MINING SECTOR **UPDATE**

DECEMBER 2019

INTRODUCTION

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

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IN THIS EDITION

This month we look at:

- Review into the NSW Independent Planning Commission and proposed amendments to NSW planning laws
- Administrative reforms for Queensland's mineral and petroleum royalty regimes
- How the mining sector can avoid the pitfalls of annualised salaries
- The rise of electric vehicles – how will this impact on the mining and oil & gas sectors?
- Australia's AI roadmap for the mining sector

RECENT ANNOUNCEMENTS

Panoramic continue to recommend against off-market takeover offer

On 25 November 2019, ASX-listed **Panoramic Resources Limited**, a metals, mining and exploration company, recommended to its shareholders to avoid taking any action in relation to an off-market takeover offer announced by **Independence Group NL** on 4 November 2019 (**Offer Date**).

Panoramic Resources operates the **Savannah Nickel Project** in the East Kimberley, which produces nickel, copper and cobalt. The company also has interests in the Panton Project 60km south of the Savannah Project, which provides the company with platinum group metals.

You can read more about this no-action recommendation here.

Independence Group is offering one share for 13 Panoramic Resources shares, which as of the Offer Date amounted to an implied offer of A$0.476 per share. Independence Group intends to acquire all ordinary shares in Panoramic Resources that it does not already own. As of 4 November 2019, it held 24,920,325 shares (or 3.8%) of the total issued capital of Panoramic Resources.

Independence Group cited unsuccessful attempts with engaging Panoramic Resources' board on a change of control transaction as a reason for making the offer to shareholders directly. It also characterised its offer as consistent with its strategic focus on metals critical to clean energy, including nickel and copper.

The original takeover announcement can be read here.

Horizon Minerals submits revised proposal to Focus Minerals

Horizon Minerals has offered a total cash consideration of A$52 million, payable over a 12-month period

On 21 October 2019, ASX-listed **Focus Minerals Limited**, a gold exploration company, published an update on the potential sale of the **Coolgardie Gold Project** (**Project**).

In our October edition of the Mining Sector Update, it was reported that the non-binding indicative cash offer made by **China Hanking Holdings Limited** to acquire the Project had been rejected in favour of **Horizon Minerals Limited**.

Focus Minerals has subsequently considered competing offers put forth by third parties. In response to this, Horizon Minerals has submitted a revised non-binding indicative proposal to Focus Minerals (**Horizon Counter Proposal**).

Under the terms of the Horizon Counter Proposal, Horizon Minerals has offered a total cash consideration of A$52 million, payable over a 12-month period. Additionally, the Horizon Counter Proposal provides for an extension of the exclusivity period, break fees payable in various events and the removal of fiduciary carve outs that originally gave Horizon Minerals full exclusivity during the extended exclusivity period.

The potential transaction remains subject to the entry into binding written documentation, and receipt of approvals.

You can read the full ASX announcement here.

RECENTLY COMPLETED DEALS

Chinese lithium producer backing Australian miner's lithium play in Africa

On 11 November 2019, ASX-listed **AVZ Minerals Limited**, an Australian-headquartered mineral exploration company, announced that it has received a strategic investment from **Yibin Tianyi Lithium Industry Co., Ltd** in the form of a share placement. AVZ Minerals holds a majority interest in the **Manono Lithium and Tin Project** located in the Democratic Republic of Congo.

Yibin Tianyi is an emerging Chinese lithium chemical producer that is backed by entities including the largest EV battery manufacturer in China, **Contemporary Amperex Technology Co., Limited**, and Shenzen-listed company, **Suzhou TA&A Ultra Clean Technology Co., Ltd**. It is currently constructing the first phase of a lithium chemical plant in Yibin, China.

The share placement is taking effect under the terms of a conditional subscription agreement (**Subscription Agreement**). Under the terms of the Subscription Agreement, AVZ Minerals will issue 314,300,000 shares to Yibin Tianyi at A$0.045 per share, subject to shareholder, regulatory and other approvals.

After the placement, Yibin Tianyi will own 12% of AVZ Minerals.

Following completion of the A$14.1 million placement, the Subscription Agreement also requires AVZ Minerals and Yibin Tianyi to negotiate in good faith a binding offtake agreement for the products from the Manono Lithium and Tin Project.

You can read the full ASX announcement here.

Saracen acquisition of the Kalgoorlie Super Pit

On 18 November 2019, ASX-listed **Saracen Mineral Holdings Limited**, an Australian gold mining and mineral development and exploration company, announced that it has entered into a binding agreement to acquire 100% of the shares in **Barrick (Australia Pacific) Pty Limited** for US$750 million cash. This acquisition gives Saracen Minerals a 50% interest in the Kalgoorlie Consolidated Gold Mines Joint Venture (**KCGM JV**), which owns and operates the **Super Pit gold mine** in Western Australia.

The Super Pit is a Tier 1 gold mine with 490koz of gold produced in the 12 months to 30 June 2019. Acquisition funding (the cash consideration and associated transaction costs) will be sourced through a combination of an institutional placement, an entitlement offer and a secured term loan.

This acquisition is said to align with Saracen Minerals' strategic objectives. On completion, **Newmont Goldcorp Corporation** will be Saracen Minerals' joint venture partner, retaining its ownership interest and operatorship of the Super Pit.

You can read the full ASX announcement here.

This acquisition gives Saracen Minerals a 50% interest in the Kalgoorlie Consolidated Gold Mines Joint Venture

MARKET RUMOURS AND OPPORTUNITIES

Barrick Gold is reported as being eager to eclipse its goal of divesting

Barrick Gold looking to go beyond its US$1.5bn asset sale target

On 18 November 2019, *The Globe and Mail* reported that New York Stock Exchange and Toronto Stock Exchange-listed **Barrick Gold Corporation** is eager to eclipse its goal of divesting US$1.5 billion in holdings by the end of 2020.

This report follows Barrick Gold's recent divestment of its 50% interest in the Super Pit gold mine in Western Australia that has been acquired by **Saracen Mineral Holdings Limited**, as discussed above.

This was reportedly Barrick Gold's first step in their plan, following the acquisition of Rangold Resources last year.

Barrick Gold's CEO Mark Bristow declined to comment on the specific assets that fall within its divestment goal.

Analysts have speculated that Barrick Gold's Lumwana copper mine in Zambia, and the Massawa gold mine in Senegal are next, with neither being among the Tier 1 mines Barrick Gold has said it will focus on.

Barrick Gold were reported to be considering whether to extend its copper business (and by how much) in order to capitalise on growing demand.

Alkane planning to raise investment of A$55 million

On 26 November 2019, the *Australian Financial Review* reported that ASX-listed gold miner **Alkane Resources Limited** is planning to raise up to $A55 million to fund drilling and underground operations at the Tomingley gold operation.

First Quantum Minerals seeking strategic partners for new copper projects

On 27 November 2019, *The Globe and Mail* reported that TSX-listed Canadian miner **First Quantum Minerals** is searching for strategic partners to join in the development of new copper projects. First Quantum's CEO, Philip Pascall, is reported to have said there are a number of potential partners, and not necessarily limited to just mining companies.

