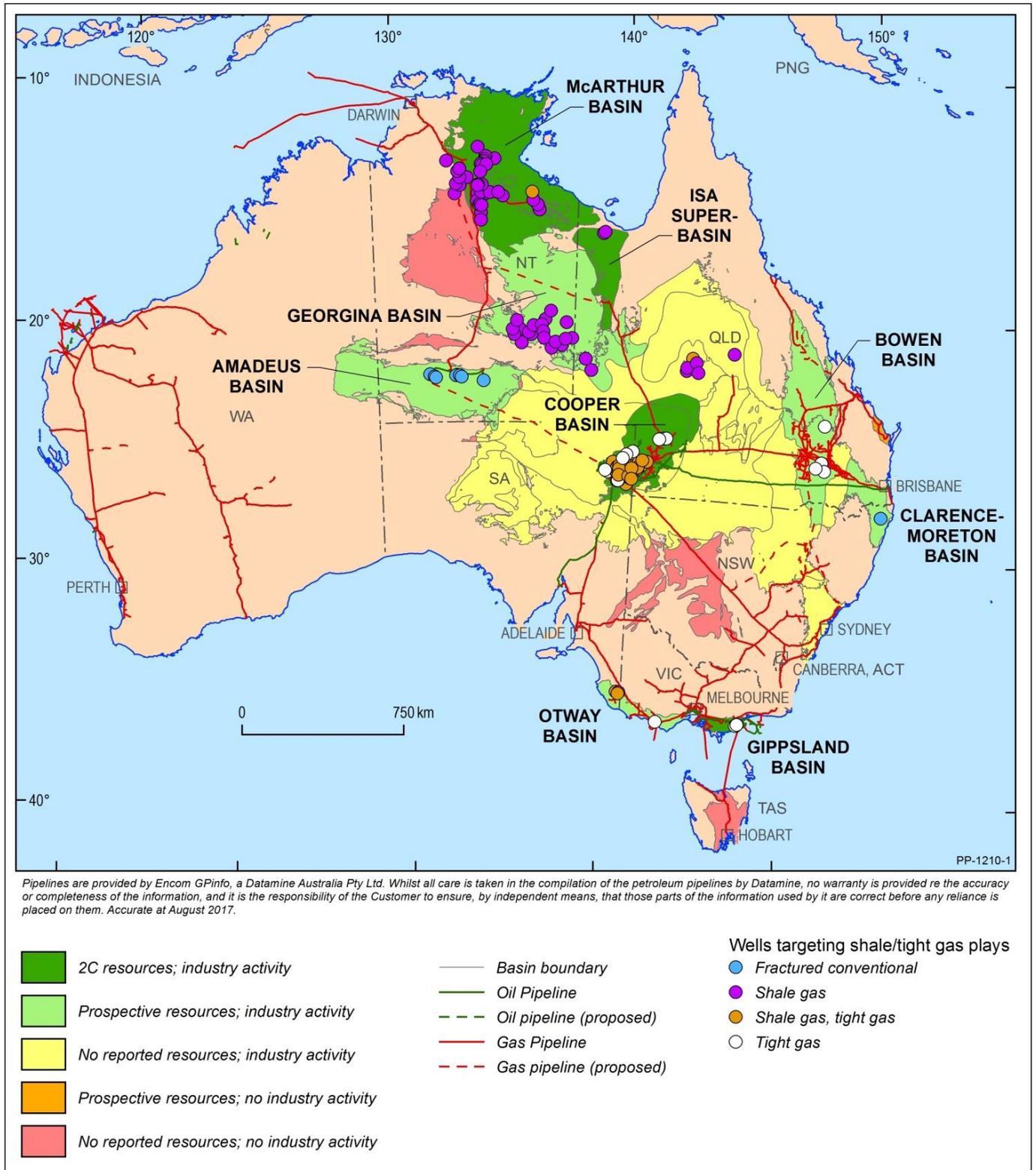
*EIA estimates used for ranking order. ARI estimates in parentheses.

The commonly cited figure of Australia's shale gas resources (396 Tcf) is only based on four of Australia's basins and, as such, the undiscovered shale gas resource could indeed be over 1,000 Tcf if all prospective basins are considered.¹⁵⁵

There is limited commercial production of shale gas throughout Australia at present due to several factors, including the remote location of some basins, the significant capital investment that would be required to establish supporting infrastructure, and limited access to hydraulic fracturing crews and appropriate drilling rigs.

The majority of shale gas exploration in Australia is currently being carried out in the Cooper Basin, where Australia's onshore traditional gas reserves are largely located¹⁵⁶ (see **Figure 14**). The Cooper basin is considered Australia's most commercially viable region for shale gas development due to an estimated 142.8 Tcf gas-in-place and a potentially recoverable amount of 6.9 Tcf, coupled with an extensive pipeline network already supplying gas to South Australia, New South Wales, Victoria and Queensland.¹⁵⁷

Figure 14: Basins with tight gas and shale gas resource potential and gas infrastructure¹⁵⁸



Other basins in which appraisal and early appraisal activities pursuing shale gas are currently being undertaken include the Gippsland and McArthur basins and Isa Superbasin.¹⁵⁹ Exploration activities are underway in the Amadeus, Bowen, Clarence-Moreton, Georgina and Otway basins.¹⁶⁰

(d) Tight Oil and Tight Gas

Tight gas resources have long been known to exist in Australia but have only attracted exploration interest in the last decade. Total identified tight gas resources in Australia are currently estimated at around 2 Tcf.¹⁶¹ The largest known resources of tight gas are in the Cooper Basin (1096.4 Tcf mean estimated gas-in-place), Gippsland Basin (307.3 Tcf mean estimated gas-in-place), Canning Basin (1213.4 Tcf mean estimated gas-in-place) and Otway Basin (180.0 Tcf mean estimated gas-in-place).¹⁶²

Ongoing exploration activity suggests these values are likely to grow, particularly in areas with established infrastructure such as the Cooper Basin and the Perth Basin.¹⁶³ Other occurrences of tight gas have been identified in Australia’s more remote onshore basins and offshore.¹⁶⁴

Although tight gas is not currently produced in Australia, tight gas resources in the Cooper, Perth and Gippsland basins are currently being considered for commercial production.¹⁶⁵

(e) Tight gas activity in the Cooper Basin

Tight gas is the most mature unconventional play in the Cooper Basin.¹⁶⁶ Santos has conducted drilling to extract and test tight and shale gas from its existing Cooper Basin fields.¹⁶⁷ While Santos sustained production from three unconventional wells, no reserves are currently reported for the Cooper Basin.¹⁶⁸ In South Australia, Beach Energy, Santos and Senex are also reported by the Australian Government to have been actively exploring for tight gas.¹⁶⁹

In Queensland, Beach Energy has drilled ten wells to examine the gas potential of the eastern Nappamerri Trough.¹⁷⁰ In far north Queensland, Santos and Real Energy’s drilling activities have proven a basin-centred gas play within Patchawarra and Toolachee formations in the Windorah Trough.¹⁷¹

5.4 Australian CSG to LNG Projects

(a) Overview

Three world class CSG to LNG projects are currently in operation in Gladstone, Queensland (see **Figure 15**). These projects are the first in the world to use CSG as the principal feedstock in the LNG production process.¹⁷²

Figure 15: CSG to LNG Projects in Queensland

Phase	Project
Operational	Queensland Curtis LNG (QCLNG) – owned by Shell, China National Offshore Oil Corporation and Tokyo Gas ¹⁷³
	Australian Pacific LNG (APLNG) – a joint venture between Origin, ConocoPhillips and Sinopec ¹⁷⁴
	Gladstone LNG (GLNG) – a joint venture between Santos, PETRONAS, KOGAS and Total ¹⁷⁵

The LNG processing plants for the APLNG, GLNG and QCLNG projects are currently operating on Curtis Island, off the coast of Gladstone, Queensland.

Figure 16: GLNG natural gas compression hub¹⁷⁶



(b) A summary of the three CSG to LNG projects is set out below:

Figure 17: Summary of CSG to LNG projects in Queensland

Liquefaction terminal	Equity partners	Status	Trains	Capacity (approx.)	Consumer markets	Capital cost
Queensland Curtis LNG	Train 1: Shell 50% and CNOOC 50% ¹⁷⁷ Train 2: Shell 97.5% and Tokyo Gas 2.5% ¹⁷⁸	Status: Operational ¹⁷⁹	2 trains ¹⁸⁰	8.5 Mtpa ¹⁸¹	China, Japan, Chile and Singapore ¹⁸²	A\$20.4 billion ¹⁸³
Australia Pacific LNG	Origin Energy 37.5%, ConocoPhillips 37.5% and Sinopec 25% ¹⁸⁴	Status: Operational ¹⁸⁵	2 trains ¹⁸⁶	9 Mtpa ¹⁸⁷	China and Japan ¹⁸⁸	A\$25.5 billion ¹⁸⁹
Gladstone LNG	Santos 30%, Petronas 27.5%, Total 27.5% and Kogas 15% ¹⁹⁰	Status: Operational ¹⁹¹	2 trains ¹⁹²	7.8 Mtpa ¹⁹³	Malaysia and South Korea ¹⁹⁴	A\$18.5 billion ¹⁹⁵

6 Key Legal Considerations when Buying or Developing Australian Oil and Gas Projects



6.1 Exploration and Production Rights

In Australia, petroleum is owned by the State and the right to explore for and produce petroleum is granted and regulated by either:

- (i) the relevant State or Territory government, if the resource is situated within the territorial borders of the State or Territory (including the coastal waters of that State or Territory); or
- (ii) the Federal government, if the resource is located in Commonwealth waters.

Each State and Territory has its own legislation regulating petroleum exploration and production rights within its jurisdiction (including its coastal waters which is three nautical miles from the low tide mark). Commonwealth waters commence three nautical miles from the low tide mark and end at the outer limits of the Australian continental shelf. The Commonwealth has its own legislation (principally the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) (**OPGGG Act**)) which regulates offshore petroleum activities in Commonwealth waters. Although the petroleum laws of each State and Territory of Australia and the Commonwealth are different, they do have many similarities.

(a) Exploration rights

The right to explore for petroleum is granted pursuant to an exploration permit or licence¹⁹⁶ and, if applicable, the associated environmental authority, which authorises the holder to go onto the land specified in the permit or licence for the purpose of exploring for petroleum.

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.

In most Australian jurisdictions, exploration permits or licences are usually granted for five to six years. However, in Queensland, an authority to prospect for onshore petroleum can be granted for up to 12 years.¹⁹⁷ Exploration permits or licences can be renewed, however, in some Australian jurisdictions, there is a cap on the total length of the term of the permit and the number of renewals granted.

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 is reduced over time.

Exploration permits or licences will typically contain conditions that 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.

For onshore petroleum exploration, the holder of an exploration permit or licence, is required to give the owner or 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 or 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 is an annual fee payable for an exploration permit or licence which is usually based on the area of the licence. For exploration permits or licences granted under a competitive tender process, there may be a cash bid component in the tender. As such, the cash bid amount specified in the winning tender (which may be a significant amount) will also be payable upon the grant of the 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, if applicable, the environmental authority (including obligations under relevant petroleum and environmental laws). The security is usually in the form of cash or a bank guarantee.

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 permits or 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 most Australian jurisdictions, retention leases or licences¹⁹⁸ are available to provide security of title over currently non-commercial discoveries of petroleum for a reasonable period until these discoveries become commercially viable. Retention leases or licences are granted over a particular area selected from the existing exploration permit (usually for a period of five years) and can be renewed, except in Victoria where a retention lease for onshore petroleum exploration is granted for 15 years and cannot be renewed.¹⁹⁹

However with effect from November 2017 Victoria has placed a moratorium on petroleum exploration production on on-shore areas until 30 June 2020.

(b) Production rights

An exploration permit or licence does not give the holder a right to produce petroleum. If the holder of an exploration permit or licence discovers a commercially viable petroleum resource and wishes to hold production rights, then the holder must apply for a production lease or licence.²⁰⁰

A production lease or licence (and, if applicable, any associated environmental authority), authorises the holder to go onto the land specified in the production lease or licence for the purpose of petroleum production. In most Australian jurisdictions, production leases or licences are granted for between 21 and 30 years (which includes, if applicable, any renewal). However, in Victoria²⁰¹ and offshore waters regulated by the Commonwealth,²⁰² production licences are usually granted for the life of the resource, while in Western Australia, production licences granted after the commencement of the *Petroleum and Energy Legislation Amendment Act 2010* (Cth) remain in force indefinitely.²⁰³

Before a production lease or licence 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 or authorities (EAs) and competing resource rights. Some of these issues are also relevant in relation to the grant of an exploration permit or licence. These issues are discussed in further detail later in this publication.

The holder of a production lease or licence will be required to provide to the relevant government department security for the performance of the holder's obligations under the production lease or licence and, if applicable, the environmental authority (including rehabilitation obligations and other obligations under relevant petroleum and environmental laws). The security is commonly in the form of a bank guarantee, and may be for a very significant amount.

Just like exploration permits or licences, production leases or licences can also be held by one or more parties and interests in production leases or licences can be transferred, subject to obtaining the prior consent of the relevant government departments.

Foreign parties are entitled to hold interests in production leases or licences, both on their own and as joint holders with others, subject to obtaining any necessary FIRB approval.

6.2 Offshore Petroleum

The States and Northern Territory control petroleum activities in coastal waters (that is waters up to 3 nautical miles from the low-water mark or other international baseline), while the Commonwealth controls petroleum activities in Commonwealth waters (that is beyond coastal waters).

Petroleum exploration and production in Commonwealth waters is governed by the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) (**the OPGGS Act**). Under the OPGGS Act, an 'adjacent area' is created for each State/Territory and a 'Joint Authority' is established for each adjacent area. The Joint Authority for each State and the Northern Territory is comprised of the responsible Commonwealth Minister together with the relevant State or Northern Territory minister.

The Joint Authority makes major decisions under the OPGGS Act in relation to offshore petroleum titles. For example, the Joint Authority has the power to:

- release offshore petroleum exploration acreage for tender;
- assess bids for offshore petroleum exploration acreage; and
- grant, renew, vary, suspend, or cancel offshore petroleum titles.

