MINING SECTOR UPDATE

JULY 2019

INTRODUCTION

Welcome to the July 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:

- the link between climate change and human rights for resource projects in light of the 'Rocky Hill' decision
- the lengthy approvals process for Adani's Carmichael Coal Project
- a recent decision in the Supreme Court of Western Australia on parent company guarantees
- a new guideline released on progressive mine rehabilitation and closure in Queensland

a proposed metallurgical coal mine with a yield of up to 8 million tonnes per annum of product coal

RECENT ANNOUNCEMENTS

Sandfire Resources to acquire MOD Resources

Further to a report in our March Mining Sector Update, ASX listed copper miner **MOD Resources** announced on 25 June 2019 that **Sandfire Resources NL** will acquire 100% of the shares of MOD by way of a scheme of arrangement. The deal, which was unanimously recommended by the MOD board, values the equity of MOD at A$167 million.

The joint ASX announcement can be read here.

Cazaly's Parker Range Iron Project to be fully acquired by Gold Valley

On 11 June 2019, ASX listed **Cazaly Resources Limited** announced it has agreed commercial terms for the sale of its **Parker Range Iron Ore Project** to **Gold Valley Iron Pty Ltd**, which is part of the Gold Valley Group.

Cazaly has agreed to sell its wholly owned subsidiary **Cazaly Iron Pty Ltd**, which holds the tenements underlying the Parker Range Iron Ore Project that is located in the Yilgarn region of Western Australia.

Under the terms of the agreement, after payment of a A$50,000 exclusivity fee and a strategic acquisition of 10 million shares of Cazaly, Gold Valley Iron will commence a three month due diligence and exclusivity period, with the option to extend for a further three month period on payment of a further fee of A$250,000.

The agreement also provides for an initial payment of A$5 million upon signing of formal transaction documents and a further A$8 million on the commencement of production from the Parker Range Iron Ore Project, plus royalties of between A$0.50 to A$1 per tonne payable on all ore produced from the project.

You can read the full ASX announcement here.

A$1 billion Winchester South Project open for public comment

In a Joint Statement on 24 June 2019, the Honourable Cameron Dick (Minister for State Development, Manufacturing, Infrastructure and Planning) and Mrs Julieanne Gilbert (Assistant Minister for State Development) announced that Queensland's independent Coordinator-General has released draft terms of reference (**TOR**) for the Winchester South project's environmental impact statement.

The public have from 24 June until 19 July 2019 to comment on the TOR.

The project proponent is **Whitehaven WS Pty Ltd**, a wholly owned subsidiary of Whitehaven Coal. The project is a proposed metallurgical coal mine with a yield of up to 8 million tonnes per annum of product coal for a mine life of approximately 30 years.

You can read the joint statement here.

You can read the draft terms of reference here.

You can read about the Winchester South Project here.

Novo Resources and Sumitomo enter into farm-in and JV worth US$30 million

On 7 June 2019, **Novo Resources Corp**, a TSX listed gold exploration and development company, announced that it has entered into a US$30 million farm-in and joint venture agreement with **Sumitomo Corporation** and a wholly owned Australian subsidiary of Sumitomo.

Under the Agreement, Sumitomo is entitled to earn up to a 40% interest in Novo's **Egina** project, 'an early-stage, high potential gold project' located in the Pilbara region, Western Australia.

You can read Novo Resources' full news release here.

FMG Resources and Tasman Resources sign farm-in and joint venture agreement

On 14 June 2019, ASX listed **Tasman Resources Ltd** announced that it has executed a conditional farm-in and joint venture agreement with **FMG Resources Pty Ltd**, a subsidiary of ASX listed **Fortescue Metals Group**. The agreement relates to exploration expenditure for Tasman's Exploration Licence 5499, located about 30km north of **BHP's Olympic Dam** mine in South Australia and has 'iron oxide-copper-gold-uranium' prospects.