The CEO was also reported to be expressing the view that new copper mines will generally require between US$3 billion and US$4 billion to develop - attributed to declining grades over the past few years, requiring higher mining volumes.

REGULATORY UPDATES

NSW GOVERNMENT ANNOUNCES REVIEW INTO THE INDEPENDENT PLANNING COMMISSION AND PROPOSED AMENDMENTS TO PLANNING LAWS FOR THE ASSESSMENT OF SCOPE 3 GREENHOUSE GAS EMISSIONS

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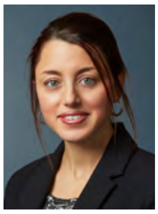

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Introduction

Following a string of recent decisions by the Independent Planning Commission (**IPC**) in relation to proposed coal mining developments, the NSW Government announced a package of measures to redress concerns in the mining sector resulting from determinations made on climate change grounds.

The measures are focused on regulating consent authorities' consideration of Scope 3 or 'downstream' greenhouse gas (**GHG**) emissions for mining projects, and include:

1. amending the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) to prohibit approval conditions relating to downstream emissions;
2. removing the requirement for consent authorities to specifically consider downstream emissions under *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* (**Mining SEPP**);
3. developing a NSW Government policy and guidelines on GHG emissions; and
4. a review of the IPC and its functions, to be undertaken by the Productivity Commission.

On 24 October 2019, the Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019 (**Bill**) was introduced into Parliament by NSW Minister for Planning and Public Spaces, Rob Stokes (**Minister**), to give effect to items 1 and 2 above. As at the time of writing, the Bill is in the NSW Legislative Assembly awaiting the second reading debate.

Background to the IPC's recent coal mining decisions

As reported in previous Mining Sector Updates, in February 2019, the NSW Land and Environment Court (**LEC**) refused development consent for the Rocky Hill Coal Project in the NSW Gloucester Valley, citing the mine's likely contribution to global climate change as one of several reasons for refusal.

Despite the decision in *Gloucester Resources Ltd v Minister for Planning* [2019] NSWLEC 7 (**Rocky Hill**) being a merits review decision in Class 1 of the LEC, and arguably therefore having limited precedent-setting value,[1] it appears to have influenced the IPC's approach to the assessment of GHG emissions from proposed mining projects, particularly Scope 3 emissions.[2]

1 On 22 March 2019, the LEC handed down a decision in Australian Coal Alliance Inc v Wyong Coal Pty Ltd [2019] NSWLEC 31. In those Class 4 judicial review proceedings, the LEC considered whether the Planning Assessment Commission (the IPC's predecessor) had adequately addressed GHG emissions in its assessment and determination of the Wallarah 2 Coal Project. The LEC did not consider itself bound by Rocky Hill, on the basis that the Rocky Hill decision was concerned with the merits of the Rocky Hill Coal Mine and did not set any precedent for future development assessment and decision-making processes.

2 Scope 3 emissions are those generated from sources not owned or controlled by the proponent, such as the emissions generated from export coal.

REGULATORY UPDATES

Rocky Hill appears to have influenced the IPC's approach to the assessment of GHG emissions

Following the Rocky Hill decision:

1 On 9 August 2019, the IPC determined to approve, in part, a development application for recommencement of mining operations at the Dartbrook Coal Mine in the NSW Hunter Valley. The IPC did not approve that part of the application which sought to extend mining operations by 5 years, on the basis that the IPC was not satisfied with the level of information provided regarding GHG emission-related impacts and the appropriateness of the methodology for estimating the social and economic costs of projected emissions. The IPC also considered that there had not been any proposal to minimise, mitigate or offset those impacts, and therefore imposed a condition of consent requiring the proponent to implement all reasonable and feasible measures to minimise the release of GHG emissions from the project site. The Rocky Hill judgment was cited in several paragraphs of the IPC's determination report.

2 On 28 August 2019, the IPC determined to approve the United Wambo Open Cut Coal Mine Project, subject to conditions requiring the applicant to prepare an Export Management Plan. The Export Management Plan is to outline protocols for the applicant to use best endeavours to ensure that coal is only exported to countries that are parties to the Paris Agreement or have equivalent GHG emissions reductions policies. These conditions were imposed notwithstanding a submission made by the Planning Secretary Jim Betts in response to the draft conditions, which clarified the NSW Government's stance on the approach to the assessment of Scope 3 GHG emissions. In that letter, the Planning Secretary indicated that:

   (a) while consent authorities have a broad discretion to weigh up the merits of development applications under the EPA Act, and may refuse a development application if the proposal is considered to have unacceptable downstream impacts, this discretion is to be exercised carefully within the broader policy framework. Departures from this framework should occur in exceptional circumstances;

   (b) there is no policy at either the State or Commonwealth level that would support the imposition of conditions to minimise Scope 3 emissions;

   (c) even if such policy were made, it would be more efficient and equitable to apply it across the board through legislation, rather than in respect of individual project approvals; and

   (d) while consent authorities are obliged to consider whether or not development consent should be issued subject to conditions to ensure that GHG emissions are minimised to the greatest extent practicable, the policy intent of this obligation has always been to focus on the direct impacts of the development (being Scope 1 and Scope 2 emissions), and not Scope 3 emissions. This is because Scope 3 emissions that flow from a project cannot be reasonably controlled by the applicant, and in any event constitute the Scope 1 or Scope 2 emissions of other separate projects. Further, this is consistent with the approach taken in all national and international agreements and the associated arrangements for accounting and reporting on these emissions.

3 On 18 September 2019, the IPC determined to refuse development consent for the Bylong Coal Project, despite the NSW Department of Planning, Industry and Environment (**Department**) recommending approval. Long-lasting environmental, agricultural and heritage impacts were cited as the main reasons for refusal. However, the IPC also

referred to the Rocky Hill decision in finding that the proponent had not done enough to minimise GHG emissions associated with the project. Mitigation measures were proposed to reduce Scope 1 and 2 emissions, but not Scope 3 emissions. Applying the reasoning of the LEC in Rocky Hill, the IPC considered that the cumulative environmental impacts of the proposal were relevant to weighting the acceptability of GHG emissions associated with the mine, and that preference should be given to projects with lower social, environmental and economic impacts. Despite the IPC acknowledging that the Project's contribution to global greenhouse gas emissions would be small, it considered the omission of mitigation measures a failure to minimise GHG emissions to the 'greatest extent possible', as required under clause 14(1)(c) of the Mining SEPP.

4 On 4 October 2019, the IPC announced its decision to approve a proposed 21-year extension of the Rix Creek Coal Mine near Singleton. A few hours later, the IPC announced a reversal of its decision, on the basis that it was invalid as the public submissions period had not yet closed. The Minister responded to this administrative error by requesting an immediate review into the IPC's procedures.

It is the culmination of these decisions that has led the NSW Government to announce a package of measures designed to redress the resulting concerns of mining industry proponents.

The Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019

The primary object of the Bill is to amend the EPA Act to prevent development consent conditions from being imposed in relation to the impacts of GHG emissions occurring outside Australia.

This means that consent authorities will be prohibited from imposing conditions to control Scope 3 GHG emissions or other climate-related impacts occurring outside Australia as a result of the development, such as those imposed in relation to the United Wambo Open Cut Coal Mine Project

The NSW Government has announced measures to redress the concerns of mining industry proponents

(although the Bill is not intended to have retrospective effect).