The National Offshore Petroleum Titles Administrator (**NOPTA**) is a national body created under the OPGGS Act and is responsible for administration of title matters under the OPGGS Act.

Another national body created under the OPGGS Act called the National Offshore Petroleum Safety and Environment Management Authority (**NOPSEMA**) is responsible for health, safety and environmental regulation of offshore petroleum activities.

NOPSEMA's role includes the review and approval of Safety Plans, Well Operations Management Plans and Environmental Plans. On occasion, an EA will also need to be obtained under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**the EPBC Act**).

6.3 Competing Resources – Overlapping Tenements

A number of Australian States have legislation that allows exploration and production rights for petroleum and CSG to overlap with exploration and production rights for coal, and governs the interaction between petroleum and CSG and coal exploration and production where this overlap occurs. The purpose of this legislation is to facilitate and encourage the commercial production of both CSG and coal wherever possible.

In 2016 Queensland introduced a regime whereby production tenures for either resource can be obtained

in an overlapping area without the need to obtain the consent of the other tenure holder; however production is dependent upon the holders of each tenure agreeing to a development plan and coordinated safety management plans. Statutory arbitration applies where there is a failure to agree to a joint development plan.

CSG production is given an 11 year start before coal mining can occur in the same area.

This period can be reduced to around two years by notice from the coal production tenure holder, subject to the coal production tenure holder paying compensation for lost CSG production and the costs of relocation of CSG production infrastructure.

Further, the coal production tenure holder has to offer any CSG incidentally extracted or extracted to make coal operations safe, to the overlapping CSG tenure holder (although this can be an offer on commercial terms).

The exploration tenure for one resource may overlap with a production tenure for the other resource. However, operations under the exploration tenure will be conditional upon them not materially interfering with already commenced operations under the production tenure.

Similar restrictions apply where there is an overlap of exploration tenures for each resource.

It is also possible for exploration and production rights for CSG to overlap with geothermal or gas storage rights. In those cases a statutory regime exists to resolve conflicts with competing operations and to establish priorities.

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

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

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

6.4 Landholder Compensation

The statutory rights to explore for and produce petroleum conferred by exploration licences and petroleum leases granted under the laws of the various States and Territories of Australia are concurrent with (and do not displace) normal land ownership rights.

The ability to access private land to conduct exploration and production activities is closely regulated, and compensation must be paid to owners and occupiers of land for any damage or inconvenience caused by the exploration and production 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 petroleum activities. In some jurisdictions an access and compensation agreement will need to be agreed with the landowner (or determined by the relevant court or statutory arbitration) before disruptive petroleum activities may be undertaken. In other cases the issue of compensation is left for determination until after the petroleum activities have been carried out.

In certain jurisdictions there are areas where activities are either prohibited or may be undertaken only with the consent of the owner or occupier of the relevant structure or facility that makes the land restricted land. Examples include operations within a stated distance of occupied residences, schools, office buildings or agricultural infrastructure such as dams, irrigation systems or feedlots.

Where access to those areas is subject to the consent of the owner or occupier of the relevant area there is no ability to compel consent or for a government body or tribunal to substitute its own determination as to whether consent should be given. The owner or occupier has absolute discretion as to whether or not to give its consent.

6.5 Native Title and Cultural Heritage

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

- (a) native title; and
- (b) cultural heritage.

(a) Native title

Broadly speaking, native title comprises 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' wholly or partially (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 petroleum permit application has been made, certain native title parties are given the 'right to negotiate' with the petroleum permit applicants about how the applicant's activities will affect the rights and interests of those native title parties. The petroleum permit cannot be granted until either the applicant and the relevant native title parties have come to an agreement as contemplated under the NTA, or the National Native Title Tribunal (**NNTT**) has made a ruling about whether the petroleum permit should be granted (and if so, on

In most cases owners and occupiers of land must be given prior notice of an intended entry onto the land to conduct petroleum activities



what conditions). Petroleum exploration permits through to petroleum production permits (as well as pipeline and facilities permits) 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 petroleum permit, or payment of royalties), and 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.

Agreements reached under the full right to negotiate or expedited procedure process will generally only apply to a particular petroleum permit or permits. Accordingly, a new right to negotiate process may be required for each new petroleum tenure, including when a production lease is being sought over an existing exploration tenure.

An applicant for a petroleum permit may also satisfy the requirements of the NTA to enable the grant of a petroleum permit 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 in addition to the grant of the permit. 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 production permits, or the construction of facilities or pipelines, and any compensation payable. 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. Once finalised, an ILUA is registered with the NNTT. The registration process itself can take 6 months or more.

When negotiating compensation payments under an ILUA or an agreement reached through the 'right to negotiate' process, the 2019 decision of the High Court in the *Timber Creek Case*²⁰⁴ may provide some limited guidance to petroleum permit applicants about the potential quantum of compensation payable for any impairment of native title rights. See the Hot Topic on **page 54** for more information.

To some extent, the existence of a registered native title claim over an area of land is not relevant to an assessment of the potential significance of native title for a petroleum permit 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. 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 a petroleum permit application is 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 native title 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.

(b) Aboriginal and Torres Strait Islander cultural heritage

Aboriginal and Torres Strait Islander cultural heritage is protected by State legislation (and to a lesser extent Commonwealth legislation) that imposes a broad 'duty of care' on proponents to take all reasonable and practicable measures not to damage First Peoples cultural heritage. The protection afforded is separate from native title and applies irrespective of whether native title exists.

Generally, First Peoples cultural heritage includes human remains, rock-art and archaeological sites, and any areas or objects of significance to Traditional Owners 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 Traditional Owners.

Because cultural heritage legislation generally imposes a 'duty of care' to take 'all reasonable and practicable measures' not to harm First Peoples 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 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.

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 Traditional Owners, to comply with the 'duty of care guidelines', or to enter into another agreement (for example a native title agreement or ILUA) that also deals with management of cultural heritage.

In Queensland, in the event of an application for a petroleum permit requiring an environmental impact statement (generally production and pipeline permits), First Peoples cultural heritage legislation requires that the applicant enters into a CHMP with relevant Traditional Owners for the area of the petroleum permit before it can be granted. The First Peoples cultural heritage legislation sets out a structured process and requirements for development of approved CHMPs. 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 permit applied for, petroleum companies will frequently conduct (and the Traditional Owners will frequently expect that petroleum 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 Traditional Owners, and several Traditional Owners 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 CHMP, which will typically include provision for:

- (i) relocation of moveable objects of significance and protection of other objects;
- (ii) protocols for management of any cultural heritage 'finds' during establishment and operation of the project;
- (iii) protocols for management of any finds of human remains including, for example, 'stop work' provisions;
- (iv) cultural training for project employees;
- (v) engagement of 'cultural heritage monitors' to supervise any activities that involve disturbance to the surface of the land or clearing of trees and objects from the surface; and
- (vi) possibly the establishment of 'no go zones' being areas in which activities cannot be carried out and the area otherwise left undisturbed.

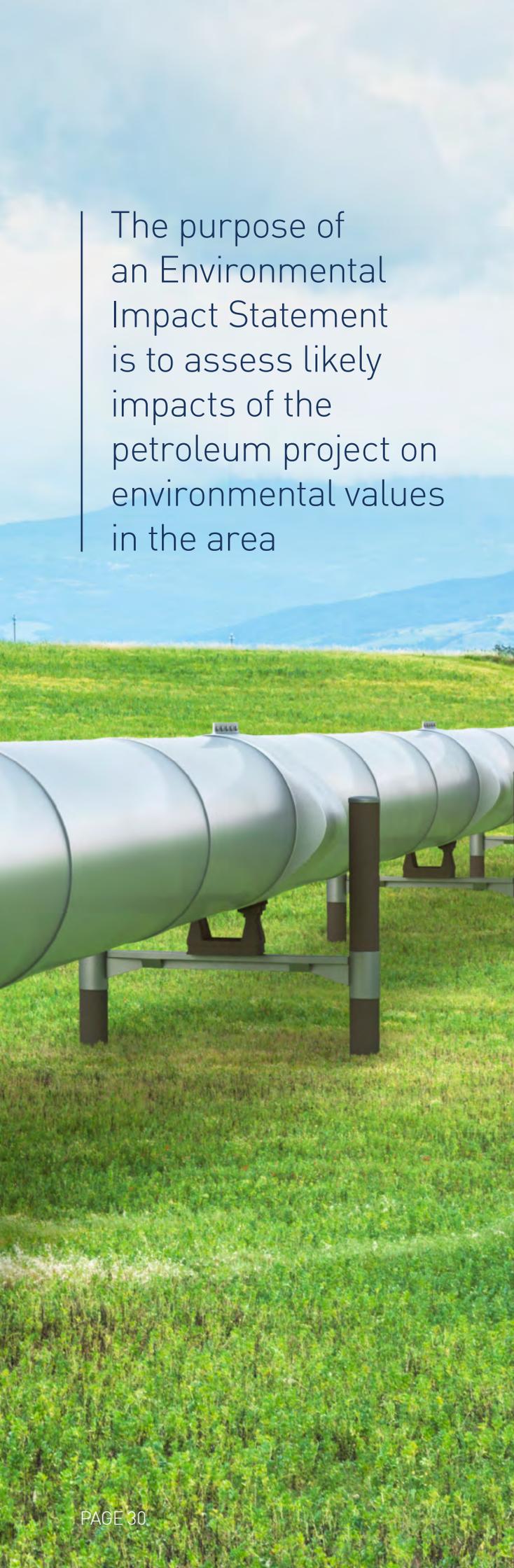
The petroleum permit applicant will be expected to bear all the Traditional Owners expenses in conducting the cultural heritage survey and in negotiating the management plan.

The process of negotiating and obtaining approval for a CHMP generally takes a minimum of two months, and could potentially take ten months or more.

(c) Aboriginal cultural heritage requirements for exploration activities

In order to undertake any exploration activities, a proponent must comply with the cultural heritage duty of care, and it may be necessary to negotiate a CHMP with relevant Traditional Owners. However, a CHMP 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, more intrusive activities such as larger scale drilling or seismic surveys are likely to require (at the least) consultation with local Traditional Owners, and probably engagement of 'cultural heritage monitors' to oversee the activity.

Isolated work area clearance surveys are usually conducted over the area of exploration activities (such as seismic surveys and drilling), prior to those activities commencing. A work area clearance survey is conducted in the field with a clearance team typically consisting of the petroleum company representative, specialists such as anthropologists and multiple traditional owners representing the relevant Traditional Owners.



The purpose of an Environmental Impact Statement is to assess likely impacts of the petroleum project on environmental values in the area

6.6 Environmental Approvals and Assessment

(a) Generally

Each Australian State has its own environmental legislation that requires all resource activities in that State to be covered by an EA of some kind. In some States (for example, Western Australia) EAs are administered by the same agency or government department that issues exploration and production tenures.

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 petroleum operation.

In addition to the State level regulatory framework, the project will need to be referred to the Federal government if the resource activities for a project are likely to impact on environmental matters classified as being Matters of National Environmental Significance (**MNES**) under the 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 MNES), it will require assessment and approval under the EPBC Act.

The EPBC Act was amended in 2013 to include an additional MNES, specifically for coal seam gas (**CSG**) and large coal mining developments. The Commonwealth 'water trigger' relates to impacts on 'water resources', which includes both surface and groundwater systems, including organisms and ecosystems that contribute to the physical state and environmental value of the water resource. Federal assessment of such projects can also involve review of assessment material relating to water resources by the Independent Expert Scientific Committee appointed under the EPBC Act. State Governments may also seek advice from the Independent Expert Scientific Committee in their assessment.

An independent review of the water trigger was conducted in 2017, which concluded that the water trigger was an appropriate measure to address the perceived regulatory gap that existed prior to its enactment, and to alleviate public concern.

Resources activities may also have impacts that relate to other MNES, including listed threatened species and ecological communities, migratory species and wetlands of international importance.²⁰⁵

(b) 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 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 preparation of the EIS and completion of the EIS process can take a significant period of time to complete (up to two years or more, depending on the scale of the project, the extent of its impacts and the degree of community opposition). All EIS processes involve public notification of the draft EIS that enables persons to make submissions in relation to the draft EIS.

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

The purpose of an EIS is to assess likely impacts of the petroleum 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. Such 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, State and Federal Governments try to coordinate their responses to project assessment to avoid duplication and inconsistent conditions.

In NSW, the enactment of the *Biodiversity Conservation Act 2016* (NSW) has meant that the existing NSW assessment bilateral agreement requires amendment. While the existing bilateral agreement will remain operational for certain transitional projects that will continue to be assessed under the old NSW biodiversity legislation, new projects may need to undertake a dual assessment process under both State and Federal regimes, or be the subject of an assessment accredited under the EPBC Act. There have been no

further developments regarding any separate approvals bilateral agreements since drafts were prepared in 2014-2015. No such agreements are currently in place. An approvals bilateral agreement would have the effect of accrediting specified State approvals processes for Commonwealth purposes, meaning that State Governments could decide to approve proposals that are likely to have a significant impact upon a MNES, without requiring an additional approval under the EPBC Act.

(c) Common Issues in Resource Project Environmental Impact Assessments**(i) Endangered regional ecosystems**

The presence of 'endangered' and 'of concern' regional ecosystems in the area covered by an application for a petroleum lease has the potential to impede the obtaining of a petroleum lease and associated EAs over the areas covered by those ecosystems.

However the presence of an endangered regional ecosystem does not automatically mean that resource 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 ecosystem and the management measures proposed by the proponent (for example, 'offset' arrangements). No definite position can be confirmed in advance of the relevant assessment. However, resource activities have been permitted in areas of endangered regional ecosystems in the past.

(ii) CSG water and groundwater

One of the main environmental issues dealt with by the EIA process for unconventional gas (including CSG) production, relates to the extraction and management of groundwater and salt, and the management of the potential impacts of extraction on groundwater aquifers.

CSG is produced by dewatering coal seams to reduce the pressure that keeps the gas in place. This process brings significant quantities of water to the surface. The extraction, use and disposal of this water, which is usually highly saline, gives rise to a number of management issues concerning surface water and groundwater systems, as well as salt disposal.