Under the terms of the agreement, FMG Resources may earn a 51% joint venture interest by sole funding A$4 million (plus GST) on exploration expenditure within a three year period, and has an election to increase its joint venture interest to 80% by sole funding a further A$7 million (plus GST) on exploration expenditure within a further 5 year period.

You can read the full ASX announcement here.

RECENT ANNOUNCEMENTS (CONTINUED)

the acquisition aligns with its strategic plan to increase its underground mining capability

Macmahon Holdings to acquire GBF Underground Mining Group for A$48 million

On 18 June 2019, ASX listed **Macmahon Holdings Limited**, an Australian based mining services company, announced that it has executed a binding contract to fully acquire **GF Holdings (WA) Pty Ltd** and its subsidiaries, the **GBF Underground Mining Group**. The GBF Underground Mining Group is a specialist underground mining contractor with activities in the Goldfields region of Western Australia.

The purchase price is A$48 million upfront, funded in cash and taking on GBF's finance lease debt. Completion is anticipated to occur by mid-August 2019.

According to Macmahon's announcement, the acquisition aligns with its strategic plan to increase its underground mining capability.

You can read the full ASX announcement here.

Mincor to divest its Widgiemooltha Gold Operations

On 7 June 2019, ASX listed **Mincor Resources NL** advised it has completed a strategic review of its gold operations in Western Australia. Mincor announced that its board has decided to commence a divestment process for its **Widgiemooltha Gold Operations** and its gold rights at **Bluebush** and **Jeffreys Find**.

You can read the full ASX announcement here.

Komatsu to acquire Immersive Technologies

On 14 June 2019, **Komatsu Ltd** announced that it has, through its wholly owned Australian subsidiary, agreed to acquire **Immersive Technologies Pty Ltd**, a mining workforce optimisation company based in Western Australia. Komatsu expected to complete the acquisition on 1 July 2019.

You can read Komatsu Ltd's full press release here.

Iluka Resources to commence strategic partnership in Sierra Leone

On 6 June 2019, ASX listed **Iluka Resources Limited**, an international mineral sands company with projects in Australia and Sierra Leone, announced that it has entered into a strategic partnership with the **International Finance Corporation** (**IFC**) in relation to Illuka's **Sierra Rutile** operations. Sierra Rutile Limited is a wholly owned subsidiary of Iluka and operates mineral sands assets in Sierra Leone.

Under the terms of the agreement, IFC will subscribe to shares equivalent to a 10% stake in Sierra Rutile, for US$60 million. This will comprise an initial investment of US$20 million and a further investment of US$40 million. The US$40 million investment is conditional on Iluka's approval of the construction of early works for the Sembehun project and completion and disclosure of the Environmental and Social Impact Assessment.

Another key term of the agreement is Sierra Rutile's commitment to the IFC Performance Standards on Environmental and Social Sustainability. These standards define IFC clients' responsibilities for the management of their environmental and social risks.

You can read the full ASX announcement here.

You can also read the IFC's Performance Standards here.

RECENTLY COMPLETED DEALS

Westgold sells Higginsville Gold Operations to RNC Minerals

Further to our reporting in our May edition, on 12 June 2019 ASX listed **Westgold Resources Limited** announced the completion of the sale of its **Higginsville Gold Operations** to **RNC Minerals**, a Canadian-based mining company. RNC Minerals paid 50% in cash and 50% in RNC shares for a total consideration of approximately A$50 million.

You can read the full ASX announcement here.

MARKET RUMOURS AND OPPORTUNITIES

a lot of opportunities right now in the lithium space

Northern Star may be considering buying Kalgoorlie Super Pit gold mine

ASX listed gold miner **Northern Star** may be considering an acquisition of the **Super Pit** gold mine in Western Australia. Following on from our last Mining Sector Update, *The Australian* reported on 26 June 2019 that the mine, which is jointly owned by **Newmont Goldcorp** and **Barrick Gold**, may be up for sale by the end of the year. The report noted that ASX listed **Evolution Gold** may also be interested in the mine.