In this regard, the Bill appears to adopt an approach that is consistent with the Planning Secretary's submission to the IPC in relation to the United Wambo Open Cut Coal Mine Project, referred to above.

The Bill will also amend the Mining SEPP to remove the specific requirement for consent authorities to consider 'downstream greenhouse gas emissions' in determining development applications for the purposes of mining, petroleum production or extractive industry developments.

However, the Bill will not alter the requirement for consent authorities to consider 'the likely impacts of the development, including both direct and indirect environmental impacts' and 'the public interest' under section 4.15 of the EPA Act. In Rocky Hill, Preston CJ considered that the LEC was required to consider Scope 3 emissions for several reasons:

1 first, because the Mining SEPP expressly requires consideration of 'downstream emissions';

2 secondly, due to the requirements of section 4.15 of the EPA noted above, particularly the requirement to consider the 'public interest', which has been held to encompass the principles of ecologically sustainable development (including the precautionary principle and the principle of inter-generational equity); and

3 thirdly, on the basis that taking Scope 3 emissions into consideration was consistent with precedents set in other Australian and international jurisdictions.

Accordingly, even if the Bill is passed and the requirement to consider 'downstream greenhouse gas emissions' under the Mining SEPP is removed, consent authorities (including the IPC) may nonetheless consider that they are obliged to have regard to Scope 3 emissions, given their statutory environmental assessment functions under the EPA Act. Further, although the amendments proposed to the EPA Act may prevent consent authorities from imposing conditions to regulate Scope 3 emissions, the consideration of Scope 3 emissions may nonetheless continue to provide a basis for determining whether a project should be approved or refused, having regard to the overall merits of the proposal. Consequently, the proposed prohibition on conditions of consent regulating Scope 3 emissions may result in projects being refused where they would otherwise have been approved with conditions relating to such emissions.

In his second reading speech, the Minister highlighted that the Bill is focussed on clarifying the extraterritorial operation of the EPA Act. The Minister indicated that the Bill *"...provides certainty to all players in the planning system about how extraterritorial impacts can be dealt with in New South Wales planning approvals. It makes the basic point that while consent conditions can quite appropriately relate to matters within Australia's territorial limits, there is clearly an enforcement issue with development conditions that purport to control impacts outside the jurisdiction of Australia."*

The Bill is focussed on clarifying the extraterritorial operation of the EPA Act

Review of the IPC

The Productivity Commission is expected to report to the Minister by mid-December 2019 in relation to its review of the IPC. The Terms of Reference for the review require the Productivity Commission to:

1 recommend whether it is in the public interest to maintain an Independent Planning Commission, considering, where relevant, the experience with similar bodies in other common law jurisdictions;

2 make recommendations in relation to the IPC's operations and the mechanisms by which State significant development (**SSD**) is assessed and determined; and

3 identify any proposed changes to the IPC's functions, processes and resourcing, having regard to thresholds for referrals, the clarity and certainty of guidelines that inform determinations, the skills, expertise and qualifications of Commissioners, the extent to which the IPC should rely on assessment reports prepared by the Department, resourcing and budgetary support, and whether the IPC's Secretariat should be employed directly by the IPC or by another Government agency.

It is interesting to note that the Terms of Reference of the review requested by the Minister appear to contemplate, by implication, the possibility of abolishment of the IPC or the curtailing of its functions, given that as recently as 1 March 2018 the IPC was renamed as the *Independent* Planning Commission (formerly the Planning Assessment Commission), to emphasise the independence of its functions and operation.

If the IPC is abolished or reconstituted as a result of this review, this is likely to have implications for the way SSD is assessed and determined generally, not just for the mining sector, as the Terms of Reference have been expressed in general terms.

The Productivity Commission is expected to report to the Minister by mid-December 2019 in relation to its review of the IPC

Conclusion

Although the NSW Government's proposed reform package has brought some welcome relief to mining industry proponents in the wake of the IPC's recent string of coal mine decisions, whether the Bill passes the Upper House, and the outcomes of the IPC review, remain to be seen.

Former Supreme Court judge Paul Stein QC has recently been quoted as stating that the NSW Government's reform package represents a "... dangerous retrograde step" in terms of the NSW Government's approach to curbing global GHG emissions.[3]

As discussed above, it is possible that consent authorities will continue to have regard to Scope 3 GHG emissions in carrying out their assessment functions under the EPA Act, even if the Act is amended as proposed under the Bill. The main immediate effect of the Bill would be to stem the imposition of conditions on the grant of development consents, which seek to regulate Scope 3 emissions generated outside of Australia (similar to those imposed in relation to the United Wambo Open Cut Coal Mine Project). Accordingly, the potential for the IPC to refuse future coal mining projects and other fossil fuel developments on the basis of indirect GHG emissions is likely to remain – subject to further reforms to the IPC's functions, which could result from the Productivity Commission's review.

Proponents should therefore continue to ensure that environmental assessments for new projects include fulsome information regarding GHG emissions, including Scope 3 emissions. Proponents should also have regard to the suite of practical tips provided in our special edition of the Mining Sector Update that was published following Rocky Hill (accessible here).

3 See ''NSW should be alarmed': Former judge slams planning laws', *Sydney Morning Herald*, 6 November 2019, accessed 13 November 2019, available at: ‹https://www.smh.com.au/politics/nsw/nsw-should-be-alarmed-former-judge-slams-planning-laws-20191105-p537j4.html›.

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ADMINISTRATIVE REFORMS ON THE HORIZON FOR QUEENSLAND'S MINERAL AND PETROLEUM ROYALTY REGIMES

Queensland's Office of State Revenue (**OSR**) has released its consultation paper setting out how it will undertake a Royalty Administration Modernisation Program of the state's mineral and petroleum royalty regimes (**RAM Program**).[4]

The RAM Program is separate to the petroleum royalty review announced in the FY 2019-2020 state budget. It will instead focus on aligning the administrative elements of Queensland's mineral and petroleum royalties with the administration of other state revenue laws.

The role of the Office of State Revenue

The OSR is responsible for administering the State's revenue laws for betting, stamp duty, land tax and payroll tax. The OSR administers these revenue laws under the guidance of a single piece of legislation: the *Taxation Administration Act* 2001 (Qld) (**TAA**).

The TAA provides the OSR with a unified set of 'modern revenue management principles' (which are found in other state and federal revenue laws) to administer commonly-occurring situations that arise under each of these revenue laws, such as:

- making assessments/reassessments;
- recovering tax;
- refunding overpaid tax; and
- imposing penalties.

TAA principles already introduced into the royalty regimes

Since 2011 the OSR has been administering the state's mineral and petroleum royalties under the *Mineral Resources Act 1989* (Qld) and the *Petroleum and Gas (Production and Safety) Act* 2004 (Qld) respectively (**royalty regimes**).

Aspects of the TAA have been progressively introduced into the royalty regimes such as the making of assessments and reassessments, royalty penalties, unpaid royalty interest, record keeping and confidentiality obligations.

The RAM Program intends on completing this alignment between the administration of the royalty regimes and the administration of other revenue laws.