EAs that need to be obtained for a project will identify potential environmental risks associated with the extraction of groundwater and possible impacts on groundwater aquifers. Conditions will be imposed to ensure these risks are properly dealt with.

As part of the State EA application process, CSG operators are required to show how they plan to manage CSG water. This will include information such as:

- (A) flow rate, quantity and quality of expected CSG water;
- (B) proposed management of CSG water, including use, treatment, storage or disposal;
- (C) criteria for monitoring and assessing the management of CSG water; and
- (D) proposed actions by the CSG operator should management criteria not be met.

CSG operators are also required to submit an annual evaluation of how effective and appropriate their management of CSG water has been.

The Queensland government's *Coal Seam Gas Water Management Policy* is an example of a policy guideline for CSG operators in managing CSG water under their EA.

The objective of this policy is to be achieved by managing CSG water in accordance with the following two priorities:

- (A) **Priority 1** – CSG water is used for a purpose that is beneficial to one or more of the following: the environment, existing or new water users, and existing or new water-dependent industries.
- (B) **Priority 2** – After feasible beneficial use options have been considered, treating and disposing of CSG water in a way that firstly avoids, and then minimises and mitigates impacts on environmental values.

Where the extraction of CSG water results in the loss of water to others who use groundwater, such as farmers and graziers, there is an obligation under some legislation (such as the *Water Act 2000* (Qld)) to 'make good' such losses of groundwater resources. This would usually take the form of deepening an existing bore, sinking a new bore or financial compensation.

Typically, Federal approvals will also require a groundwater management and monitoring plan to track the impact of groundwater extraction on groundwater aquifers.

(iii) GHG emissions

In light of the increasing public awareness and concern regarding climate change, and the commitments made by the Federal government at an international level to implement measures to reduce global warming to below 2 degrees Celsius above pre-industrial levels, the assessment of GHG emissions is becoming increasingly relevant within EIA processes.

However, there have been different approaches taken in different jurisdictions as to the extent that different kinds of GHG emissions should be assessed as part of the EIA process. In particular, scope 3 emissions, being those indirect emissions that are produced by third parties as a consequence of project activities, have been the subject of distinctly different approaches.

In a decision of the NSW Land and Environment Court in *Gloucester Resources Limited v Minister for Planning* (2019) NSWLEC 7, the Court refused development consent for the proposed Rocky Hill Coal Mine, partially on the basis of the mine's predicted contribution to global GHG emissions, including scope 3 emissions. Notably the Court determined that scope 3 emissions were a relevant consideration, having regard to applicable NSW legislation which expressly requires consideration of 'downstream' GHG emissions for proposed mining, petroleum production and extractive industries, and consideration of the 'public interest'. Our Hot Topic on [page 55](#) considers this case in detail.

Comparatively, the approach taken by the Queensland Land Court has generally rejected the view that scope 3 emissions should be taken into account when deciding whether to grant mining leases, reflecting the distinct legislative framework that applies in each State.

6.7 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. Laws have been developed in some States to deal with these potential conflicts in different ways.

(a) Queensland

Queensland's State Planning Policy (**SPP**) sets out matters which should be addressed in local government schemes and other planning instruments in relation to matters of State interest. The SPP identifies a State interest in ensuring that 'planning protects the resources on which agriculture depends, and supports the long term viability and growth of the agricultural sector'.

Increasingly, regional planning initiatives are being adopted to better regulate potentially conflicting land uses. The key example is the *Regional Planning Interests Act 2014* (Qld) (**the RPI Act**), which gives effect to State policies, and interacts with the SPP, in relation to protection of regional areas, particularly agriculturally important areas. The RPI Act aims to prevent resource activities from unreasonably constraining, restricting or preventing ongoing agricultural operation, and to protect ecological integrity.

This legislation establishes an 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 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).

(b) New South Wales

The NSW government finalised the implementation of its Strategic Regional Land Use Policy in 2013 and 2014 through further amendments to the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* (**Mining SEPP**).

The Mining SEPP requires 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:

- (i) **Biophysical strategic agricultural land (BSAL)**, being land identified as having high quality soil and water resources capable of sustaining high levels of productivity. This land has high agricultural value to NSW and plays a critical role in sustaining the State's agricultural industry. Approximately 2.8 million hectares of BSAL has been mapped at a regional level across the State and a site verification process exists under the Mining SEPP to determine the existence of BSAL at the local level; or
- (ii) **Critical industry cluster land**, being land where there is a concentration of highly productive industries within the Upper Hunter 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 Regional Water (**Minister**) for advice regarding the impact of the proposal on water resources. The Minister must have regard to the minimal impact considerations set out in the Aquifer Interference Policy and the other provisions of that Policy in providing advice on the impact of a proposed development of water resources.

In considering applications, the Independent Mining and Petroleum Gateway Panel must have regard to advice provided by the Minister and the Committee and must assess the proposal against detailed scientific and technical criteria identified in the Mining SEPP. The Panel cannot refuse to grant a gateway certificate, but may 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.

As a result of amendments made to the Mining SEPP in 2013 and 2014, no new coal seam gas (**CSG**) development is permitted in or under land within a CSG exclusion zone or within a buffer zone. This land includes existing residential land, future residential growth area land and critical industry cluster land. Minor modifications of existing CSG projects within CSG exclusion zones are permitted where those modifications do not enlarge, expand or intensify CSG development, and which have minimal anticipated environmental impact.

7 Broader Regulatory Landscape

7.1 Foreign Investment Approval

The Australian government welcomes foreign investment into Australia and recognises the substantial contribution it makes to Australia's development. 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 precise requirements of the regime but also the spirit of the regime. Adopting a clear commitment to Australia's foreign investment regime from the outset is critical to facilitate timely approval.

To facilitate the process, it is important that a foreign investor who is looking at a significant and potentially sensitive proposal:

- respects the process and consults with the Foreign Investment Review Board (**FIRB**) and the Treasurer prior to any public announcement;
- appreciates and manages community sensitivities as needed;

- develops a whole of stakeholder strategy that engages key political and community players; and
- proactively identifies and seeks to address potential national interest concerns (if any).

(a) Overview of foreign investment regulation

(i) Framework

Australia's foreign investment regulatory framework comprises a number of elements:

(A) A legislative framework, and in particular the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**FATA**) and the *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* (Cth) (**Fees Imposition Act**) and their associated regulations.

Under FATA, foreign investors must submit foreign investment proposals that meet certain criteria to the Treasurer for approval. The Treasurer has the power to block foreign investment approvals that are contrary to Australia's national interest or apply conditions on the way in which a proposal is to be implemented to ensure it is not contrary to the national interest.

The Fees Imposition Act sets the fees for foreign investment applications and notices made under FATA.

(B) Australia's Foreign Investment Policy (**Policy**), which is issued by the Australian government. Historically the Policy was of critical importance as it included substantive additional approval requirements to those in the FATA (for example, in relation to foreign government investors). However, since the rewriting of the FATA in 2015 to cover these additional matters, the primary function of the Policy is to give a useful summary of the government's approach to administering the foreign investment framework, including national interest considerations.

(C) Guidance Notes, which provide more specific information on how the foreign investment framework applies for different acquisitions and investors.

(ii) Regulators

As mentioned above, the Australian Treasurer is responsible for the foreign investment framework and reviews investment proposals against the national interest on a case-by-case basis.

FIRB, a non-statutory body, advises the Treasurer on the foreign investment regime in the context of any national interest implications and is responsible for the day-to-day administration of the regime, together with the Board Secretariat that is within the Commonwealth Treasury. Ultimate responsibility for making decisions rests with the Treasurer.

FIRB is supported by a secretariat located in Treasury and by the Australian Taxation Office (**ATO**). FIRB's remit specifically addresses foreign investment in relation to business, agricultural land and sensitive commercial land proposals. The ATO administers foreign investment in residential real estate and non sensitive commercial land.

(b) Who should consider the regime?

(i) Foreign persons

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

- (A) a natural person not ordinarily resident in Australia;
- (B) a foreign government or foreign government investor;
- (C) a corporation, trust, partnership or fund where an individual is not ordinarily resident in Australia;
- (D) foreign corporation or foreign government holds a substantial interest of at least 20%; or
- (E) a corporation, trust, partnership or fund in which two or more foreign persons hold an aggregate substantial interest of at least 40%.

A foreign government investor is:

(A) a foreign government or separate government entity; or

(B) a corporation, trust, partnership or fund in which:

- a foreign government or separate government entity (together with other foreign government investors from the same country) holds a substantial interest of at least 20%; or
- foreign governments or separate government entities of more than one foreign country hold an aggregate substantial interest of at least 40%.

(ii) Foreign investors from FTA countries

Certain privately owned investors from countries with whom Australia has a free trade agreement (including Canada, Chile, China, Japan, Mexico, South Korea, Singapore, New Zealand, Vietnam and the United States) are subject to higher monetary notification thresholds for acquisitions made directly by those investors.

To take advantage of these higher thresholds the investment must come directly from the free trade agreement country investor and not through a subsidiary incorporated in another country (including Australia).

(iii) Foreign governments and their related entities

All foreign government investors must obtain approval before acquiring a direct interest in an Australian entity or business, starting a new business or acquiring an interest in Australian land, regardless of the value of the investment. Foreign government investors also require approval to acquire a legal or equitable interest in a mining, production or exploration tenement, or an interest of at least 10% in securities in a mining, production or exploration entity.

A direct interest is:

(A) an interest of at least 10% in the entity or business;

(B) an interest of at least 5% in the entity or business if the person who acquires the interest has entered a legal arrangement relating to the businesses of the person and the entity or business (other than the supply of goods or services on normal commercial terms); or

(C) an interest of any percentage in the entity or business if the person who has acquired the interest is in a position to:

- participate or influence the central management and control of the entity or business; or

- influence, participate or determine the policy of the entity or business (for example a nominee director).

(c) Approval

Whether notification of a proposed transaction is required will depend on the identity of the investor, the type of investment, the industry sector and the value of the proposed investment. Importantly, the acquisition of a foreign company with Australian assets may require foreign investment approval.

All notifiable transactions require prior approval by the Treasurer and any agreement to undertake the transaction must be conditional on the approval

being obtained. A fee should be paid for each foreign investment application.

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 divestment or unwinding transactions that are subsequently found to be contrary to the national interest.

Figure 18 sets out, at a high level, when foreign investment approval will be required. Various exemptions may apply and it is important that you obtain specific legal advice in relation to your particular transaction.

Figure 18: Foreign Approval Requirements

Type of Investment	Foreign investors	Foreign government investors	FTA country investors
Land			
Agricultural land	A\$15 million (cumulative threshold)	Any interest regardless of value	A\$1,154 million for US, New Zealand and Chilean investors A\$50 million for Thai investors
Developed commercial land (non-sensitive)	A\$266 million	Any interest regardless of value	A\$1,154 million
Sensitive developed commercial land including mines and critical infrastructure (for example airports and ports)	A\$58 million	Any interest regardless of value	A\$1,154 million
Vacant commercial land	Any interest regardless of value. Usually subject to condition to develop within 24 months of the acquisition	Any interest regardless of value	Any interest regardless of value
Production tenements (does not include exploration)	Any interest regardless of value	Any interest regardless of value	A\$1,154 million for US, New Zealand and Chilean investors
Exploration tenement	Approval not required	Any interest regardless of value	Approval not required
Companies			
Acquisition of at least 20% in an Australian business or corporation which is not sensitive	A\$266 million	Direct interest regardless of value	A\$1,154 million for Canada, Chile, China, Japan, Mexico, South Korea, Singapore, New Zealand, Thailand and US investors
Acquisition of a direct interest in an agribusiness	A\$58 million (based on value of investment)	Direct interest regardless of value	A\$1,154 million for US, New Zealand and Chilean investors
Proposal to invest 5% or more in the media sector	Must be notified regardless of value	Must be notified regardless of value	Must be notified regardless of value

Type of Investment	Foreign investors	Foreign government investors	FTA country investors
Acquisition of at least 20% in an Australian business or corporation which is sensitive	A\$266 million	Direct interest regardless of value	A\$266 million
Australian land corporation	Will depend on the underlying land held – refer to Land requirements above	Any interest regardless of value	Will depend on the underlying land held – see above
Australian agricultural land corporation	A\$15 million (cumulative)	Any interest regardless of value	A\$1,154 million for US, New Zealand and Chilean investors A\$50 million for Thai investors

[Source: Australian Government Foreign Investment Review Board, *Monetary thresholds* (Web Page) <<http://www.firb.gov.au/exemptions-thresholds/monetary-thresholds>>.]

(d) Fees

By way of overview, the fees payable to FIRB for an application are set out in **Figure 19**[^]:

Figure 19: FIRB Application Fees

Fees for commercial land and entities and businesses*			
	Consideration for the acquisition is \$10 million or less	Consideration for the acquisition is above \$10 million and not more than \$1 billion	Consideration for the acquisition is above \$1 billion
Commercial land (vacant and developed)	A\$2,000	A\$26,200	A\$105,200
Companies / businesses	A\$2,000	A\$26,200	A\$105,200
<ul style="list-style-type: none"> • Acquiring an interest in securities in an entity or issuing securities in an entity • A foreign government investor acquiring a direct interest in an Australian entity or Australian business • Acquiring a direct interest in an Australian entity or Australian business that is an agribusiness • Acquiring interests in assets of an Australian business or a direct interest in an Australian business that is an agribusiness 			
Fees for agricultural land			
		Consideration for the acquisition is above \$2 million and not more than \$10 million	Consideration for the acquisition is above \$10 million
Agricultural land*	A\$2,000	A\$26,200	A\$105,200

[Source: Australian Government Foreign Investment Review Board, *Guidance Note 30* (Web Page) <<http://www.firb.gov.au/guidance-resources/guidance-notes/gn30>>]

[^] Note: Fees are indexed annually. The figures are current as at 1 July 2019.

* Note: The fee for land acquisitions is based on the consideration of the highest title for all actions considered part of the one agreement rather than based on the total consideration for the entire acquisition. For example, a foreign person is acquiring a \$5 million agricultural land property with over 5 titles as part of the one agreement. The highest title has an apportioned consideration of \$1.5 million. Hence the total fee for this acquisition is \$2,000.