Wesfarmers still on the lookout for lithium investment

The Australian reported on 14 June 2019 that Perth-based ASX listed **Wesfarmers Limited** is looking for further acquisition opportunities in the lithium space. This follows on from the company's A$776 million acquisition of **Kidman Resources Limited** (expected to complete in September 2019) and their $1.5 billion proposal to takeover rare earths producer **Lynas Corporation**. *The Australian* reports that Wesfarmers' Managing Director, Rob Scott sees a lot of opportunities right now in the lithium space but there are 'very few that would meet [Wesfarmers] investment criteria'.

Coal India looking at buying stakes in Australian assets

The Indian *Business Standard* on 9 June 2019 reported that state-owned **Coal India Limited** is in the process of procuring financial due diligence and advisory services for upcoming potential investment in mines and coal assets in Australia. The company has reportedly identified mines and companies that it believes investment in will help meet the growing coking coal and high-grade fuel demand in India.

Anglo American looking at expanding coal exports from Queensland

The *Australian Financial Review* reported on 6 June 2019 that **Anglo American plc** is looking into several new investments in its Queensland mines. The report suggests an expansion of the coal preparation plant that services Anglo's **Moranbah North** and **Grosvenor** coking coal mines could enable Anglo to sell an extra four million tonnes of coking coal per year from 2021.

The report also indicates that Anglo may soon be following the likes of **Fortescue Metals** (mentioned in our last **Mining Sector Update**) by investing in a fleet of autonomous trucks for its **Dawson** coal mine in Queensland.

You can read our article on autonomous vehicles in our previous MSU here.

BHP increasingly expected to sell remaining thermal coal assets

According to an article in *The Australian* on 24 May 2019, a sale of ASX listed **BHP**'s last remaining thermal coal assets is looking increasingly likely.

The report said that comments by BHP have led to speculation that the company may sell its last remaining thermal coal mines – the **Mount Arthur** mine in the NSW Hunter Valley and the **Cerrejon mine** in Colombia. The report suggests that the fall in profit margin of these two mines is likely to continue.

could enable Anglo to sell an extra four million tonnes of coking coal per year

REGULATORY UPDATES

COMMONWEALTH

Lessons from 'Rocky Hill': Why proponents of major projects need to consider the link between climate change and human rights

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Probably the most controversial and much-discussed aspect of the recent refusal by the NSW Land and Environment Court of planning approval for the Rocky Hill coal mine is how the Court supported its decision by drawing on international jurisprudence linking fossil fuels and climate change.

But by refusing development consent on the basis of the mine's likely contribution to climate change and adverse social impacts, the Court has also drawn our attention to the increasing importance of human rights considerations in assessing the impact of major projects.

Proponents of major projects should be mindful of the link between climate change and human rights, particularly when assessing the public interest criterion of project impacts.

In an evocative closing paragraph, the Court summarised the basis for its decision:

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

Climate change aspects of the decision

It is clear that this decision will have a considerable influence on the evidence required to be provided of the potential effects on climate change of new coal mines and other greenhouse gas (**GHG**) generating and fossil fuel-dependent industries in New South Wales.

The link between climate change and the burning of fossil fuels is well established. The Court cited evidence given by ANU Professor Will Steffen that the continuing effects of anthropogenic climate change initiated by excessive emissions of GHG's include increases in sea levels, ocean warming and acidification, and increases in the intensity and frequency of extreme weather events – including flood, drought, heat waves and a harsher fire-weather climate.

Groundswell, a community organisation that was granted leave to join the proceedings, argued that the impact of climate change on the community is so great as to require the rejection of the project. On behalf of Groundswell, Professor Steffen's evidence was that to keep the world's temperature at global targets below 2C above pre-industrial temperatures, most of the world's existing fossil fuel reserves must be left in the ground. It follows, he said, that no new fossil fuel development is consistent with that goal.

While the Court did not agree that no future fossil fuel development could ever again be approved, it suggested that there should be greater focus on prioritising comparatively less-damaging proposals. This would involve fully assessing both the absolute and relative merits of a proposal, including the amount of GHG emissions it would produce and the likely broader contribution to climate change.