The nature of any TAA adoptions

The consultation paper describes any amendments to the mineral and petroleum royalty regimes arising out of the RAM Program as 'minimal', and limited to what is required to support royalty administration within the TAA's framework.

4 OSR, 'Royalty Administration Modernisation Program Consultation Paper' (Report, October 2019) ‹https://s3.treasury.qld.gov.au/files/Royalty-Administration-Modernisation-Consultation-October-2019.pdf› ('Consultation Paper').

Proposed amendments will likely take one of two forms:

(a) **deferral to the TAA** (ie, where the TAA duplicates a process in the royalty regimes, the provision in the royalty regimes will be omitted and reference will be made to the TAA); or

(b) **partial deferral to the TAA** (ie, where a royalty arrangement is not covered by the TAA, the mechanics of the specific royalty arrangement will continue to operate, but reference will still be made to a general administrative provision in the TAA).

The amendments arising from the RAM Program are planned to commence from **1 July 2020**.[5]

Key changes proposed

The OSR's consultation paper highlights at least three benefits that will arise as a result of the RAM Program:

TAA: Relevant Part	Benefit to royalty regimes
Part 3 **Assessments of tax**	Streamlines the timeframes around reassessing royalty liabilities
Part 4 **Payments and refunds of tax and other amounts**	Increases certainty around timeframes for holding overpaid royalties
Part 6 **Objections, reviews and appeals against assessments**	Introduces merits review

1 TAA Part 3 – Streamlining the timeframes for reassessing royalty liabilities

Part 3 of the TAA's assessment framework forms the basis on which a liability is generated. It has largely been adopted by the royalty regimes to determine royalty liability, however a number of areas still require alignment. For example:

5 Consultation Paper, 4.

The OSR's consultation paper highlights at least three benefits that will arise as a result of the RAM Program

Internal and external review processes will provide new avenues for royalty payers to challenge royalty decisions

- reassessments that *increase* a royalty payer's liability do not have a time limit to be completed by; however
- reassessments that *decrease* a royalty payer's liability must be completed within five years from the original assessment.

Adopting Part 3 of the TAA will align these reassessment timeframes to five years.

To give effect to royalty assessment decisions made under the new review processes (discussed above), reassessments for this purpose will be permitted outside the normal timeframes.

2 TAA Part 4 – Increasing certainty around the timeframes for holding overpaid royalties

Under the current royalty regimes, overpaid royalties can be held until a future royalty liability arises – which may be an unlimited period.

Part 4 of the TAA alters this issue by specifying the situations when royalty payers are entitled to refunds for overpaid royalties. Any overpaid royalties will be held until the later of either:

- six months;
- the date the next royalty return is lodged; or
- for an indefinite period, but only if at the request of the royalty payer (ie, as pre-payment for an anticipated future liability).

The royalty regimes will adopt Part 4 of the TAA on a modified basis to reflect the larger liability associated with royalty payments compared to liabilities from other state taxes.

3 TAA Part 6 – Introducing merits review for royalty decisions

Adopting Part 6 of the TAA will confer upon royalty payers access to merits review by way of:

- a right of objection (ie, internal review); and
- a right of review to QCAT or appeal to the Queensland Supreme Court (ie, external review).

These internal and external review processes will provide new avenues for royalty payers to challenge royalty decisions relating to:

- royalty valuation decisions (ie, gross value royalty decisions); and
- royalty assessments.

Separate to the review into petroleum royalty rates

The consultation paper emphasises that the RAM Program is separate to the petroleum royalties review announced by the Queensland Government in June 2019 as part of its 2.5% petroleum royalty increase.

While the 2.5% royalty increase has come into effect as law, it is reported that the petroleum royalties review is expected to be delivered to the State by the end of this year.[6]

6 Sarah Vogler, 'Ex-Labor premier to lead Qld gas royalties review', Courier Mail, 8 November 2019 ‹https://www.couriermail.com.au/news/queensland/queensland-government/exlabor-premier-to-lead-qld-gas-royalties-review/news-story/72632bc5f8dd1c0426bffa86b5dec407›.

LIKE A DUCK TO WATER: WHY ANNUALISED SALARIES REQUIRE ONGOING WORK

Annualised salaries are widespread in the mining sector. Attractive for their apparent administrative ease, and for the benefits attached to standardising irregular work patterns, annualised salaries look relatively simple if/when implemented well, but there is much work required 'below the water line'.

As has been widely publicised, however, some of Australia's most iconic names and brands have fallen short of what is required. Amidst a flurry of negative publicity, these brands have admitted to the Fair Work Ombudsman (**FWO**) significant underpayments. And, reflective of the public dissatisfaction, the FWO has warned businesses that they 'must understand that admission is not absolution. Companies should expect that breaking workplace laws will end in a public court enforcement outcome'.[7]

The wave of headlines have now led to the approval of a Senate Inquiry into the provocatively badged issue of 'Wage Theft', in which the expectation is that senior officers of companies where underpayments have occurred will be asked to explain why.[8]

The issue has become one of accountability and the social license to operate. It is another example of how organisations should re-evaluate their approach to risk management and compliance when doing business in Australia.

So at a time when the mining sector battles claims that the use of casual employment 'rips off' workers, the scrutiny that is placed on the mining industry at all levels has a new front.[9]

This article explores how we got to this point, and how to positively move forward from it.

How did we get here?

Annualised salaries are attractive to employers for their apparent ease of administration. Rather than have to deal with the burden of calculating overtime, penalty rates, allowances and other obligations that arise under awards or enterprise agreements, an annualised salary offers the ease of a set amount each week. Annualised salaries are particularly useful for employers in the mining industry, with complex roster cycle arrangements and a desire to standardise arrangements.

From an employee's perspective, the certainty of each payment is also attractive. A payment system that 'smooths out lumps' makes it easier to budget and plan.

For all the purported ease of annualised salaries, however, a number of challenges quickly emerge. First and foremost is the relative complexity of the Australian workplace relations system. The very attractiveness of annualised salaries – ie, reducing administrative burdens – belies the work and vigilance needed to ensure that the salary actually meets those underpinning legal entitlements. And those entitlements change. An employer simply cannot 'set and forget'.

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7 Sandra Parker, Fair Work Ombudsman, 30 October 2019 ‹https://www.fairwork.gov.au/about-us/news-and-media-releases/2019-media-releases/october-2019/20191030-ww-mr›.
8 David Crowe, 'Bosses may front Senate probe into wage theft', The Age, 14 November 2019.
9 Media Release, The Hon Tony Burke MP, Shadow Minister for Industrial Relations, 13 November 2019 ‹https://www.tonyburke.com.au/media-releases/2019/11/13/labor-establishes-wage-theft-inquiry›.

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The interpretation of awards is often not clear, and enterprise agreements that are drafted between parties are often notoriously ambiguous

Connected to the relative complexity of industrial relations system is the lack of understanding of many of the workplace obligations. There can be a lack of understanding by payroll functions (sometimes based overseas) of Australian workplace laws, and the payroll function is often disconnected from the legal or HR functions. Of course, even where legal or HR eyes are cast over the system, reasonable minds may differ. The interpretation of awards is often not clear, and enterprise agreements that are drafted between parties are often notoriously ambiguous.