(i) Conditions

To ensure that the action will not be contrary to the national interest, FATA allows the Treasurer to decide that the Commonwealth has no objection to the foreign investment subject to conditions. Foreign investors are generally given the opportunity to review and respond to the proposed imposition of these conditions.

In determining whether the action is contrary to the national interest, the Treasurer considers the potential impact of an action on Australian tax revenues. The ATO is consulted in determining the potential tax impact of every non-residential foreign investment proposal. If, following consultation, the Treasurer considers the action may involve a risk to tax revenues, standard tax conditions may be imposed as conditions of a no objection notification, to ensure that the action will not be, or is not, contrary to the national interest.

The standard tax conditions may be imposed on no objection notifications.²⁰⁶ Generally there is no ability to negotiate on any conditions imposed on a no objection notification.

(ii) National interest

Under Australia’s foreign investment regime the Treasurer, on behalf of the Australian government, assesses foreign investment proposals against the national interest on a case-by-case basis. The government typically considers the following factors when assessing foreign investment proposals:

Figure 20: *Factors for assessing foreign investment proposals*

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.

(iii) Direct investments by foreign governments and 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. In addition, the Australian government also considers the following factors in respect of a proposal involving a foreign government or a related entity:

- (A) 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;
- (B) for partially privatised potential investors: the size, nature and composition of any non-government interests and any restrictions on the exercise of their rights as interest holders; and
- (C) any investment proposals not operating fully on an 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 factors that assist in determining whether or not a proposed foreign investment is contrary to the national interest include the:

- (A) existence of external partners or shareholders in an investment;
- (B) level of non-associated ownership interests;
- (C) governance arrangements for the investment;
- (D) ongoing arrangements to protect Australian interests from non-commercial dealings;
- (E) future or continuous listing of the investment target on the ASX or another recognised exchange; and
- (F) size, importance and potential impact of an investment.

(e) Petroleum tenements

Under FATA, an 'interest in Australian land' includes an interest in certain types of petroleum tenements.

Figure 21 sets out which oil and gas interests will require FIRB notification and approval and the relevant thresholds that apply.

Figure 21: *FIRB notification and approval thresholds*

Investor	Exploration tenement*	Petroleum lease	Petroleum joint venture (incorporated or unincorporated)	Operating project
Foreign investors	×	✓ Must be notified regardless of value	✓ Must be notified regardless of value	✓ Must be notified regardless of value**
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 and Chile)	×	✓ Must be notified regardless of value	✓ Must be notified regardless of value	✓ A\$1,154 million

[Source: *Foreign Acquisitions and Takeovers Act 1975* (Cth); *Foreign Acquisitions and Takeovers Regulation 2015* (Cth); Australian Government Foreign Investment Review Board, *Monetary thresholds* (Web Page) (<http://www.firb.gov.au/exemptions-thresholds/monetary-thresholds>.)]

* 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 (generally speaking, exploration tenements in Australia do not grant an exclusive right to occupy land).

** Assuming it includes a production tenement, otherwise the relevant threshold will be \$58 million.

(f) 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) (**Corporations Act**), the *Competition and Consumer Act 2010* (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 flowcharts below.

Figure 22: FIRB process for applicants

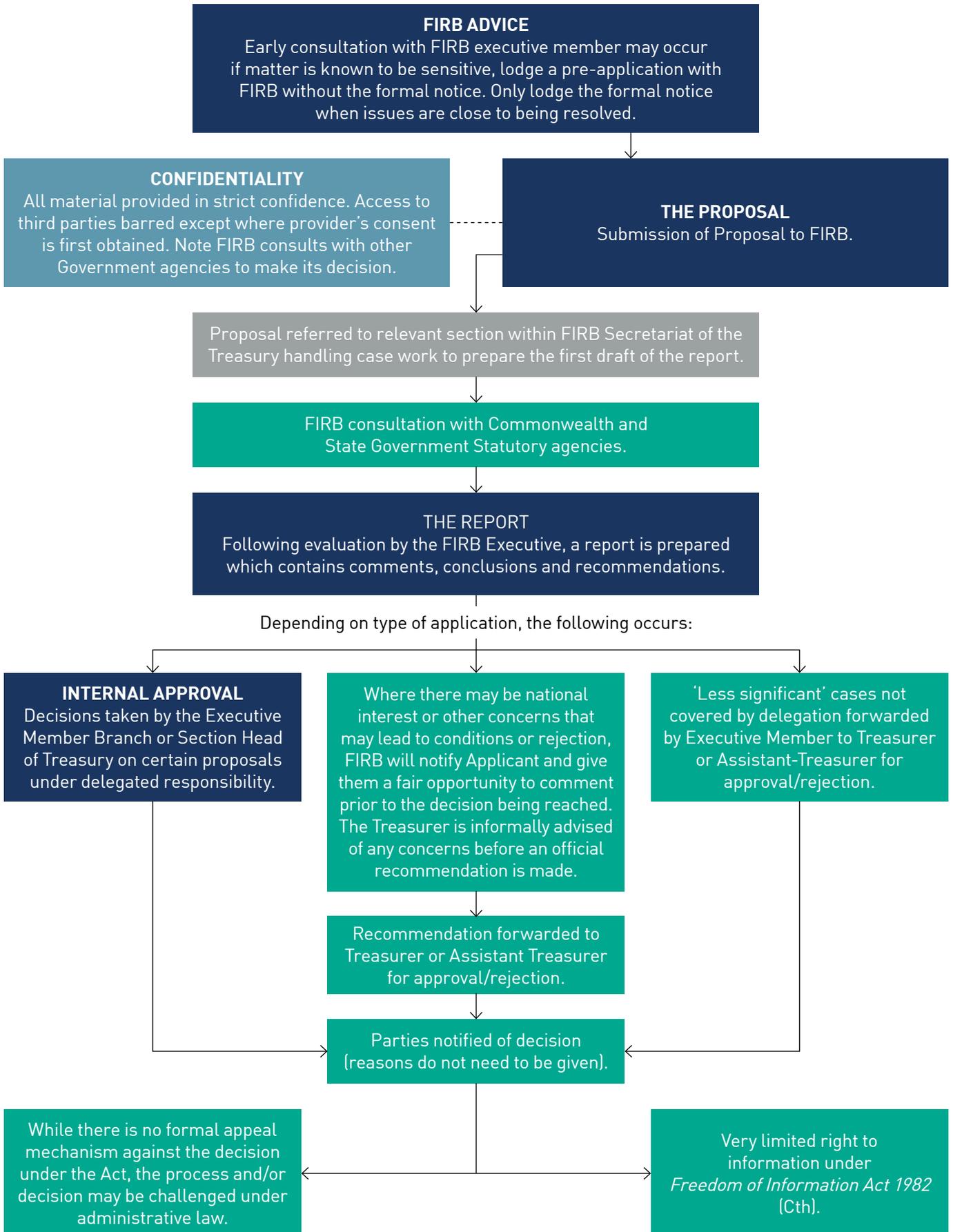
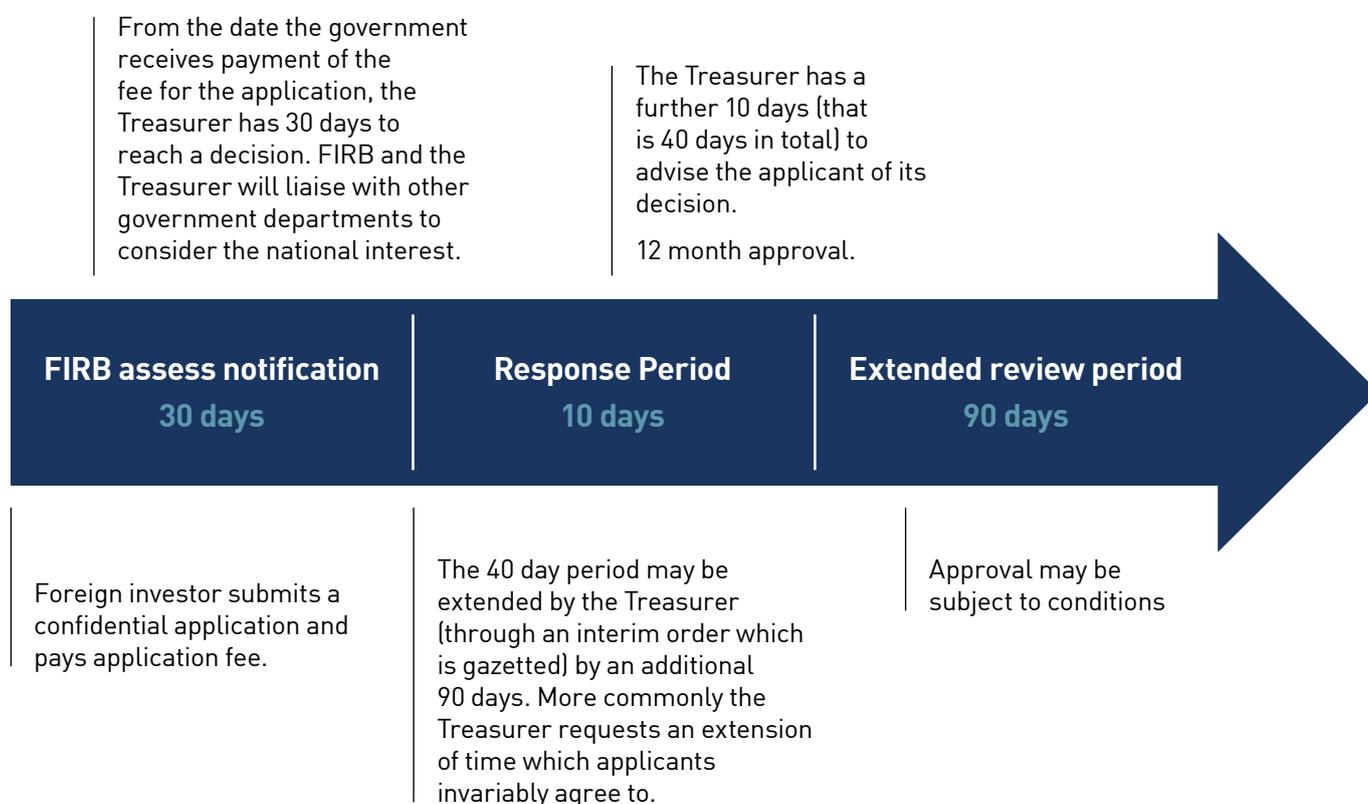


Figure 23: Timeframe for FIRB review



(g) 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.

7.2 Competition Law

Australia’s competition laws apply to a range of transactions and conduct including acquisitions of shares or assets, arrangements between competitors, incorporated and unincorporated joint ventures, exclusivity and intellectual property licensing arrangements, joint maintenance, marketing and supply arrangements, access to regulated infrastructure and wholesaling and retailing.

(a) Laws and Regulator

Australia’s competition laws are set out in the *Competition and Consumer Act 2010* (Cth), its regulations and Codes made under that Act (**CCA**).

The national competition law regulator is the ACCC. The ACCC is an active regulator that takes regular enforcement action for contravention of the CCA.

(b) Acquisition of Shares or Assets

An acquisition of shares or assets may contravene Australian competition law if the acquisition has the purpose or would be likely to have the effect of substantially lessening competition in any market in Australia. Voluntary clearance and authorisation processes are available, which involve applying to the ACCC for clearance or authorisation to proceed with the proposed acquisition.

A risk of not obtaining clearance or authorisation is the ACCC commencing court action against the transaction parties. Court orders may include orders preventing the acquisition from proceeding, orders for divestiture (unwinding) of the acquisition if it has already completed and orders for civil penalties.

(c) Cartel Conduct

Cartel conduct is prohibited under the CCA. Civil penalties and criminal offences can be ordered for contravention of the cartel provisions of the CCA.

Cartel conduct is a potential risk whenever arrangements are made between actual or potential competitors, particularly arrangements that result in the allocation of customers, suppliers or territories, direct or indirect attempts to fix or control prices, restricting outputs in the production or supply chain or 'bid-rigging'.

There are certain exceptions to the cartel conduct provisions. For example, there are limited exceptions in relation to certain types of joint venture arrangements and joint marketing arrangements.

Applications may also be made requesting the ACCC to authorise the proposed conduct on the basis that the public benefits arising from the proposed conduct outweigh any potential detriment to competition.

(d) Concerted Practice

Concerted practices involve conduct between two or more individuals or businesses, where the conduct substitutes, or would be likely to substitute, cooperation between parties in place of the uncertainty of competition. Information exchanges can constitute a concerted practice if the exchange reduces strategic uncertainty in the market or facilitates collusion (for example, where the data exchanged is sensitive or strategic).

Transactions or arrangements that involve the disclosure or exchange of strategic data or sensitive information may need to be tested against the concerted practices provisions before any disclosure or exchange occurs.

(e) Access to Regulated Infrastructure

Access to regulated infrastructure services, including certain telecommunication services, gas pipelines, rail infrastructure and ports may be subject to an approved access regime under the CCA.

(f) Oil Code of Conduct

The Oil Code of Conduct (**Oil Code**) regulates the conduct of wholesalers and fuel resellers involved in the supply or acquisition of certain petroleum products such as diesel, unleaded petrol and fuels blended with ethanol.

A March 2019 report by the Parliamentary Joint Committee on Corporations and Financial Services titled 'Fairness in Franchising' made a number of recommendations for changes to the Oil Code. One of the more significant recommendations is for more serious penalties to be introduced for contraventions of the Oil Code. As at the date of this publication, it remains to be seen whether the recommendations in the report will be implemented.

(g) The Australian Consumer Law

The Australian Consumer Law is part of the CCA. It regulates a range of general and specific consumer protection matters including misleading or deceptive conduct, unconscionable conduct, unfair contract terms, product recall, manufacturers' liability and product safety standards. Despite its name, many of the statutory protections under the ACL are not limited to individual consumers – they can also protect businesses and can apply to business-to-business transactions.

7.3 Royalties and Taxation

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

(a) Royalties

In Australia, petroleum is the property of the State (subject to minor exceptions). Royalties can be imposed by a State or Territory government if petroleum production occurs within the territorial borders of the relevant State or Territory. The State based royalties in the major petroleum producing jurisdictions are:

- in Queensland – a royalty of 12.5% of wellhead value, effective as of 1 July 2019;
- in South Australia – a royalty of 10 -12.5% of wellhead value; and
- in Western Australia – a royalty of 10 -12.5% of wellhead value.