Human rights link

Although the Rocky Hill decision did not expressly connect the climate change-related consequences of the project's approval with human rights impacts, the decision has significance for human rights.

In its concern for the social impact of the proposed development, the Court implicitly recognised the adverse human rights implications of climate change.

As outlined by Professor Steffen, climate change has clear and direct consequences for people across the world. It affects considerations enshrined in the Declaration of Human Rights, such as the right to life, adequate food, water, health, housing, to livelihoods, and an adequate standard of living.

Chief among these is the right to life. As Kyung-wha Kang, former UN Deputy High Commissioner for Human Rights, noted:

> 'Global warming and extreme weather conditions may have calamitous consequences for the human rights of millions of people ... ultimately climate change may affect the very right to life of various individuals ... [countries] have an obligation to prevent and address some of the direst consequences that climate change may reap on human rights'

Rising sea levels threaten to displace millions around the world, destroying livelihoods, communities and heightening human insecurity. Substantial increases in the number of extreme weather events (a consequence of climate change) also pose a direct threat to the right to life.

The risk has a particular impact on indigenous peoples, due to their deep engagement with the land. The Australian Human Rights Commission recently predicted that northern Aboriginal communities will bear the brunt of climate change and will face serious risk of disease and heat stress, as well as loss of food sources from floods, droughts and more intense bushfires.

The Court did not accept arguments that the impacts of one mine are too remote to warrant refusal on the basis of a scientifically complex force linked to global trends in resource and energy exploitation and use.

Rather, the Court acknowledged that these macroscopic impacts, which will affect humanity as a whole, are capable of justifying a decision to refuse consent to a single proposed project on its merits.

Although the GHG emissions and the consequent impact on climate change played a part in the decision to refuse development consent, the Court explicitly acknowledged that the primary and 'better' reason for its decision was the project's effect on social and other amenities. This is another aspect of the decision's relevance from a human rights perspective.

The Court did not accept arguments that the impacts of one mine are too remote to warrant refusal

the Court implicitly took into account a number of human rights consequences that may result from a large scale development

Social impacts of the Rocky Hill project

Chief Justice Preston had significant regard for the fact that the project would 'adversely affect the social composition of the community and the current rural town atmosphere' and 'significantly affect people's sense of place and hence community'. His Honour strongly endorsed expert evidence of Dr Askland where he stated:

'The risks associated with the project in relation to sense of place relate to:

1. the physical destruction of a loved environment; and
2. the rupture of a positive emotional bond between self and environment, which is central to people's sense of self and place'

(Askland Report, [135])

His Honour was concerned that these changes would undo strong community ties and the attachment the residents have to Gloucester as a place, in light of their lived experiences and strong emotional bonds to the land.

The Court also recognised that the distributive injustice of the project would also have social impacts. The benefits of the mine would be experienced by a select few for a limited period of time, but the detriment would be ongoing and not necessarily experienced by those who would benefit.

In all, it was thought that the resultant social risk was so extreme that overall, the project's effects would be more negative than positive — even taking into account the lost economic opportunity.

Ultimately the decision shows that the Court implicitly took into account a number of human rights consequences that may result from a large scale development. It did this by placing particular emphasis on the Rocky Hill project's social and community impacts and citing these as a specific and defined basis for refusing to grant consent.

The importance of community, well-being and public interest

The weight afforded by the Court to the project's perceived social detriment echoes an emerging sentiment among global policymakers that broader social 'well-being' is a key consideration that ought to be given greater weight.

The impetus behind this is the acknowledgement that decreased social well-being can indirectly bear upon fundamental human rights. One example is the right to the enjoyment of the highest attainable standard of physical and mental health and the right to an adequate standard of living under the International Covenant on Economic, Social and Cultural Rights (see Article 12). More generally, resultant human insecurity is seen as an undesirable end in itself.

It is also worth considering the relevance of rights to identity and self-determination. It is a generally-accepted principle that these rights are intertwined with the need to belong to a community or other social group. This is because humans exist naturally as a 'eusocial' species that is heavily dependent on communal relationships. In order for these rights to be fulfilled, community groups must be afforded stability and support to endure, flourish and grow.