Genuine errors of interpretation of the law occur. As was recently demonstrated by the Mondelez case[10] – which confirmed that personal leave should be accrued and deducted in days, not hours, and provided ten days for all employees irrespective of their work arrangements – common understandings of how the laws work can be wrong. For the mining sector it has led to the incongruous outcome where an employee on a five day, seven hour roster can receive 70 hours' personal leave; while an employee working a three day, 12½ hour roster receives 125 personal hours.

There are other factors at play, with various changes to the workplace. Wage growth is low, and margins tight particularly for labour suppliers in the industry. Finally, corporate attention has not been focused on compliance with HR issues to the same extent it has on tax, competition law or environmental or health and safety obligations.

What now?

Against this backdrop, and in an environment of increased external scrutiny of corporate practices, the game has changed.

Additional regulatory powers

The FWO has been 'called to arms', equipped with additional funding and powers to investigate alleged underpayments. It has announced that its priority for 2019-20 is to take a stronger approach to enforcement.[11] This includes pursuing and prosecuting non-compliant companies and individuals and naming and shaming employers who underpay workers or deprive them of their entitlements to send a message of deterrence to employers breaking the law. The FWO has also toughened its compliance and enforcement policy with a view to increasing the amount of compliance notices issued. As mentioned above, recent developments appear to have hardened the approach of the FWO even more.

The Federal Government has increased the penalties available, with a single contravention of the *Fair Work Act 2009* (Cth) now attracting a maximum penalty of $12,600 for individuals and $63,000 for companies. Each serious contravention (that is when a court finds that a person or company knowingly contravened an obligation under workplace laws and the contravention was part of a systematic pattern of conduct) attracts a maximum penalty of $126,000 for individuals and $630,000 for companies.[12] Penalties for failing to keep records or provide payslips have also increased.

The FWO has enhanced powers to investigate, fine and commence proceedings against an employer for underpayment contraventions in relation to any employees, including full time and part time employees who may be subject to set off clauses or annualised salary arrangements.

10 *Mondelez v AMWU* [2019] FCAFC 138. See also: ‹https://corrs.com.au/insights/a-day-is-a-day-personal-carers-leave-in-the-wake-of-mondelez-v-amwu›. An application for special leave to appeal to the High Court has been filed, but not determined as at the time of writing.

11 *Fair Work Ombudsman*, 'FWO launches 2019-20 priorities' (online, 3 June 2019) ‹https://www.fairwork.gov.au/about-us/news-and-media-releases/2019-media-releases/june-2019/20190603-aig-pir-media-release›.

12 *Fair Work Ombudsman*, 'Litigation' (online) ‹https://www.fairwork.gov.au/about-us/our-role/enforcing-the-legislation/litigation›.

Recently, increased enforcement action against employers failing to properly remunerate employees on annualised salaries came to the fore, with a string of high profile underpayments demonstrating that even the strongest brands in Australia are not immune from these issues.

Recent developments appear to have hardened the approach of the FWO even more

Criminalising 'wage theft'

Responding to community concerns, the Federal Government has proposed criminalising wage theft, releasing a discussion paper calling for submissions on the issue.

The Government's rationale for criminalising wage theft is to protect workers and prevent non-compliant employers from having an unfair advantage over employers who pay the correct employee entitlements.

The discussion paper also considers possible maximum criminal penalties for such conduct. It suggests the punishment should be similar to comparable forms of wrongdoing, such as the model work health and safety laws, the 'corrupting benefits' provisions of the *Fair Work Act 2009* (Cth) and general theft offences. Such forms of wrongdoing carry a maximum of ten years' imprisonment.[13]

Upcoming Senate Inquiry

Adding to the heightened focus on wage theft is the wide-ranging Senate Inquiry into the extent and amount of unlawful underpayment of employees' remuneration by employers.

The Inquiry will examine:

- how best to identify and uncover wage and superannuation theft;
- how to protect those who expose underpayments;
- investigating the most effective means of recovering unpaid entitlements;
- the tax treatment of recovered entitlements;
- changes to the existing legal framework that would assist with recovery and deterrence; and
- whether Government procurement practices can be modified to ensure that public contracts are not awarded to businesses in wage and superannuation theft.

We can reasonably expect that the FWO will be a lead player in the Inquiry, updating and informing on the full extent of its investigations to date. A Senator has already signalled that the Inquiry will call senior officers of corporations to account, with CEOs asked not only 'how and why' about underpayments, but also what the Board and senior management did to prevent the underpayments occurring. It is expected that the committee will report in mid next year.

Be aware of changes

Employers should need to be aware of upcoming changes to annualised salary arrangements in light of the 2019 'Annualised Wage Arrangements' decision by the Fair Work Commission, which will take place in March 2020.[14]

13 *Australian Government – Attorney-General's Department*, 'Improving protections of employees' wages and entitlements: strengthening penalties for non-compliance' (online, September 2019) ‹https://www.ag.gov.au/Consultations/Documents/industrial-relations-consultation-strengthening-penalties-for-non-compliance/strengthening-penalties-for-non-compliance-discussion-paper.pdf›.

14 *Four Yearly Review Of Modern Awards – Annualised Wage Arrangements* (2019) FWCFB 4368.

REGULATORY UPDATES

Employers who use annualised salaries must be aware of their obligations

This applies in particular to businesses with employees covered by the Mining Industry Award, which is one of the awards that will incorporate a new annualised salary clause. These new requirements on employers will increase the scope for potential FWO enforcement action.