Royalties are also payable to the Federal government for offshore petroleum production in the North West Shelf project area. The royalty rate for the North West Shelf project area is set between 10 - 12.5% of the wellhead value, depending on the size of the area covered by the petroleum production licence. Royalty proceeds are shared between the Federal and Western Australian Governments.²⁰⁷ Since 1 July 2012, the Federal Petroleum Resource Rent Tax (**PRRT**) has also applied to the North West Shelf.

(b) 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 matters that are commonly pertinent to conducting business operations in Australia. Foreign investors also need to consider the implications of the tax regime in their home jurisdiction, and any relevant double taxation agreement (**DTA**) between Australia and other jurisdictions.

Each level of government (Federal, State or Territory and local) imposes its own taxes. The Federal government imposes the most significant taxes including income tax, Goods and Services Tax (**GST**), Fringe Benefits Tax (**FBT**), PRRT, 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 petroleum and minerals from within its borders (see above). Local governments levy annual charges (rates) on the owners of real property in their jurisdiction.

(i) Income tax

The Federal government imposes income tax.

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

A company will be a resident of Australia for tax purposes under Australian law if:

- (A) it is incorporated in Australia;
- (B) it carries on business in Australia and has its central management and control in Australia; or
- (C) its voting power is controlled by shareholders who are residents of Australia.

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 assets that have a substantial connection with Australia, such as the sale of Australian real property (held directly or, in some cases, indirectly).

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 (for example business and investment income) and statutory income (for example 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 and applied against future assessable income if the company satisfies one of the following tests:

- (A) the 'continuity of ownership test', which is failed if the company has undergone a substantial change in ownership or control; or
- (B) the 'same business test', which requires the company to carry on the same business and not derive income from any new kinds of business or transactions.

In February 2019, the government supplemented the same business test with a 'similar business test', which requires the company to carry on a similar business to its former business immediately before the failure of the continuity of ownership test. The new test was aimed at start-ups, but the way in which it will be interpreted by the ATO is not yet entirely clear.

Capital losses can only be applied 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).

(A) Corporate tax rates

The full company tax rate for both resident and non-resident companies is 30%. A lower company tax rate of 27.5% applies to certain companies with an aggregated annual turnover of less than A\$50 million for the 2018-19 income year. It is currently proposed that this lower rate be reduced progressively to 25% by the 2021-2022 income year.

We recommend that company tax rates be monitored on an ongoing basis, as there are current proposals that the full corporate tax rate be lowered progressively to 25% by the 2026-2027 income year.

(B) Dividend imputation

Under Australia's dividend imputation system, Australian shareholders can receive credits on certain dividends paid by an Australian company for corporate tax already paid by the company. More specifically, the payment of company tax by an Australian company gives rise to credits in the company's franking account. The company can attach these franking credits to dividends paid by the company. Australian shareholders who receive 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 franking credits in respect of franked dividends, but dividend withholding tax (see below) does not apply to franked dividends paid to non-resident shareholders.

(C) Capital gains tax

Australia has a comprehensive capital gains tax (**CGT**) regime. Net capital gains (after offsetting any available capital losses and any applicable discounts – discussed below) are subject to income tax. The disposal of a capital asset may give rise to a capital gain if the sale proceeds exceed the cost base of the asset (broadly, its acquisition cost). Conversely, there may be a capital loss if the sale proceeds are less than the asset's cost base (subject to various adjustments). Capital losses can only be applied 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 (discussed below).

Non-resident taxpayers are only subject to CGT in Australia on capital gains from the sale of assets that have a certain connection with Australia ('taxable Australian property'). Such assets include:

- a direct interest in real property situated in Australia;
- a mining, quarrying or prospecting right to minerals, petroleum or quarry materials situated in Australia;
- a lease of real property or mining, quarrying or prospecting rights;
- a CGT asset used at any time in carrying on a business through a permanent establishment in Australia; or

- an indirect interest in Australian real property – where you and your associates hold 10% or more of an entity, including a foreign entity, and the value of your interest is principally attributable to Australian real 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 (that is after taking into account current year or carry forward capital losses) by 50%. A complying superannuation entity may reduce net capital gains by 33.3%. 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 the CGT discount.

As the CGT rules operate to include net capital gains (after offsetting any available capital losses) in assessable income, Australian residents are assessed on their capital gains at ordinary income tax rates.

(D) Tax consolidation

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

Broadly, a tax consolidated group is treated as a single entity for income tax purposes. The main 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 disregard intra-group transactions (including asset transfers, loans and distributions of income or capital) for income tax purposes; and
- the ability to pool certain losses attributable to group members for use against the group's taxable income (albeit with restrictions on the rate at which such losses can be used).

Foreign-owned groups with multiple entry points into Australia have some flexibility under special rules to decide the scope of its Australian consolidated group or groups.

The Australian head company of a tax consolidated group is responsible for paying the group's income tax liability to the ATO. However, all group members are jointly and severally liable for the group's tax liabilities of the group in the event of a default by the head company. The risk of joint and several liability can be mitigated if the group members are covered by a valid tax sharing agreement, which notionally allocates the group's tax liabilities to each member on a 'reasonable basis'. In such circumstances, an individual member's liability will be limited to its allocation of the group tax liability under the tax sharing agreement. A valid tax sharing agreement also provides for the clean exit of a group member in the event that it leaves the consolidated group.

(ii) International

(A) Withholding taxes on dividends, interest and royalties

Australia imposes withholding tax on dividends, interest and royalties paid by Australian residents or permanent establishments to non-residents. Under domestic law, the withholding tax rates are generally 30% on unfranked dividends, 30% on gross royalties and 10% on gross interest. As noted above, there is no Australian dividend withholding tax on franked dividends paid to a non-resident. There is no branch profits remittance tax in Australia.

The rates of withholding may be restricted if there is an applicable DTA. Australia has a comprehensive DTA network with over 40 countries, covering most of its major trading partners including New Zealand, China, Japan, the United States and the United Kingdom. A notable exception is Hong Kong, which is not covered by the agreement with China.

Under most Australian DTAs, the rate on dividends is reduced to 15% and may be reduced further to 5% or nil in some DTAs (for example the United States and the United Kingdom), depending on the circumstances. The rate on royalties may be reduced to 5% (for example Japan, the United States and the United Kingdom), 10% (for example China and India for technical royalties) or 15% (for example Korea and India for non-technical royalties).

The Australian head company of a tax consolidated group is responsible for paying the group's income tax liability to the ATO



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 the construction, installation and upgrade of buildings, plant and fixtures.

(B) Foreign resident capital gains withholding

Under the foreign resident capital gains withholding (**FRCGW**) rules, a purchaser from a foreign resident vendor must withhold 12.5% of the purchase price in relation to the sale of:

- taxable Australian real property (which relevantly includes a direct or indirect interest in mining, quarrying or prospecting rights) with a market value of \$750,000 or more;
- an indirect Australian real property interest (see above); or
- an option or right to acquire such property or interest.

The intention of the measure is to assist in the collection of foreign residents' CGT liabilities upon the sale of taxable Australian property (see above).

Where FRCGW does not apply to a transaction, depending on the circumstances an Australian resident vendor can obtain a FRCGW clearance certificate or a declaration from the vendor evidencing that no withholding is required.

(C) Thin capitalisation

Deductions for interest incurred by inbound investment vehicles (broadly, a foreign controlled Australian company) and outbound investment vehicles (broadly, Australian entities investing overseas) may be limited under Australia's 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% 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's level of gearing is consistent with the actual extent to which its worldwide group is geared (the worldwide gearing test).

Different tests apply to non-bank financial entities and Authorised Deposit-taking Institutions (**ADIs**). 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 (discussed below) if the relevant parties did not deal with each other at arm's length in determining the interest rate.

(D) Debt and equity rules

Complex rules affect the taxation treatment of a variety of financial instruments. Under the debt and equity rules, taxpayers are required to apply certain tests to determine whether an instrument is treated as debt or equity for certain 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 that 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 would not be deductible.

Conversely, instruments that take the legal form of equity might be classified as debt for Australian tax purposes. In such circumstances distributions are treated as interest and are potentially deductible, but cannot be franked. The debt or equity classification of an instrument is also relevant for a taxpayer's thin capitalisation analysis.

The hybrid mismatch rules were introduced with effect from 1 January 2019 to prevent multinational corporations from exploiting differences in the tax treatment of an entity or instrument under the laws of two or more tax jurisdictions.

(E) Transfer pricing

Australia's transfer pricing regime has recently undergone considerable reform and is broadly aligned with the OECD transfer pricing guidelines. The transfer pricing rules are intended to ensure that an entity's tax position in relation to its cross-border dealings is determined on the basis of conditions that might be expected to operate between independent entities dealing wholly independently with one another in comparable circumstances. Where an Australian taxpayer deals with a foreign party (whether or not related) on a non-arm's length basis, the transfer pricing rules require the substitution of the actual arrangements with the arm's length arrangement for tax purposes. This may require an adjustment to the taxable income of the taxpayer.

The transfer pricing rules can apply to arrangements in respect of the provision or acquisition of services, goods and financing (for example loans). A taxpayer is required to have appropriate transfer pricing documentation in place by the time it is required to lodge its tax return.

Special rules allow 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 (discussed above). 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.

(F) Multinational Anti-Avoidance Law and Diverted Profits Tax

In addition to income tax general anti-avoidance laws, Australia has various measures affecting 'significant global entities' (**SGEs**) that are part of a group with annual global income exceeding A\$1 billion.

The multinational anti-avoidance law (**MAAL**) is designed to prevent SGEs using artificial arrangements to limit the attribution of profits to Australia. The MAAL is complemented by the diverted profits tax (**DPT**), which aims to prevent the diversion of profits offshore by SGEs through contrived arrangements by imposing a 40% tax on diverted profits. It also contains measures to encourage SGEs to provide sufficient information to the ATO to allow for the timely resolution of tax disputes.

SGEs are also subject to Country by Country Reporting (**CbCR**) obligations and higher administrative penalties. In July 2018, the SGE definition was extended to include, potentially, members of large private groups headed by unlisted companies, trusts, partnerships or other investment vehicles.

(iii) Petroleum Resources Rent Tax

The PRRT is imposed on profits from the sale of oil and gas commodities produced in Australia, including:

- stabilised crude oil;
- sales gas;
- condensate;
- liquefied petroleum gas;
- ethane; and
- shale oil.

The PRRT generally does not apply to the liquefaction of gas and the storage and shipping of LNG. The PRRT does not apply to coal seam gas extracted as an unavoidable incident of mining coal.

(A) General features

PRRT is assessed on a project-by-project basis. A project may comprise one or more petroleum production licences. Currently, the PRRT applies to all Australian onshore and offshore oil and gas projects, including the North West Shelf, oil shale and coal seam gas projects. PRRT originally only applied to offshore petroleum projects, but was expanded to include onshore petroleum projects from 1 July 2012. Onshore petroleum projects will be removed from the scope of the PRRT from 1 July 2019, as onshore projects are not expected to result in any PRRT liabilities but can reduce taxpayers' PRRT liabilities for offshore projects because of the transfer of exploration expenditure (see below).

PRRT is levied at a rate of 40% of the taxable profit (as calculated under the PRRT rules) from an entity's interest in a project (that is it is not imposed on a joint venture basis). It is payable quarterly on an instalment basis. A PRRT liability only arises when a project has recovered all eligible project outlays and deducted eligible exploration expenditure transferred from other projects, and a threshold rate of return has been achieved.

Another distinctive feature of the PRRT regime is that a PRRT taxpayer with multiple projects can transfer eligible exploration expenditure between projects (subject to certain requirements). As a result of these features, a project may not give rise to a PRRT liability until several years after production has started, and the incidence of PRRT may depend on market factors including commodity prices and exchange rates. It also means that different taxpayers within a project may be subject to PRRT at different points in time.

To avoid double taxation of projects, other resources taxes from the project (for example State or federal royalties and production excise) are rebateable against a PRRT liability from the same project. PRRT payments are deductible for income tax purposes.

(B) Deductibility of expenditure

Notably, all expenditures outlaid on a project (whether capital expenditure or operating costs) are immediately deductible for PRRT purposes (unlike income tax, where capital expenditures are either not deductible or depreciated over a period of time). Deductible expenditure



In general, the supplier of goods or services is required to remit GST to the ATO equal to 10% of the value of the goods or services supplied

includes expenditure incurred from exploration, development, operating and closing down activities. However, financing costs, some indirect administration costs, income tax and cash bidding payments are not deductible for PRRT.

Excess deductible expenditure is compounded at set rates and carried forward to be offset against future assessable receipts from the project. Undeducted costs are generally compounded at the long-term bond rate (**LTBR**) plus 5-15%. However, excess deductible expenditure is quarantined to each project. As a result of a review of the PRRT by the Federal government in November 2018, the uplift rates for excess deductible expenditure will be lowered from 1 July 2019.

The government also announced it would undertake a review of the gas transfer pricing regulations. Further changes to improve PRRT efficiency and administration were expected to be introduced in 2019.

(iv) Goods and Services Tax

In general, the supplier of goods or services is required to remit GST to the ATO equal to 10% 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 to the ATO for GST by lodging a Business Activity Statement (**BAS**) on a monthly or quarterly basis (depending on the turnover of the business).

The liability for paying the GST is generally imposed on the supplier. So the supplier should take into account the GST in determining its prices, or there should be a GST clause in all contractual arrangements that allows the supplier of a taxable supply to pass on its GST liability to the recipient. Recent changes mean that GST is also payable on the supply of digital products and services and low value goods through electronic distribution platforms.

Some supplies are GST-free and do not give rise to a GST liability to the supplier including, subject to certain conditions, the export of goods or services from Australia and the supply of a business as a 'going concern'. Other supplies may be input taxed (for example 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.

(v) Stamp duty

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

(A) the purchase of business assets (business transfer duty) in WA, Qld and the NT;

(B) in some jurisdictions, the purchase of interests in partnerships and trusts where the partnership or trust holds property located in that jurisdiction; and

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

In addition, an indirect transfer of an interest in land may be subject to landholder duty. In general terms, landholder 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 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.