There is academic recognition that local government and planning law can curtail and restrict or promote and assist the fulfilment of these rights, by regulating land use through zoning. Much of this discourse has centred around the emerging concept of a 'right to remain' amidst the phenomenon of gentrification and the marginalisation of particularly vulnerable or ostracised social groups. Those affected may include immigrants, particular ethnic groups, Indigenous peoples, and the socio-economically disadvantaged.

However, there is room to apply these concepts in a more mainstream manner, where there are contentious and large-scale projects that may cause enduring shifts in the composition and dynamic of local communities.

Move away from economic metrics

The Gloucester decision recognises a notion of 'communal well-being' that is not necessarily intertwined with the pursuit of economic gain. This shift away from abstractions like economic growth, and towards metrics better reflecting the tangible enrichment of human life, has long been stressed in development studies.

Amartya Sen, in his renowned book 'Development as Freedom' ([2004) Oxford University Press), argues that greater emphasis ought to be place on substantive freedoms, 'expanding the freedoms that people enjoy; the enrichment of human life'.

In a similar vein, the recent Marsh Global Risks Report 2019 recognises societal stress as a key risk for the first time ever. Like Chief Justice Preston's judgment, the report suggests that communal 'well-being' is an important public interest consideration. It highlights how individual harms and stressors can contribute towards (and exacerbate) systemic risks, with grave implications. For instance, broader social discontent could generate greater political volatility, and increase the risk of social unrest.

A different way of looking at impacts of development

As can be seen, policy makers, academics and now the courts, are taking a wider perspective on the environmental impacts of developments under assessment.

Proponents of highly-impactful developments should be mindful of the effects of climate change from this different perspective. GHG emissions affect the environment and must be fully assessed on that basis. The Rocky Hill decision makes clear that this 'pure' environmental assessment must include direct, indirect and downstream impacts of GHG emissions.

Proponents should also consider the social and, ultimately, the human rights impacts of the rapid and severe changes to the environment caused by climate change.

As non-economic metrics evolve and gain greater weight in environmental impact assessment, predictions of a project's employment generation capacity alone will not satisfy the social and human rights expectations of planning authorities and communities into the future.

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ADANI'S CARMICHAEL COAL PROJECT
TIMELINE TO APPROVAL

On 13 June 2019, the Queensland Department of Environment and Science granted the final environmental approval for **Adani's Carmichael Coal and Rail Project** (the **Project**) by approving the mine's groundwater management plan. This was the last hurdle in a long series of approvals, criticisms and challenges to the Project in a process which has spanned almost nine years. Here we take a look at how the Project's approvals process has played out since Adani lodged its initial application back in 2010.

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2010

22 October 2010
Adani Mining Pty Ltd (**Adani**) lodges its application and initial advice statement to the Queensland Government for a A$16 billion, 60 Mtpa open cut and underground thermal coal mine and associated infrastructure in the Galilee Basin.

26 November 2010
Queensland's Coordinator-General declares the Project a 'significant project' for which an Environmental Impact Statement (**EIS**) is required under State legislation.

2011

6 January 2011
The Project is deemed a 'controlled action' with potential to have a significant impact on matters of national environmental significance, requiring approval under the *Commonwealth Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**).

2012

15 December 2012
Adani releases its initial EIS for public consultation. The consultation period ends on 11 February 2013.

2013

26 March 2013
Queensland's State Coordinator-General requests additional information for the EIS.

25 November 2013
Adani releases additional information in its supplementary EIS for public consultation. The consultation period ends on 20 December 2013.

2014

16 April 2014
Queensland's Department of Natural Resources, Mines and Energy issues public notices of three mining lease applications (**MLA**s) for the Project lodged by Adani under the *Mineral Resources Act 1989* (Qld).

28 August 2014
Adani is issued a draft environmental authority (**EA**) for the mine under the *Environmental Protection Act 1994* (Qld) (**EPA**), subject to a number of environmental protection conditions imposed by the Coordinator-General.