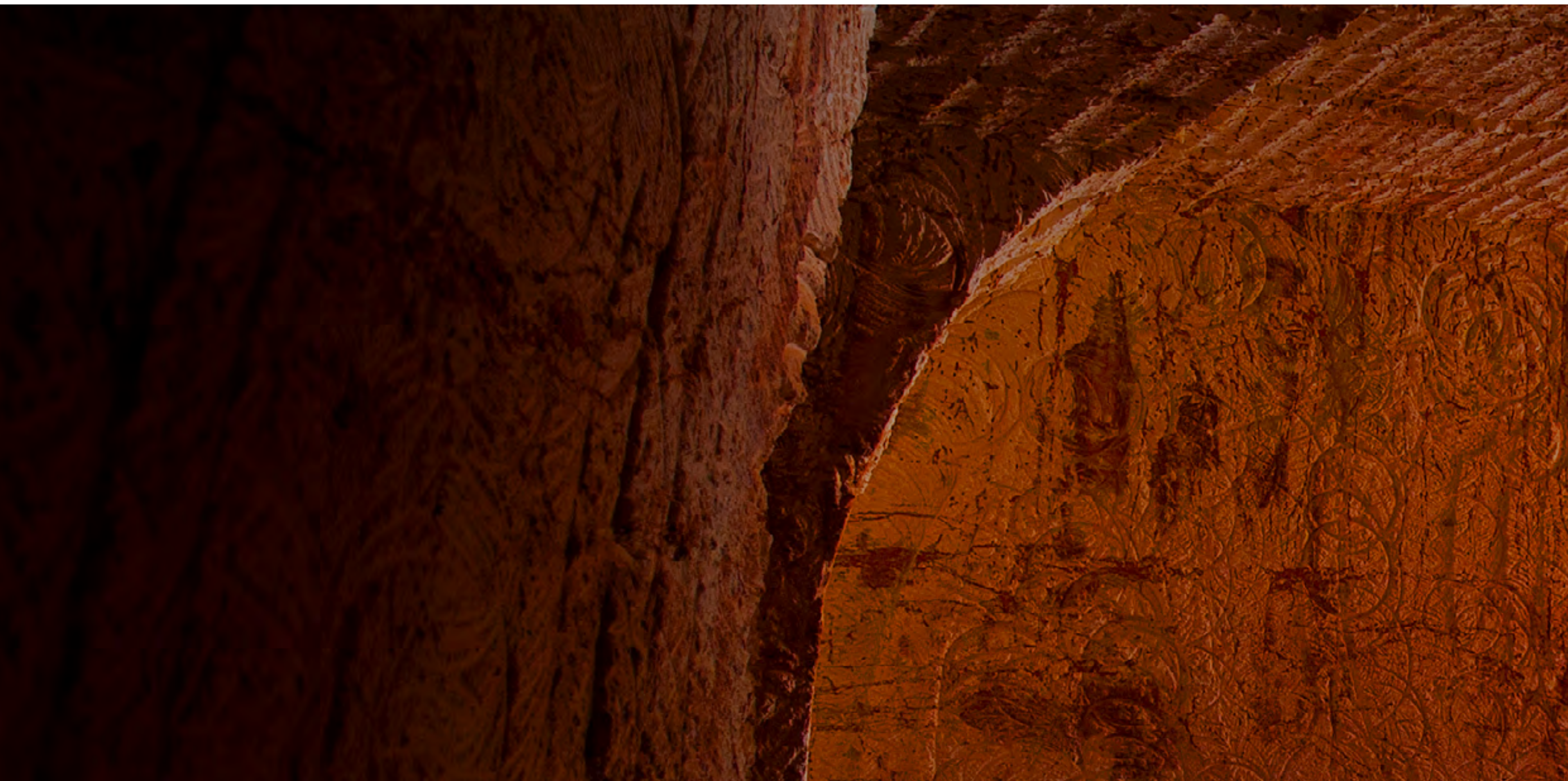
In anticipation of these award changes, employers (who rely on these clauses) should ensure they are familiar with what their new obligations will be and have the requisite systems in place to fulfil their new obligations under the affected awards, such as increased record keeping and notifying employees of the outer limit number of ordinary hours and overtime hours they can work before they are entitled to an additional payment on top of their annualised salary. Alternatively, employers should consider a common law set-off arrangement outside of the award provisions. More information can be found in our previous article on this issue.

What should employers do?

Fundamentally, annualised salaries and the use of set-off clauses are valid so long as the amount paid to the employee is sufficient to fully meet the employer's obligations under an award or enterprise agreement, and various other requirements (eg, drafting, monitoring, time recording etc.) are met. It follows, however, that employers who use annualised salaries must be aware of their obligations in relation to such arrangements and have strong systems in place to ensure compliance.

Much like work health and safety, we expect to see increased focus on the steps that Boards and senior management have taken to ensure compliance with workplace laws. Senior managers and Boards are likely to be asking for assurance from their legal and HR departments that their business will not be caught up in the next wave of very public scrutiny of these issues.

At a minimum, we suggest employers implement the following steps to ensure ongoing compliance:



- **Incorporate compliance checking protocols for engaging new employees**. Compliance issues can occur from the outset of an employment relationship. Those involved with recruitment need to be aware of industrial instrument obligations and have systems in place to ensure compliance of proposed employment arrangements. This may include, for example, setting salary 'floors' in payroll systems and providing guidance regarding the uplifts required in annualised arrangements to compensate for anticipated overtime and other allowances and loadings. Of course, having well-drafted employment contracts is a good start.
- **Annual salary reviews**. Award rates generally increase every year on 1 July. Employers should regularly review and update employees' salaries, to ensure employees are receiving a salary rate of pay sufficient to cover the relevant award's base rate for ordinary hours.
- **Accurate record keeping**. Accurate records are critical to any accurate payment. The *Fair Work Act* and *Fair Work Regulations* require accurate employee records, including in some cases prescriptive content for time records and pay slips such as the rate of pay, loadings, allowances and hours worked (where an employee receives an hourly rate of pay). For employers relying on annualised salaries, ensure that there are systems in place to record start and finish times and unpaid breaks.
- **Annual salary reconciliations**. Employers should review the actual hours worked by employees and reconcile these against the hours actually paid to an employee and the amount the employee would have received under an industrial instrument.
- **Improve communication between departments**. Many of the recent large-scale underpayment admissions have come as a result of a payroll departments not fully understanding the legal obligations. Employers should ensure payroll regularly checks they are meeting their payment obligations to employees, with specialist HR and/or legal advice.

Employers should review and upgrade their payroll systems to ensure they are calculating employee entitlements correctly

It should be obvious that doing nothing is no option for any business with a significant number of employees

- **Upgrade payroll systems**. The Australian industrial relations system is complex. Many payroll systems are developed overseas for simpler industrial relations systems and are largely ineffective or cumbersome in calculating the relevant entitlements for workers under the Australian system, or have not been updated to reflect changes to relevant industrial instruments. Employers should review and upgrade their payroll systems to ensure they are calculating employee entitlements correctly.
- **Monitor trends in payroll queries and complaints**. Where there is smoke, there is often fire, so it is prudent for employers to have a system in place to monitor and interrogate trends in individual employee or union payroll queries and complaints. This will assist employers to 'join the dots' and proactively identify compliance issues potentially affecting a broader class of employees.
- **Consider available mechanisms to implement annualised salary arrangements**. Many employers rely solely on common law set-off clauses in providing employees with annualised salaries. However, employers should also consider the feasibility of other options. While annualised salary arrangements under modern awards are becoming increasingly complex to implement, they do offer the advantage of being deemed to have satisfied key award entitlements including overtime, penalty rates, allowances and annual leave loading. Employers could also consider using individual flexibility arrangements. For more senior employees, an annual guarantee of earnings, which suspends the application of the modern award to the employee entirely for the duration of the guarantee,[15] may be an attractive and relatively simple option.

Finally, it should be obvious that doing nothing is no option for any business with a significant number of employees. A surprisingly large number of employers have been caught out in recent underpayment issues, and they are from a wide variety of industries. It is time for businesses in the mining industry to take stock, and make sure that all that work required 'below the water line' is actually going on.

15 *Fair Work Act 2009*, Sections 48(2), 329.

THINKING PIECE

THE RISE OF ELECTRIC VEHICLES: WHAT DOES THIS MEAN FOR THE RESOURCE SECTOR?

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A decade ago, the thought of driving down a street where electric vehicles (**EVs**) outnumber conventional petrol and diesel vehicles may have seemed a world away. But if a report released earlier this year by Bloomberg New Energy Finance is anything to go by, this day might become a reality a lot earlier than you'd think. With worldwide sales of EVs exceeding two million vehicles last year, up from a mere few thousand in 2010, the report predicts that by 2040 more than half of all passenger vehicle sales, and more than 30% of all the cars on our roads, will be EVs.