7.4 Employment Relations and Skilled Labour

(a) Minimum employment entitlements in the petroleum 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 and government employees.

The legislation establishes a number of instruments that determine the terms and conditions of employment for employees, including those engaged in the petroleum industry.

(i) National employment standards

The FW Act contains ten minimum standards of employment known as the National Employment Standards (**NES**) that apply to all employees covered by the FW Act (including executives). These minimum standards relate to 4 weeks' annual leave (5 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.

(ii) Modern awards

The FW Act also provides for instruments known as 'modern awards' to be made and updated by the Fair Work Commission (**FWC**) (Australia's principal industrial tribunal). Modern awards apply on an industry or occupation specific basis and supplement the minimum standards contained in the NES. The key modern awards in the petroleum industry include the *Hydrocarbons Industry (Upstream) Award 2010*, the *Hydrocarbons Field Geologists Award 2010*, the *Maritime Offshore Oil and Gas Award 2010* and the *Oil Refining and Manufacturing Award 2010*.

Modern awards are not intended to cover managers or senior employees, though some modern awards contain classifications that may capture such employees.

(iii) 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 petroleum sector, and provide the flexibility to determine site and/or employer specific terms and conditions of employment. Enterprise agreements typically operate for a period of three to 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.

Under the FW Act collective bargaining regime:

(A) employers may be required to collectively bargain for an enterprise agreement with their employees where the majority of their employees wish to do so;

(B) 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;

(C) employers, trade unions and employee representatives are required to bargain 'in good faith'; and

(D) there are a range of measures that bargaining parties can utilise when bargaining becomes contested or contentious. This includes narrow circumstances in which strikes or other industrial action can lawfully be taken in support of claims made during negotiations (which is known as 'protected industrial action').

There has been a significant amount of industrial action in the petroleum industry, particularly from the Maritime Union of Australia, which controls labour supply to offshore gas vessels and is known for its militancy and ambitious wage demands. This has resulted in caution from major oil and gas operators and producers, as they seek to limit their exposure to industrial action, partly by sharing the risk with contractors.

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 oil and gas 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. In 2015, the Federal government introduced amendments to the FW Act which enable an employer to apply to the Commission for the approval of a greenfields agreement, where no agreement had been reached between the parties. An application can be made where a 'notified negotiation period' of six months has ended.

The FWC may approve an agreement if it is satisfied the agreement provides for pay and conditions consistent with the prevailing pay and conditions within the relevant industry for equivalent work. The provision is not often used, and there have been questions raised about whether the six month 'negotiating period' is too long for a greenfields project (which must be a new project with no employees employed at the time the agreement is made to the FWC for approval of the agreement).

(b) 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.

Some jurisdictions also have industry-specific long service leave laws. While there are no petroleum industry long service leave laws in Australia, employees working on particular aspects of a petroleum project may have the benefit of other industry-specific long service leave laws. For example, employees involved in the construction of petroleum projects in Western Australia may be entitled to long service leave under the *Construction Industry Portable Paid Long Service Leave Act 1985* (WA).

(c) 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.

(d) 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, although there are exceptions.

There are also a range of protections contained in the FW Act prohibiting adversely affecting employees and others (including prospective employees) for reasons including a person's workplace rights, industrial activity and grounds of discrimination. Prohibitions on discrimination in employment also exist in other Federal and State legislation.

(e) **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. The new employer may also be required to recognise the continuous service and leave entitlements the employee accrued while working for the old employer.

(f) **Health and safety**

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

In most States and Territories, the onshore petroleum industry is subject to 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.

Some States and Territories also have health and safety legislation that applies specifically to the petroleum industry, such as the *Petroleum and Gas (Production and Safety Act) 2004* (Qld) and the *Petroleum and Geothermal Energy Resources Act 1967* (WA). This legislation applies to the exclusion of the general health and safety laws in certain circumstances.

The *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) and the *Offshore Petroleum and Greenhouse Gas Storage (Safety) Regulations 2009* (Cth) also place health and safety obligations on participants in the offshore petroleum industry (such as operators of offshore facilities, employees, contractors or other persons at those facilities, and their designers and manufacturers). This legislation also requires the taking of all reasonably practicable steps to ensure that offshore petroleum facilities, and all activities carried out in connection with them, are safe and without risk to the health of any person.

(g) **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.

(h) **Employment of foreign workers**

The ability to deal with capacity constraints and address skill shortages is a key challenge for the Australian petroleum industry and so the regulation of business migration is an important issue.

Australian or overseas businesses can apply to sponsor an overseas skilled worker to fill nominated position 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 Skill Shortage (TSS) Visa (subclass 482 visa)* to skilled workers from outside Australia for this purpose. The subclass 482 visa has three streams; short-term, medium, and labour agreement streams. The latter stream is for employers to source overseas workers in accordance with a labour agreement with the Commonwealth.

A worker in a 'short-term stream' can hold a visa for a period of up to two years if their occupation is on the list of eligible skilled occupations (or up to four years if an International Trade Obligation applies). Relevant to the petroleum industry, this list includes metal fitters and machinists, printing and wood machinists, and some management positions (for example facilities and production manager).

A worker in a 'medium-term stream' can hold a visa for a period of up to four years if the occupation is listed on the Medium and Long-term Strategic Skills List (**MLTSSL**). Relevantly, the MLTSSL includes fitters, certain management positions (for example construction project managers or engineering managers), electricians, petroleum engineers, and gas or petroleum operators.

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.

8 Current Hot Topics

8.1 Domestic Gas Debate

Natural gas is a critical energy resource for Australia and despite rising supply shortages on the east coast and significant price increases, many claim that Australia has enough gas resources to support both domestic and international demand. However, a public debate exists over whether or not State and Federal Governments should impose a domestic gas reservation policy to secure supply of gas to the domestic market.

Peak industry body, the Australian Petroleum Production and Exploration Association (**APPEA**) argues that a gas reservation policy actually impairs local gas supply and affordability rather than improves it.²⁰⁸ APPEA claims that a reservation policy would inevitably deter investment and do nothing to stimulate the exploration and development needed to deliver new infrastructure and gas supplies that would put downward pressure on domestic prices.²⁰⁹

We discuss below the current regulatory position in Australia relating to securing supply of gas for domestic purposes.

A domestic gas reservation policy currently exists in Western Australia (**WA**). The policy, introduced in 2006, requires liquefied natural gas (**LNG**) exporters in the State to reserve the equivalent of 15% of their export volumes for supply to the domestic market in Western

Australia.²¹⁰ The effect of this policy is to increase the amount of domestic gas supplied to the State, which in turn lowers the gas price for consumers.

In Queensland, domestic gas reservation policy exists in a more limited sense. Gas exploration and production titles in Queensland may be granted subject to an 'Australian market supply condition' under State legislation. If subject to one of these conditions, gas produced from a particular area must not be supplied other than to the Australian market.²¹¹

In 2017, the Australian Federal government introduced the Australian Domestic Gas Security Mechanism (**ADGSM**) by way of regulations under the *Customs Act 1901* (Cth).²¹² The stated objective of the ADGSM is to ensure sufficient supply of natural gas to meet the forecast needs of domestic consumers within Australia.²¹³ The Federal Minister is empowered to impose LNG export restrictions in a 'domestic shortfall year'. That is a calendar year where the Minister has reasonable grounds to believe that the export of LNG would contribute to a lack of supply of natural gas for domestic consumers and that there will not be a sufficient supply unless exports are controlled. Guidelines made under the regulations provide that, unless the Minister determines that it is not necessary to consider whether a year is a domestic shortfall year, the Minister commences the process between July and October by issuing a notification of his intention to

consider whether the following calendar year will be a domestic shortfall year, and consulting with a range of stakeholders including the Australian Energy Market Operator (**AEMO**) and the Australian Competition and Consumer Commission (**ACCC**) to seek their views.²¹⁴

The Minister can then if necessary in respect of a year determined to be a domestic shortfall year require producers, whose LNG projects are drawing more gas from the domestic market than they are supplying to it, to limit their exports or otherwise find new gas sources to offset the shortfall with regard to domestic supply. The practical effect of the ADGSM remains to be seen, though its existence demonstrates a step by the Australian government towards ensuring domestic gas supply. However it is the case that to date the Minister has not imposed LNG export restrictions, largely through agreements being reached with LNG producers to make gas available domestically. In 2018 the Federal government decided not to apply export controls to the 2019 year following its consideration under the ADGSM. Also, on 28 September 2018 a new Heads of Agreement was made between the Prime Minister and representatives of APLNG, QCLNG and GLNG under which these east coast LNG exporters made commitments in relation to the domestic supply of gas in the 2019 and 2020 calendar years.²¹⁵

8.2 Hydraulic Fracturing ('fracking')

In Australia, fracking is regulated at the State level, and the policy and legislative positions in relation to fracking vary from State to State.

On 18 December 2018, Resources Ministers agreed to the *Leading Practices Guide for Coal Seam Gas Development in Australia (Guide)*, which provides guidance to regulators and information related to industry practices.²¹⁶ The Guide replaces the *National Harmonised Regulatory Framework for Natural Gas from Coal Seams*.²¹⁷

(a) Queensland

In Queensland, fracking must comply with strict environmental safety measures. The Queensland government requires CSG proponents to report on the location of any fracking, the chemicals used, the toxicity of ingredients and mixtures, and to carry out an environmental risk assessment for every well proposed to be stimulated.²¹⁸ CSG proponents are also required to undertake long-term monitoring of water produced from fracking.²¹⁹

The use of benzene, toluene, ethylbenzene and xylene (**BTEX**) chemicals in fracking by CSG proponents in Queensland is restricted.²²⁰ In practice, these restrictions mean that BTEX chemicals cannot be added to fracking fluids.

(b) New South Wales

In September 2012, the New South Wales government lifted a State-wide ban on the granting of new approvals for fracking in CSG activities. The ban has been replaced with a Code of Practice that establishes a best practice framework covering the fracking process, the use of chemicals in fracking fluid, and the sourcing of water used in fracking.²²² The purpose of the Code of Practice is to ensure that the fracking process is conducted in a safe manner and that communities, the environment and water resources are protected.²²³

Proponents are prohibited from using additives containing BTEX compounds.²²⁴ Additionally, under the Code of Practice, proponents must undertake a risk assessment before each fracture stimulation, and in relation to the potential impacts on public safety, land contamination, air pollution, noise and vibration, loss of well integrity, induced ground movements or seismicity and conflicts with existing land uses.²²⁵

Although New South Wales does permit unconventional gas exploration, in 2014 the government suspended the grant of new coal seam gas exploration licences and introduced exclusion zones (making residential areas and 152 local government areas exclusion zones) for new CSG activities. The New South Wales government also banned CSG activity within a two kilometre buffer of any future residential areas or critical industry clusters.

The suspension of the grant of exploration licences has been lifted, but no new licences have been granted to date and the State government has bought back some exploration licences that it had previously awarded.

(c) Victoria

In 2017, Victoria introduced a permanent ban on exploring for and mining coal seam gas and using hydraulic fracturing.

A moratorium until 30 June 2020 on onshore conventional petroleum exploration and production is also in place.

(d) Western Australia

An independent scientific panel enquiry into hydraulic fracturing in Western Australia delivered its final report on 12 September 2018.²²⁶

During the time the panel was considering the matter and preparing its report, there was a moratorium on hydraulic fracturing in Western Australia. That moratorium has now been lifted, but the Western Australian government will implement a new regulatory regime concerning hydraulic fracturing that will include prohibiting fracking within certain areas and implementing an enforceable code of practice with independent certification, concerning the undertaking of hydraulic fracturing.

In effect, fracking will be permitted on existing on-shore petroleum titles covering approximately 2% of Western Australia (over 5 million hectares), subject to compliance with a yet-to-be implemented regulatory regime.

The Western Australian government has indicated that native title owners and farmers must consent before any fracking-based production can occur on their land.

(e) South Australia

On 1 November 2018, South Australia introduced a 10 year ban on hydraulic fracturing across the Limestone Coast Region of south-east South Australia.²²⁷

Fracking is permitted in most areas of the State, subject to the requisite approvals under the *Petroleum and Geothermal Energy Act 2000* (SA).²²⁸ The Cooper Basin in the north-east of the State has seen fracking for many years.

Before a proponent can undertake fracture stimulation activities in South Australia, it must have an Environmental Impact Report and an approved Statement of Environmental Objectives under sections 97 and 99 of the *Petroleum and Geothermal Energy Act 2000* (SA).²²⁹

The Environmental Impact Report must identify all potential risks and the appropriate risk mitigation and monitoring strategies to be implemented. The Statement of Environmental Objectives must identify objectives to address the risks outlined in the Environmental Impact Report, and the criteria to be used to assess the achievement of the objectives.

(f) Northern Territory

As in the case of Western Australia, the Northern Territory has undertaken an independent scientific review of hydraulic fracturing. While that enquiry/report was being undertaken there was a moratorium on hydraulic fracturing in shale structures in the Northern Territory.²³⁰

The enquiry made 135 recommendations (including stricter regulation) that have all been endorsed by the Northern Territory government and are to be implemented by legislation.²³¹

The Northern Territory government has lifted the moratorium on fracking with respect to 51% of the area of the Territory.

However approvals to undertake hydraulic fracturing will be subject to a detailed application and review process with public comment and public objections being able to be made. A review of a decision to approve hydraulic fracturing will be available through an administrative appeals process.

There will also be a code of practice governing how hydraulic fracturing is to be carried out.

A special scientific and environmental advisory body will be formed to provide advice to the relevant minister on whether an approval should be given (and if so, on what conditions).