7 May 2014
Queensland's State Coordinator-General approves the Project subject to conditions and recommendations. This approval is further subject to Federal Government EPBC Act approval.

24 July 2014
Federal Minister for the Environment Greg Hunt approves the 'controlled action' under the EPBC Act, subject to 36 strict conditions focused on conserving groundwater.

4 August 2015
After a legal challenge by the Mackay Conservation Group, the Federal Court sets aside the Federal Environment Minister's approval under the EPBC Act on the basis that the Minister did not properly consider advice on two vulnerable species, the yakka skink and the ornamental snake.

14 October 2015
Federal Environment Minister Greg Hunt re-approves the project under the EPBC Act, taking into account the issues raised in the Federal Court and with additional environmental conditions which need to be met by Adani.

2 February 2016
Following the Land Court's recommendations, the State grants Adani its EA.

3 April 2016
The three MLAs for the project are approved, and mining leases granted by the Queensland Minister for Natural Resources, Mines and Energy, Anthony Lynham.

29 August 2016
The Federal Court dismisses an application by the Australian Conservation Foundation (**ACF**) seeking judicial review of the Federal Minister for the Environment's decision on 14 October 2015 to re-approve the project, alleging the Minister failed to properly consider the impacts of greenhouse gas emissions from the Project on the Great Barrier Reef.[16] The ACF subsequently lodge an appeal to the Full Court of the Federal Court. The appeal is dismissed on 25 August 2017.

4 December 2018
The ACF brings a second judicial review application in the Federal Court, alleging that the Minister for the Environment, Melissa Price, made an error in deciding that water use from the Project's proposed offsite water infrastructure (the North Galilee Water Scheme) did not require approval under the EPBC Act's 'water trigger'. The application is ultimately successful and the Minister must reassess the offsite water scheme. This assessment is not a barrier to the Project proceeding.

22 May 2019
Premier Annastacia Palasczuk confirms that there are only two remaining outstanding State-level approvals for the Project, the Black-throated Finch Management Plan (**BTFMP**) and the GDEMP.

13 June 2019
The GDEMP is approved by the DES, allowing work to begin on the mine.

2015 2016 2017 2018 2019

15 December 2015
The Land Court of Queensland concludes an objections hearing initiated by conservation group Land Services of Coast and Country (**LSCC**). LSCC object to the three MLAs and the draft EA based on:

- the impacts of the mine on groundwater and dependent ecosystems;
- the impacts of the mine on biodiversity including the Black-throated Finch;
- the contribution to climate change and damaging the Great Barrier Reef World Heritage Area;
- the mine not being economically viable; and
- the mine being contrary to the public interest.

The Court ultimately refuses the objection, but makes a list of environmental protection recommendations for the Project related to monitoring of impacts on the Black-throated Finch.

26 April 2016
LSCC seek judicial review of the EA in the Supreme Court of Queensland. The application is ultimately dismissed by the court on 25 October 2016.

12 December 2017
Premier Annastacia Palasczuk notifies the Federal Minister for Resources and Northern Australia, Matt Canavan, of the Queensland Government's decision to veto a reported A$1 billion taxpayer-funded Northern Australia Infrastructure Fund (**NAIF**) loan for the Project.

29 November 2018
CEO Lucas Dow announces Adani will self-finance a scaled-back version of the Project. The revised mine is advertised to begin as a 10 Mtpa open cut mine, with production increasing over time to 27.5 Mtpa. The environmental approvals remain unchanged.

22 February 2019
The CSIRO and Geoscience Australia present their final report to the Federal Department of Environment and Energy providing recommendations on Adani's Groundwater Management and Monitoring Program (**GMMP**) and Groundwater Dependent Ecosystems Management Plan (**GDEMP**). The report finds that the modelling used in the GMMP is not suitable to ensure the conditions of the EPBC approval are satisfied.

8 April 2019
After further consultation with the CSIRO and Geoscience Australia regarding the groundwater modelling, the Federal Minister for the Environment approves Adani's GMMP and GDEMP. This is the final Federal Government approval required for the Project.