The exponential uptake in EVs seen across the world has been helped by the price of batteries falling, and the range and efficiency of new models making EVs a more and more attractive option for the everyday consumer. Government policy also continues to play an invaluable role in increasing this uptake, which is particularly true in China – the country with the largest EV market and home to almost half of the world's stock of them – which quite unsurprisingly has some of the most attractive incentives for its citizens to purchase EVs.

So if we really are looking at a future with an estimated 550 million new EVs on our roads by 2040, displacing millions of conventional petrol and diesel vehicles, what might this mean for our resources sector?

Increased number of batteries

Unlike the combustion engines the market has become accustomed to over the last century, each EV comes with an entirely different demand for resources under the bonnet in the form of its battery. While it is true that battery technology is ever evolving, and the mix of materials used has and will continue to change, the batteries used in EVs in the market today typically consist of combinations of lithium, graphite, nickel, cobalt, aluminium, copper, silicon and manganese.

Most batteries in the world use a lithium-ion cell, and Australia is currently the world's largest producer of lithium, producing more than a third of the world's total output. While we may well be the largest producer of the raw mineral, it has been estimated that Australia currently only earns 0.53% of the total lithium value chain, with the rest of the value added through offshore electro-chemical processing. This presents a major opportunity for Australia to gain out of the rise in EVs if local processing plants can add value locally.

Broadly, the lithium-ion cell used in batteries consists of an anode, a cathode, precursor and electrolyte. These parts all have the potential to be manufactured in Australia, especially given the fact that we currently produce all the minerals required to produce most anodes and cathodes. This is with the exception of graphite – although we do have commercial reserves of that.

While it is projected that current lithium supply will be sufficient to supply the market until the mid-2020s before expansion of mining is necessary, new cobalt and nickel production capacity will need to be established a lot sooner in order to meet increasing demand.

Cobalt presents a potentially unique opportunity for industry in Australia with this rising demand. The Democratic Republic of Congo currently produces almost a third of the world's cobalt, but the country's mining of the mineral has come under fire in the media for human rights concerns around

Cobalt presents a potentially unique opportunity for industry in Australia

As battery production industries expand, the market for recycling and re-purposing is likely to grow too

unsafe mines, working conditions, and the use of child labour. Australia, however, holds the second largest economic demonstrated resource of cobalt, yet produces less than 5% of what the DRC does. This presents a market ripe for investment and development in Australia, especially in an age where consumers are continually seeking and demanding more responsibly sourced products, at all points along the supply chain.

An often-raised concern about EVs is about what happens to the battery at the end of its useful life. Large heavy batteries clogging up landfill is both a waste of limited resources and an environmental management nightmare. There are however two viable solutions to this – re-purposing and recycling.

Lithium-ion batteries produced today for EVs are able to have a second life after they are no longer efficient to be used in cars, operating typically up to ten more years in alternative systems. These batteries are able to be re-purposed and used to power less demanding systems, like households, lighting and refrigeration. As for recycling, the CSIRO estimates that if recycled effectively, 95% of waste components could be turned into new batteries, or used in other industries.

While these ideas may seem somewhat untenable on a large scale at the moment, as battery production industries expand, the market for recycling and re-purposing is likely to grow too.

Increased demand for electricity

If one of the reasons for us to shift to EVs is to reduce emissions, then the sizeable increase in electricity demand for recharging all these batteries needs to be coupled with an increase in renewable energy infrastructure. Otherwise, this is simply going to increase the amount of fossil fuels currently being burned in order to meet these new electricity needs, which means the potential benefits gained from lowering vehicle emissions will come at the cost of increasing non-renewable electricity emissions. This might well be a win for the fossil fuel industries, but for a population who are demanding more in terms of emissions reduction and alternative energy options, this is unlikely to cut it.

The CSIRO offers an easy household solution to this for Australians, who have the largest per capita uptake of rooftop solar PV installations in the world. According to CSIRO scientists, it would be a perfectly feasible reality to have a household battery pack charging during the day when the sun is shining, and then you simply plug your EV into the wall when you get home and it's charged and ready for you to drive to work the next morning. A car sitting in your garage, powered for free by the Australian sun – it sounds almost too good to be true.

So, why then aren't Australians lining up to buy these cars at the rate they are in Norway, where 46% of all cars sold last year were EVs? Well, like in China, generous government incentives for EVs that we don't have here in Australia might be one easy answer. Although it's not too far-fetched to imagine that the same kind of incentives which made rooftop solar so popular in Australia could have the same effect here with EVs, there are also some more situational considerations that might factor in to the Norway success story.

For one, clearly Norway is a much smaller country than Australia, and distances between cities are naturally going to be shorter. Although the driving range of EVs is almost incomparably better than it was 10 years ago, no one is pretending that a brand new Nissan Leaf is going to give you even close to the same mileage on a single 'tank' as your 2009 Toyota Corolla. The technology just isn't there yet – you're still comparing apples and oranges. The so-called 'range anxiety' of EVs is a genuine concern for consumers in Australia who might love the freedom of being out on the open road going from city to city, but fear becoming stranded without a fuel supply.

This brings us to the next point, charging infrastructure. Someone in their Tesla in Norway driving from Bergen to Oslo would still be on the road for seven hours, however range anxiety would be the least of their worries. That's because the country with the highest percentage of EVs on the roads also has a correspondingly plentiful number of publically available fast charging points for drivers to 'fill up' along their journeys. Environmental externalities concerning emissions from using these public chargers is similarly not a concern for Norwegians, as their abundant renewable energy industry means 96% of its electricity is generated by hydropower.

Price is another clear reason why Australians haven't been so keen to get on the EV bandwagon, with the cheapest models at the moment – the Hyundai Ioniq and the Nissan Leaf – currently setting customers back around the $50,000 mark (not to mention the additional cost and setup of a home charger). This being said, current estimates predict EVs to reach cost parity with conventional petrol and diesel vehicles by the early 2020s, primarily as a result of batteries becoming cheaper, which is going to give buyers more of a reason to make the switch.

Decreased demand for oil

Simple economics tells us that increasing the percentage of EVs on our roads is going to cause a subsequent decrease in the demand for oil used for road transportation – but how big an impact will this actually have?

By Bloomberg's calculations, the EV industry is expected to displace a combined 13.7 million barrels per day of total oil demand by the year 2040. For comparison, this is more oil equivalent than that used in 2012 by the whole transportation sector in the United States. The global energy consultants at McKinsey share a similar view, claiming oil demand for road transport will peak in 2025 before declining (directly triggered by the increased adoption of EVs) to eventually reduce by a third of current demands by the year 2050.

While these predictions modelled on current data and trends are subject to many assumptions coming true, the potential massive changes in oil demand from EVs would have worldwide ramifications for the oil industry, and key players like BP are taking note. Last year BP acquired Chargemaster (now BP Chargemaster), the largest EV charging company in its home country, the UK, quoting the move as a 'key part of BP's strategy to advance the energy transition' and 'a true milestone in the move towards low carbon motoring in the UK'.

Oil companies like BP also account for a sizeable chunk of Australia's retail petrol stations, so it's not hard to envision a future where EV fast charging stations start popping up in place of local petrol stations – in fact, BP has already started rolling out its first 'ultra-fast' chargers in its retail petrol stations in the UK, with plans to roll out 400 of them in the country by 2021.