(g) Tasmania

There is a moratorium on hydraulic fracturing for the purposes of hydrocarbon resource extraction in Tasmania in place until 2025.²³²

The Tasmanian government will continue to permit unconventional gas exploration. However, there is some uncertainty whether there are economically viable unconventional gas resources in the State, which could only be resolved through further private sector exploration.²³³

8.3 Compensation for Impairment or Extinguishment of Native Title

Steady progress is being made in Australia to finalise applications by native title parties under the *Native Title Act 1993* (Cth) (NTA) to have a court determine whether native title rights and interests subsist over an area of land or water. An application for compensation for impairment or extinguishment of native title rights and interests can only be made by native title parties following (or alongside) such a determination.²³⁴ Given the length of time it has generally taken for a court determination to be made, the issues of how much compensation might be payable and the basis on which it will be calculated have largely been 'on the backburner'. However in March 2019 the High Court of Australia handed down its decision on those issues in what is commonly known as the 'Timber Creek case'.²³⁵

The Timber Creek case is the first High Court decision that has comprehensively dealt with the interpretation of the NTA compensation provisions, and the principles to be applied in determining compensation under those provisions. The High Court held that both economic and non-economic loss must be considered in the assessment of compensation for the impairment or extinguishment of native title rights.

(a) Economic loss

In determining the economic loss component of the compensation, the High Court applied the compulsory acquisition law principle in the well-known case of *Spencer v The Commonwealth*.²³⁶ Under this approach, the freehold value of land is determined by calculating what a willing but not anxious purchaser would have been prepared to pay to a willing but not anxious vendor to secure the extinguishment of the rights and interests in the land in question.

The High Court confirmed that the value calculated by applying this approach equates to the value attributable to exclusive native title rights and interests. It is then necessary to discount that value according to the nature of the native title rights and interests extinguished, including in particular, if they were non-exclusive.

In the Timber Creek case, the native title claim group's native title rights and interests were categorised as usufructuary, ceremonial and non-exclusive. The High Court determined that the percentage reduction in the freehold economic value should be 50% to account for the nature of the claim group's native title rights and interests. The High Court observed that:

- (i) the inalienability of native title rights and interests is irrelevant to an assessment of the freehold value of native title rights and interests; and
- (ii) the economic value of native title rights and interests in developed areas might in many cases prove to be greater than the economic value of comparable native title rights and interests in remote locations.

(b) Non-economic loss

Compensation for non-economic loss reflects what the High Court preferred to call the 'cultural' or 'spiritual' impact of extinguishment (the loss of connection with the land).

In relation to cultural loss, the High Court noted the significant body of evidence heard by the trial judge about the claim group's connection to their land, and the impacts of the loss of that connection. In hearing that evidence, the trial judge was attempting to determine the nature of the essentially spiritual relationship which the claim group had with the country and to translate the spiritual hurt from the effects of the compensable acts into compensation. The High Court acknowledged the trial judge's concession that the process was complex, and to some extent intuitive.

The High Court decided that having regard to that evidence, an award of \$1.3 million for cultural loss was not excessive.

(c) Simple interest – Significant component of award

The interest component period ran from the date the compensable acts occurred (that also being the relevant date of the freehold market valuation). Simple interest was awarded on the economic loss component of the award (\$320,250), in the amount of \$910,100. Clearly, interest is going to be a major component of many awards for compensation under the NTA, given the time elapsing between the dates of the compensable acts and the dates of judgement.

(d) Implications for resource proponents and other stakeholders

There are currently other compensation cases pending and there is no doubt others will follow. It is important to note that although the Timber Creek case establishes some key principles regarding the determination of compensation, this area of law will continue to develop in response to the facts of each case that go before Australian courts. Regardless, the Commonwealth, States and Territories will need to make appropriate provision in their budgets for this area of liability to traditional owners whose native title rights have been impaired or extinguished.

The Timber Creek case did not consider the compensation that may *prima facie* be payable in connection with the grant or renewal of a resource tenement. This issue is not straightforward, given that other acts that impact on native title rights and interest may coexist (for example, where a mining lease is granted over certain types of pastoral leases). Further, State governments have in some cases 'passed through' their liability to pay compensation to resource proponents through legislation,²³⁷ and have the ability to do so through State agreements or conditions of grant of tenements. The issue of whether a resource proponent may be liable to pay compensation will also turn on the terms of any agreements entered into with native title parties. It is therefore important that an assessment of the potential liability of a resource proponent for native title compensation be considered on a case-by-case basis.

8.4 Rocky Hill Decision – Implications for Australian Oil and Gas Sector

In February of 2019, the NSW Land and Environment Court (**Court**) refused development consent for the proposed Rocky Hill open cut coal mine in the decision of *Gloucester Resources Limited v Minister for Planning*²³⁸ (**Rocky Hill**). In dismissing the appeal, brought by the project proponent Gloucester Resources Limited (**GRL**), the Court upheld the decision of the NSW Planning Assessment Commission (now the Independent Planning Commission) to refuse consent to the proposed mine.

In his decision, Preston CJ emphasised that the visual, social and amenity impacts of the proposed mine were unacceptable, and alone provided sufficient grounds for refusing consent. However, his Honour also held that the mine's predicted direct and indirect greenhouse gas (**GHG**) emissions provided a further reason for refusal, having regard to Australia's international commitments as a signatory to the Paris Agreement to keep global warming below 2°C. This is the first time an Australian court has cited the 'carbon budget' and climate change impacts as a reason for refusal of a project.

As GRL has confirmed that it will not be proceeding with any further appeal, the Court's decision and reasoning, including in relation to climate change impacts, will stand unchallenged.

The Court's reasoning in *Rocky Hill* is likely to be influential. However, as *Rocky Hill* was a merit appeal, it will not set a precedent in a strict legal sense for other projects in NSW. Each project will be considered on its own merits. Further, as the case was decided on the basis of NSW planning legislation, the decision will not be strictly applied by other State Courts or Tribunals. In some States, such as Queensland, Western Australia and South Australia, the opportunity for merits review of mining and petroleum development approvals is not available. However, the ability to seek judicial review of decisions remains. It is conceivable that such challenges could be made on the basis of a failure to properly consider climate change impacts, particularly where legislative schemes mandate consideration of the principles of ecologically sustainable development.

In NSW and potentially other jurisdictions, the decision in *Rocky Hill* is likely to have immediate implications for proponents seeking development approval for coal mines and other fossil fuel projects. Proponents should prudently ensure that their environmental assessments comprehensively assess the full range of GHG emissions likely to be generated, in light of the Court's finding that indirect 'scope 3' GHG emissions (being those that would be produced via the transportation and burning of extracted coal) were required to be taken into account in weighing the environmental impacts of the proposal. It should be noted that this finding was based primarily on the requirement under the *NSW State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* to consider 'downstream emissions' and such requirements differ from State to State. In Queensland, for example, there is no express requirement to consider 'indirect' or 'downstream' emissions.²³⁹ Further, the Queensland Land Court has expressly held that such consideration is not required.²⁴⁰

In light of *Rocky Hill*, proponents should also ensure that they address the 'carbon budget' methodology in their environmental assessments, in order to justify the appropriateness of their proposal as compared to alternative fossil fuel developments. Consideration should also be given to the robustness and enforceability of proposals to mitigate or offset climate change impacts, in light of the evidentiary standards required in *Rocky Hill*. In that case, the Court rejected GRL's argument that any climate change impacts of the mine would be offset by other projects, such as carbon sequestration projects, on the basis that there was no specific proposal to offset the mine's impacts by removing GHGs from the atmosphere. Further, the Court rejected GRL's submission that refusal of the mine would lead to equivalent scope 3 emissions of poorer quality being emitted elsewhere in the world, on the basis that there was no certainty on the evidence that 'market substitution' would occur.²⁴¹ The Court also dismissed GRL's argument that the mine should be approved on the basis that coking coal is critical for the production of steel. Preston CJ considered that this argument was overstated and not demonstrated on the evidence, as the demand for coking coal from steel production in Australia could be met by existing and approved mines.

With the addition of *Rocky Hill* to the growing breadth of international jurisprudence linking fossil fuel developments with climate change, proponents of fossil fuel developments would be well advised to take serious account of the decision, and to put climate change at the forefront of decision-making in both a project approvals and corporate governance context.

9 Due Diligence on Australian Oil and Gas Projects

Due diligence is an important part of any M&A transaction in the petroleum sector in Australia. Foreign buyers who have purchased interests in projects in other parts of the world will find that due diligence in the Australian context is very similar to due diligence on petroleum transactions elsewhere in the world.

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

- technical matters (such as resource quality and quantity, geological and geotechnical conditions and infrastructure);
- 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.

9.1 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. Nonetheless, the conduct of legal due diligence is a very important part of an M&A transaction, because legal due diligence will often uncover issues that:

- 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 upfront. Where the seller has

prepared a data room containing information about the relevant petroleum project, the foreign buyer should agree with its 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 petroleum 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);
- farm-in / farm-out, joint venture or shareholder arrangements (where the petroleum project is owned by multiple parties);
- off-take and marketing / sales agency arrangements;
- infrastructure and services;
- private royalty (or commission) agreements;
- the supply of equipment, spares and consumables;
- the construction, operation and maintenance of the project (including arrangements for well drilling services, waste removal, extracting, processing, transporting, storing and loading);
- environmental issues;
- other Governmental licences, permits and approvals;
- land tenure and landowner consents and compensation;

- native title;
- cultural heritage;
- employee, safety and superannuation (that is pension) matters;
- existing or threatened legal claims; and
- intellectual property and information technology.

In addition to reviewing materials provided by the seller that 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);
- petroleum tenure searches (for each relevant exploration licence and petroleum lease, and for overlapping mining, 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 petroleum 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. As previously noted, 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 oil and gas 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 which presents a risk to the buyer.

10 Investment Structures and Financing



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

10.1 Companies

In Australia, a company is a separate legal entity that is established under Australia's 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 petroleum sector. They are listed public companies, unlisted public companies and private companies.

(a) 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.

An example where a foreign investor has acquired an Australian listed public company in the petroleum industry is Chinese Landbridge Group's takeover of WestSide Corporation in 2014. WestSide Corporation was subsequently removed from the ASX official list in September of that year.

(b) 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, with private companies having to comply with fewer prescriptive regulations (for example financial reporting requirements).

An example where a foreign investor recently tried to purchase an interest in a private Australian company was the A\$13 billion bid by Hong Kong's CK Group for Australia's largest gas pipeline operator APA Group in 2018. However, this acquisition was rejected on the basis that it would be contrary to national interest.

(c) Incorporated joint ventures

Where two or more parties are shareholders in an unlisted public company or private company which owns a petroleum 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 petroleum industry, and a foreign investor who wishes to acquire an interest in a petroleum project that is owned by one of these companies may be able to do so by buying an interest in the company.

10.2 Assets

The other way for an investor to acquire an interest in a petroleum project in Australia is to acquire a direct interest in the assets and business of the petroleum project. This is quite common in the Australian petroleum industry, particularly where the project has more than one owner.

(a) Unincorporated joint ventures

Unincorporated joint ventures are very common in the Australian petroleum industry. An unincorporated joint venture is where two or more parties own interests in the assets of a petroleum 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 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 petroleum projects where there are multiple owners, due to various tax and other benefits.

One tax benefit of an unincorporated joint venture is that, if 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 creates flexibility for each party 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 that 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 an 'operator'. This will typically be the party with the largest interest in the joint venture, a wholly owned subsidiary of that party, or a company that is jointly owned by all of the parties who have an interest in the joint venture.

Joint operating agreements will often contain restrictions on a party that wishes to sell all or part of its 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.

Joint venture partners usually enter into deeds of cross charge under which each joint venture partner grants a charge over its interest in the joint venture in favour of each other partner, as security for the performance of its obligations under the joint venture agreement. In these cases, third party financiers are required to recognise the deed of cross charge and security granted to each joint venture partner as ranking in priority to any security granted to the third party financier.

(b) Farm-in agreements

Farm-in agreements (also known as farm-out agreements) are another common form of project participation in the Australian petroleum industry. Farm-in agreements are typically used in the exploration stage of petroleum projects. Whereby 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 petroleum tenement which is owned by the Farmor. The interest received by the Farmee is a 'farm-in interest'.

Often, a farm-in 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 farm-in 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 farm-in 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 petroleum tenement. Once the Farmor has transferred an interest in the petroleum tenement to the Farmee or earned an interest in the petroleum tenement, the Farmee and Farmor will generally form a joint venture (governed by a joint operating agreement) for the continued exploration, and subsequent development, of the petroleum tenement.

10.3 Company or Assets

When deciding whether to acquire an interest in the company that owns a petroleum project, or a direct interest in the assets of the project itself, it should be noted that neither method is inherently better than the other. Sometimes only one method will be available in the circumstances of the particular petroleum project and the party who is wishing to sell.

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.

10.4 Investment vehicle

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

The choice of investment vehicle for a foreign investor into the Australian petroleum 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.

(a) Australian 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 holding companies incorporated in other jurisdictions that exist between the Australian company and the foreign investor in the corporate structure. The best investment structure will depend upon the circumstances, 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. This is particularly evident in relation to regulations and restrictions around 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, which all take a more relaxed regulatory approach.

10.5 Financing

Financing of petroleum projects can be undertaken through a range of methods, although the method and availability of finance is dependent on what stage the project is at and the appetite of financiers to fund the commodity in question.

Financing of petroleum projects is different to financing of other natural resource projects, in that the capital intensive nature of the project often means that the project is not held through a special purpose vehicle, but rather held through an unincorporated joint venture, in which multiple participants hold undivided shares of the assets of the project.

In addition, due to the multiple interconnected units, interface risks, licencing requirements, technology, product markets and sales, more due diligence is required for a petroleum project.

In respect of upstream projects, the primary components of the project consist of exploration of reserves, drilling, establishing the viability of wells, recovery and production. Significant additional risk is experienced in upstream projects, due to the fact that

the resource is usually located deep under the surface (whether onshore or offshore).

Following the extraction and production of the resource, typically midstream projects are primarily concerned with the transportation and storage of the product for onward passage to the relevant downstream market (whether domestic or international), while upon receipt of product, the downstream projects are primarily concerned with the processes to turn the product into a usable end product.

Each of upstream, midstream and downstream projects have their own challenges and as such attract slightly different financing solutions.

(a) **Bankability**

For any financier contemplating financing a petroleum project, the bankability of the project will be a key concern. In this regard consideration must be given to whether the project is an upstream, midstream or downstream project, as well as the nature of the resource. In determining whether the project is bankable, the financier will consider, amongst other matters:

- the location of the project, and consequential environmental, political, social and regulatory requirements;
- the creditworthiness of the various sponsors to the project, particularly where an unincorporated joint venture is the project vehicle;
- adequacy of security of tenure to the resource rights;
- adequacy of contractual undertakings to ensure that the project is developed and operates effectively;
- whether there is sufficient infrastructure to enable the product to meet its market;
- reliability of cash flow through appropriate sale arrangements;
- whether there is a social licence to operate;
- the rights of the indigenous people to the land; and
- whether appropriate and ongoing authorisations are in place.