31 May 2019
The BTFMP is approved by the Queensland Department of Environment and Science (**DES**).

REGULATORY UPDATES (CONTINUED)

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Parent company guarantees can't circumvent arbitration because they aren't 'as good as cash'

In a recent decision – *JKC Australia LNG Pty Ltd v CH2M Hill Companies Ltd* [2019] WASC 177 – the Chief Justice of the Supreme Court of Western Australia refused to declare that a parent company guarantee was 'as good as cash'. In doing so, he in effect invalidated calls on parent company guarantees while the underlying dispute was subject to arbitration, and clarified the circumstances in which instruments will be treated in that way.

Background

INPEX Operations Australia Pty Ltd engaged JKC Australia LNG Pty Ltd (**JKC**) to engineer, procure, construct and commission the Ichthys Onshore LNG Production Facility, which forms part of the Ichthys LNG Project.

The onshore facilities are powered by a Combined Cycle Power Plant (**Power Plant**). JKC subcontracted the engineering, procurement, construction and commissioning of the Power Plant to a consortium of CH2M Australia Pty Ltd, UGL Infrastructure Pty Ltd, General Electric Company and General Electric International Inc (**Consortium**).

The performance of the Consortium's obligations under the subcontract was guaranteed by parent company guarantees (**Parent Company Guarantees**) given by CH2M Hill Companies Ltd, UGL Pty Ltd, and General Electric Company (**the Parents**).

The subcontract was terminated and disputes arose between JKC and the Consortium relating to the subcontract and the termination. These disputes are presently the subject of an arbitration. JKC is claiming the costs of engaging replacement subcontractors to complete the Power Plant, and the Consortium is claiming for the value of the work it performed.

On 24 July 2018 and 2 November 2018, with the arbitration still unresolved, JKC issued demands to the Parents under the Parent Company Guarantees. The Parents denied they had any liability under the Parent Company Guarantees for the amounts claimed, on the basis that the Consortium's liability was still in dispute, and that they were entitled to rely on any defence, set-off or counterclaim available to the Consortium.

The court proceedings – what were the issues?

JKC brought proceedings in the Supreme Court of Western Australia seeking a number of declarations as to the proper construction of the Parent Company Guarantees. JKC argued that the Parent Company Guarantees should be treated as 'pay now, argue later' instruments, similar to bank guarantees.

The Parents argued that any obligation under the Parent Company Guarantees depended on establishing actual liability under the subcontract. If so, they could rely on any defence, set-off or counterclaim that the Consortium could assert to resist payment under the Parent Company Guarantees. In that context, the Parents also challenged JKC's ability to form a reasonable opinion as to the Parents' liability without reference to the Consortium's defences.

A question of construction

The dispute turned partly on the construction of clauses 2, 3 and 9.2 of the Parent Company Guarantees.

- Clause 2 provided that the Parents 'unconditionally and irrevocably guaranteed' the performance of the Consortium's obligations under the subcontract, including 'the payment of any amounts due and unpaid under the subcontract'.
- Clause 3 provided that if, in JKC's 'reasonable opinion', the Consortium had failed to perform any obligations under the subcontract, the Parents were required to perform those obligations on receiving written notice from JKC 'until the termination of the Subcontract by the effluxion of time or otherwise'.
- Clause 9.2 related to the limitation of the guarantors' liability under the subcontract, and stated that in the event of 'any claim under this guarantee', the guarantor was entitled to assert any defence, set-off or counterclaim.

Parent Company Guarantees not 'as good as cash'

Chief Justice Quinlan found that the Parent Company Guarantees were not in the nature of performance bonds, and did require actual liability on the part of the Consortium. Accordingly, the Parents were entitled to assert any defence, set-off or counterclaim to a claim under the guarantees, and any call under the guarantees would need to wait until actual liability had been determined in the arbitration.