So, what does the future hold?

Uptake of EVs in Australia has undoubtedly been slow compared to the rest of the world, with only 2,216 of the more than two million EVs purchased worldwide last year being bought in Australia. But this is no reason to discount the potential for large scale uptake of EVs in Australia, or make excuses saying the 'Australian situation' will remain an outlier to the global trend.

We may not have the same social, political and environmental climate as Norway right now, but our abundance of resources (both in the ground and in the sky) is something that can genuinely be leveraged to make the worldwide EV transition both profitable and affordable for Australians. There are gains to be made all across the resource sector, and the sooner that government and industry leads the charge on this, the better.

By Bloomberg's calculations, the EV industry is expected to displace a combined 13.7 million barrels per day of total oil demand by the year 2040

MINING SECTOR IN THE SPOTLIGHT IN AUSTRALIA'S AI ROADMAP

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'Natural resources and the environment' has been identified as one of three high potential areas for artificial intelligence (**AI**) specialisation in Australia in the A*rtificial Intelligence: Solving problems, growing the economy and improving our quality of life* report[16] published by the Australian Government in November 2019.

'AI' is a broad term, and is used generally to refer to technologies that can solve problems autonomously and perform tasks to achieve objectives without explicit human guidance. The term encompasses processes such as machine learning, computer vision, automated planning, expert systems and robotics.

The report sets out a roadmap for investment in Australian AI capabilities where Australia has the greatest strengths. It identifies the following key industries as fertile ground for opportunities for AI to solve big problems, and for Australia to export AI technology globally:

- natural resources and environment;
- health, ageing and disability; and
- cities, towns and infrastructure.

The report recommends resources as a focus area because Australia is already a leader in agricultural robotics, mine site automation,[17] and the use of AI for environmental monitoring and management.

What is the practical impact of the report for those in the mining industry?

For those developing AI technologies, the report is good news: the Australian Government has indicated that it will continue to support and invest in the development and export of AI mining technologies. In particular, the report identifies mining operations in Africa, Asia and South America as ripe for the export of Australian AI technologies focused on identifying mineral deposits and mine operations.

For others, as innovation in AI mining technologies will continue at a rapid pace, the resources sector should be actively considering new and innovative AI solutions that transform mineral discovery and operations, increase safety and reduce production costs.

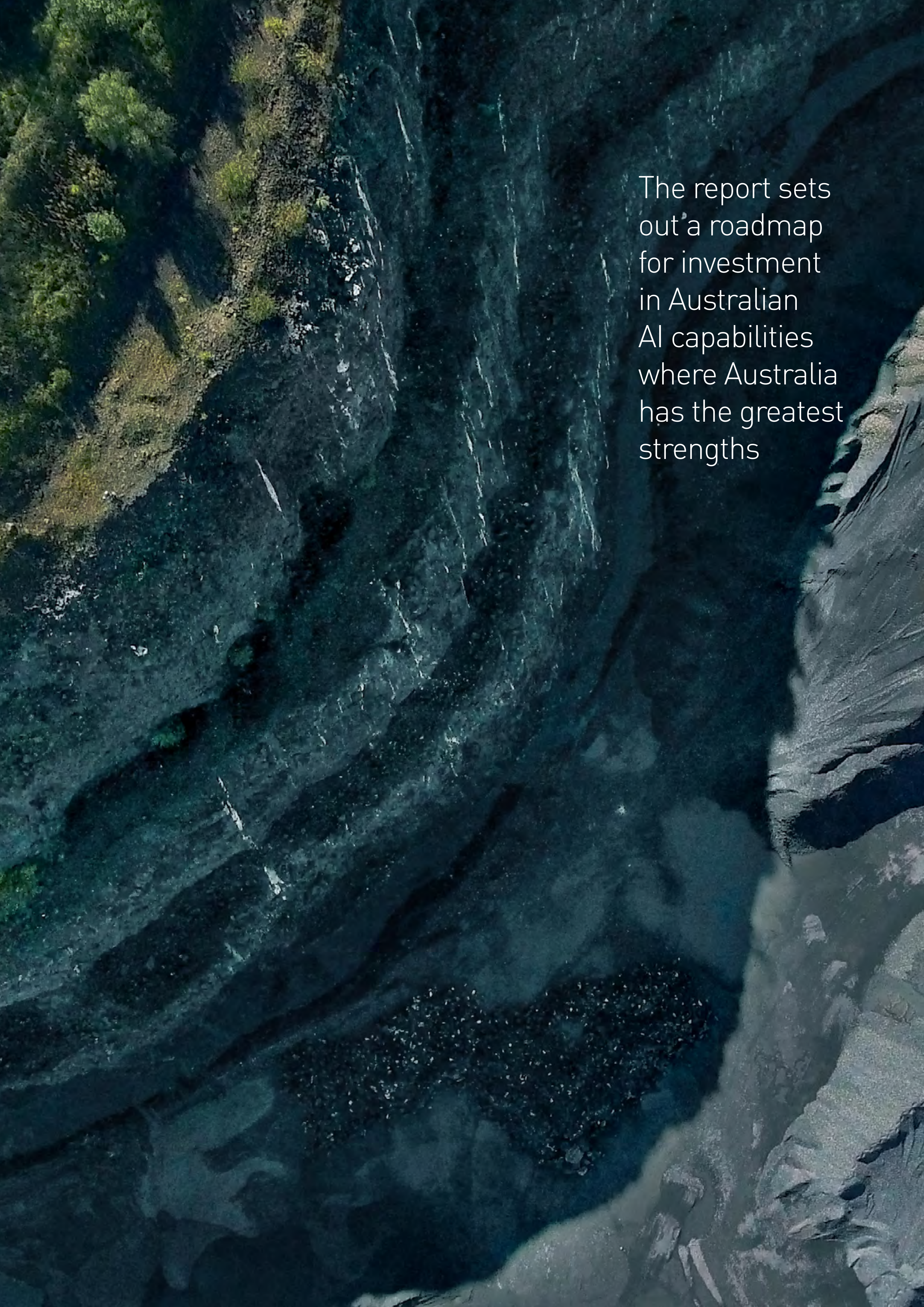
As AI technologies involve additional legal risks associated with the autonomy and transparency of an AI system, specialist technology legal advice is recommended when procuring or distributing AI technologies.

In some cases, liability for AI will be straight-forward and will not challenge established liability frameworks. However, for complex AI technologies, careful consideration of legal risk and liability issues will be required. This will often involve assessing liability risk at multiple levels. Business should also consider the significant amount of policy development that is underway around the world on the establishment of guidelines on the appropriate use of AI.

'Natural resources and the environment' has been identified as one of three potential areas for artificial intelligence

16 Available at ‹https://data61.csiro.au/en/Our-Research/Our-Work/AI-Roadmap›.

17 Our May 2019 Mining Sector Update includes a detailed article on mine site automation, which can be accessed at ‹https://corrs.com.au/site-uploads/images/PDFs/Insights/article-energy-resources-Australian_Mining_Sector_Update_May_19.pdf›.



The report sets out a roadmap for investment in Australian AI capabilities where Australia has the greatest strengths

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