While the types of funding contemplated in this publication are not specific to petroleum projects, they do have to accommodate the specific nature of the asset as well as the bankability of the project, and have to take into account a number of factors, including whether:

- the government issuing the licence has a right to acquire an interest in the project (more usual outside of Australia);
- negotiation will be required with multiple stakeholders (particularly if the project is being undertaken by an unincorporated joint venture);

- the project is highly speculative; and
- royalties are to be paid to a third party (outside of any royalty payable to the State).

Where the project sponsors collaborate through an unincorporated joint operating agreement, financiers will take a special interest in the participants in the joint operating agreement. In particular, the financiers will want to consider:

- the creditworthiness, identity, scope of role, liabilities of and ability to remove and replace the operator;
- the decision making process in development and expenditure in respect of the project;
- how equity funding is to be contributed, including how cash calls may be made and the impact of a failure to make a cash call;
- the lifting rights of the participants, and the consequences of a failure to lift; and
- the assignment rights (if any) of the participants.

As is the case with all natural resource projects, the financiers will be concerned as to the cash flowing into the project vehicle, and will consider any sales contract and each participant's interest in the sales.

In an upstream project or integrated project, consideration will also be given to reservoir risk (that is, the nature of the recoverable hydrocarbon and existence of proven, probable reserves in which the production profile is verified) as well as the reasonableness of the proposed production costs. The reserve report will also establish the reserve tail (that is when an anticipated 25% to 30% of the proven reserves remain) and at which point financiers will either want additional reserves committed to the project, or to be repaid.

(b) **Funding options**

(i) **Equity funding**

The exploration stage of any resource project is high risk for financiers, as the project will have limited or no cash flow to service debt unless the project is being undertaken by an entity with other sources of income. As a result a number of project sponsors have to resort to structures, including multiple sponsors who can share the equity costs of the project.

However, if the project sponsor has other operating assets, it may be able to secure funding that would otherwise only be available during the development phase of the project.

Accordingly, availability of bank debt tends to be limited, and project vehicles frequently turn to non-traditional financiers willing to accept a greater level of risk in return for the opportunity of higher returns or a stake in the project.

(ii) Reserve Base Lending

Reserve Base Lending is provided based on the net asset value of the reserves of the assets under development that will be secured in favour of the financiers.

In calculating the appropriate level of finance, financiers generally only permit the financing to equal the lesser of a discount value of the reserve base lending assets or expected cash flows.

This method of financing is commonly used as it provides financiers with a degree of security in the intermediary period between exploration and production where no cash flow is generated. Accordingly the quality of the reserve base and potential field life is critical.

Where a reserve base lending facility is provided over producing assets, lenders will require regular reporting from an independent party to confirm current reserves from time to time. If the reserves were to breach specified levels, this would then trigger specified repayment obligations.

(iii) Forward purchase agreements

Forward purchase agreement financing is a commodity loan variant under which financiers purchase the commodity to be extracted and make payment in advance. No borrowing fee is charged because the contract operates as a prepaid commodity purchase agreement rather than a loan arrangement.

While there may be some advantage in having the commodity loan unhedged, to benefit from upswings in the commodity price, most financiers require the borrower to hedge the commodity price or immediately onward sell the commodity provided the market is liquid.

The primary risk to financiers is the inability to onward sell in the market. Requiring the borrower to repurchase after delivery can mitigate this, provided the borrower is an adequate credit risk.

(iv) Volumetric Production Payments and Stream Financing

This method of financing is typically provided by specialist financiers who have industry or commodity specific expertise but do not wish to take an equity stake in the project. Traditional financiers do not generally provide this form of financing as there is a higher risk of non-repayment. There are a number of key features that are unique to this financing. These include:

(A) there is usually no obligation to repay the capital;

(B) rather than earning interest, the investor earns a right to a portion of the production; and

(C) covenants and events of default are limited.

The two most common forms of this financing are:

(A) Production payment financing:

In production payment financing the financier advances cash in return for a percentage of the future project cash flow.

(B) Stream financing:

This is similar to a commodity loan whereby the finance is provided in return for a right of ownership over a portion of the extracted commodity, not the underlying licence. The difference is that the level of finance is not directly determined by the commodity value, although it remains a factor to be taken into account.

It should be noted that this form of financing is not always characterised as a debt arrangement; however, this will depend on the terms of the financing.

(v) Offtake financing

Offtake financing came to prominence as a result of the global financial crisis reducing risk appetite in capital markets.

Offtake financing involves the off-taker, rather than commercial banks or private equity funds providing the finance. Typically the finance will be a standard debt arrangement, albeit with below market interest rates. It is also increasingly common for a direct equity stake to be taken in the project alongside standard security arrangements.

The benefit to offtakers of providing finance at the exploration or development stage is that once an asset is producing they will be entitled to purchase the extracted commodity at a discounted price, thereby providing them with a price advantage over competitors.

(vi) Subordinated or mezzanine debt

Mezzanine debt is generally provided on substantially the same terms as bank debt, but is subject to higher margins to compensate for the deep subordination of the debt (in that it is generally unable to enforce its interests until any senior debt has been repaid). Mezzanine debt may be secured (on a second ranking basis) or unsecured.

(vii) Project finance

Sponsors lacking the equity and capacity to develop the project themselves may be able to access project finance to finance the development and construction of a project by leveraging the strength of the project.

Project finance is generally provided on a no recourse or limited recourse basis. Prior to committing funding, the financier will require an independent feasibility study to be conducted that identifies all project risks, as the project financier attempts to ensure that all risks are addressed in order to minimise the risk of the debt not being repaid.

Sponsor support (through corporate guarantees) may be required where project debt levels are greater than 60%, sponsors lack commercial history and expertise, or the value of the underlying project reserves are weak or untested.

The existence of a committed sales contract at a pre-agreed price can be vital, but creates tension between the financiers' need for cash flow certainty, and the mine developer's ability to capitalise on commodity price increases.

A number of countries and financial institutions have adopted the 'Equator Principles',²⁴² a framework to safeguard environmental and social responsibility risk. Financiers generally require strict adherence to environmental and social laws and may impose ongoing disclosure requirements.

The project vehicle for a project finance can either take the form of a special purpose company or an unincorporated joint venture.

(viii) Export Credit Agencies

Export credit agencies (**ECAs**) are usually government-backed agencies that provide credit insurance (including political risk insurance) and guarantees for the obligations of project proponents that have a link to the home jurisdiction of the ECA.²⁴³ As government or quasi-government organisations, the support an ECA can provide is often limited by their government's regulatory framework and rules (for example there is frequently a minimum local content requirement).

However, ECAs can also provide additional debt funding to a project, and this is usually relevant to projects with significant capital requirements. As ECAs have lower capital charges than traditional lenders, this can be an attractive source of funds for both project developers and the mandated lead arrangers of traditional debt funding.

Significantly, they will often step in where:

(A) a bank has considered a project unviable because the debt to equity ratio exceeds 60%, or the time frame for positive cash flow exceeds five years; and

(B) equity investments are unavailable because the returns are too low for the risk involved, or existing stakeholder equity will be diluted too much.

ECA involvement can also create a 'halo-effect' when the ECA provides a guarantee over the project. In Australia, an ECA guarantee replaces a project's credit rating with that of the Australian government. The improved credit rating may encourage funding from commercial banks.

While historically ECAs have not negotiated the terms of the financing directly, but have rather required senior lenders and the mine developer to develop terms that will be acceptable to the ECA, ECAs have recently played a more significant role in the development of financing documents.

(c) Production and Expansion Stages

Once a project achieves production, project finance and other bespoke financing arrangements can fall away and be replaced by traditional corporate finance or pure reserve based lending, depending on the type of project.

Where finance is dependent on field life, any refinancing or the provision of new finance will depend on the extent to which the field life exceeds the financing term.

At a bare minimum field life should exceed the loan term by 5 years. This will ensure the project can service its debt in the event that a loan facility needs to be refinanced or extended.

Where finance is required for an expansion of a single producing asset this is typically provided based on the reserve life and value as discussed. However, if the project sponsor is considered an investment grade company it may be extended finance on a corporate finance basis or have access to debt capital markets.

Investment grade sponsors are typically companies with:

- (i) a large portfolio of producing assets;
- (ii) assets in development and exploration; and
- (iii) exploration licences and tenements.

Given the range of assets required there are very few investment grade resource companies in the world.

Resource companies with access to corporate finance can source finance from the debt capital markets like any other investment grade company outside the

resource sector would. Debt capital markets became a popular form of financing during the mining boom, due to the longer tenor, reduced covenants, flexibility for issuance and reduced costs, and have been frequently used by resource companies with operating assets. However, the end of the mining boom has made investors more cautious about investing in bonds from resource companies unless the company has significant producing assets.

(d) Protecting a Financier's Interest

Financiers will generally require clear security over the project assets.

In Australia, interests are easily enforceable; however, the process changes depending on the type of security interest. Specifically, the States and Territories have jurisdiction over land and all petroleum interests, leases, tenements. The Commonwealth's *Personal Properties Securities Act 2009* (Cth) (**PPSA**) has jurisdiction over all other personal property.

Registration is the usual method of perfection. A registered security interest will have priority over an unregistered security interest or a security interest registered later in time.²⁴⁴

The Commonwealth and each State and Territory have different rules around registration of security.

The key areas of difference are:

(i) Ministerial consent

Ministerial consent is generally required for taking security over petroleum tenements and leases, but is not required for registration of securities under the PPSA.

(ii) Indefeasible title

The registration of an interest in a petroleum tenement does not gain the benefit of indefeasibility. The result is financiers must enquire into the validity of the proposed security interest and whether it is encumbered by any defects in title.

(iii) Sub-classes of petroleum licences

The registration of a financier's interest over a petroleum licence will differ depending on the jurisdiction, as each Australian State and Territory has different licence sub-classes. However there are similarities between jurisdictions, and generally they will be dealing with exploration, production, pipeline or retention licences. Fortunately, all of the States and Territories allow for both the transfer of licences between parties and the registration of interests under these licence sub-classes. Yet undertaking these processes can be complicated given the difference in rules and processes across the States and Territories.

(iv) Personal property

For perfection of security over personal property, the security interest must either be registered or be perfected by control. Registration is the preferred method of perfection, although in certain instances financiers will also require a security to be perfected through control (for example, by taking title certificates for marketable securities).

The PPSA allows for the registration of a general security that attaches to all present and future assets of the project vehicle that are not expressly excluded from the operation of the PPSA. Significantly, this will include the project's production as soon as it is extracted.

In addition to a general security interest, financiers will also require specific security by way of a purchase money security interest (**PMSI**) over machinery, equipment or vehicles in which the financier has a retention of title interest (due to the equipment being funded via a hire purchase arrangement or finance lease).

A PMSI once registered gains a super priority that will trump most other registered interests, including a financier's general security interest registered earlier in time.

11 Glossary

ACCC	Australian Competition and Consumer Commission
ADGSM	Australian Domestic Gas Security Mechanism
ADIs	Authorised Deposit-taking Institutions
APLNG	Australian Pacific LNG
APPEA	Australian Petroleum Production & Exploration Association
ASX	Australian Securities Exchange
ATO	Australian Taxation Office
BAS	Business Activity Statement
Bbl	Barrels
bopd	Barrels of oil per day
BREE	Bureau of Resources and Energy Economics
BSAL	Biophysical strategic agricultural land
BTEX	Benzene, toluene, ethylbenzene and xylene
CbCR	Country by Country Reporting
CGT	Capital Gains Tax
CHMP	Cultural heritage management plan
Corporations Act	<i>Corporations Act 2001</i> (Cth)
CSG	Coal seam gas
DTA	Double Taxation Agreement
EA	Environmental approval or authority
ECAs	Export credit agencies
EIS	Environmental Impact Statement
EPBC Act	<i>Environment Protection and Biodiversity Conservation Act 1999</i> (Cth)
FATA	Foreign Acquisitions and Takeovers Act 1975 (Cth)
FBT	Fringe Benefits Tax
FEED	Front End Engineering Design
Fees Imposition Act	<i>Foreign Acquisition and Takeovers Fee Imposition Act 2015</i> (Cth)
FID	Final Investment Decision
FIRB	Foreign Investment Review Board
FLNG	Floating liquefied natural gas
FRCGW	Foreign resident capital gains withholding
FW Act	<i>Fair Work Act 2009</i> (Cth)
FWC	Fair Work Commission

GDP	Gross Domestic Product
GHG	Greenhouse Gas
GLNG	Gladstone LNG
GST	Goods and Services Tax
IJV	Incorporated Joint Venture
ILUA	Indigenous Land Use Agreement
kBOE	Kilo barrel of oil equivalent
LNG	Liquefied natural gas
LPG	Liquefied petroleum gas
LTBR	Long-term bond rate
M&A	Mergers and acquisitions
MAAL	Multinational anti-avoidance law
Mining SEPP	<i>State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007</i>
MLTSSL	Medium and Long-term Strategic Skills List
MMbbl	Million barrels
MNES	Matters of National Environmental Significance
Mtpa	Million tonnes per annum
NES	National Employment Standards
NNTT	National Native Title Tribunal
NTA	<i>Native Title Act 1993</i> (Cth)
OPGGGS Act	<i>Offshore Petroleum and Greenhouse Gas Storage Act 2006</i> (Cth)
PCBUs	Persons conducting a business or undertaking
PJ	Petajoule
PRRT	Petroleum Resources Rent Tax
QCLNG	Queensland Curtis LNG
RFSU	Ready for Start-up
RPI Act	<i>Regional Planning Interests Act 2014</i> (Qld)
SGEs	Significant global entities
SOEs	State-owned enterprises
SPP	State Planning Policy
Subclass 482 visa	Temporary Skill Shortage (TSS) Visa
SWFs	Sovereign wealth funds
Tcf	Trillion cubic feet
WHS Laws	National harmonised work health and safety legislation

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