In coming to that conclusion, Quinlan CJ started from a conventional position of giving the Parent Company Guarantees the meaning that reasonable commercial businesspeople would have understood them to have. Again, conventionally, His Honour considered the text, context (including the Subcontract and other bank guarantees provided under it) and their purpose.

He then turned to guarantee type provisions, and recognised that the decided authorities direct attention to two common commercial purposes for these documents:

- first, as a mechanism to provide security; and
- second, as a contractual allocation of risk.

His Honour emphasised that these purposes must be discerned as a matter of construction.

The Parents argued that a presumption against the second purpose arises where guarantees are not provided by banks, relying on the decision of the Court of Appeal of England and Wales in *Marubeni Hong Kong and South China Ltd v Mongolian Government* [2005] 1 WLR 2497. His Honour found that this presumption did not form part of the law of Australia, which avoids reliance on presumptions in favour of construing the relevant contract itself using its text, context and purpose.

Applying the Australian principles to the Parent Company Guarantees, Quinlan CJ determined that the words of the subcontract did not suggest that the Parent Company Guarantees served a 'risk allocation' purpose as contended by JKC, and so, was not intended to be akin to performance security.

the words of the subcontract did not suggest that the Parent Company Guarantees served a 'risk allocation' purpose

REGULATORY UPDATES (CONTINUED)

when drafting security that is intended to be as good as cash, drafters must be careful to ensure that that purpose and intent are clear on the face of the agreement

In coming to that conclusion, His Honour gave weight to the following factors:

- the words 'to guarantee the due performance of Subcontractor's obligations', which preceded the Parent Company Guarantees in the subcontract, suggested that their true purpose was to serve as a mechanism for the Parents to provide security for the subsidiaries' performance;
- the words 'payable on first demand of Contractor' in the subcontract supported a risk allocation purpose and, in context, could only apply to the bank guarantees contemplated by the subcontract and not the Parent Company Guarantees;
- the context in which guarantees by parent companies are often given. In such cases, parent companies have a real interest in the rights of the parties under the underlying contract, and are the very kind of entities that a reasonable businessperson would expect to be providing security for their subsidiaries' performance. This is a different scenario to that of a bank providing a bond or a letter of credit; and
- the terms of the Parent Company Guarantees did not contain any express provision which could be said to denote the 'cash equivalent' and 'pay on demand' quality of performance bonds. Rather, they manifested an intention and a purpose that the Parents had a real and substantial interest in the actual liability of the subcontractor, and that actual liability is what would determine the extent of the Parents' liability.

Comment

This decision is a good example of the Australian approach to the construction of contracts, whatever their nature. Australian Courts will focus on the objective meaning of a contract, and will as a rule be reluctant to use any presumptions to fetter that focus.

It also emphasises that when drafting security that is intended to be as good as cash, drafters must be careful to ensure that that purpose and intent are clear on the face of the agreement. To achieve this they can:

- use clear, express words in the underlying contract, such as 'payable on first demand' when referring to the security in question; and
- include a clause in the security instrument which notes that the guarantor's obligation to make payment arises on demand, notwithstanding any contest or dispute by the relevant party to the underlying contract.

Biometric technology in the workplace: why unfair dismissal claims are just the (finger) tip of the iceberg

In this age of technological advancement, employers are developing innovative methods for monitoring and identifying employees in the workplace. Biometric data, including fingerprint scans, is increasingly being utilised by employers to identify employees, establish records of working hours, restrict access to secure areas, provide security and enhance workplace health and safety.

In the recent case of *Lee v Superior Wood*, the Full Bench of the Fair Work Commission considered whether an employee's dismissal for refusing to scan his fingerprints was an unfair dismissal.

This decision raises important issues for employers looking to introduce new biometric data collection technology in the workplace, and provides guidance on how to lawfully manage an employee's refusal to participate in that process.

Read our full analysis here.

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REGULATORY UPDATES (CONTINUED)

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Draft guideline issued on progressive rehabilitation and closure plans

Last year we saw the *Mineral and Energy Resources (Financial Provisioning) Bill 2018* (**Bill**) make sweeping reforms to the Queensland resources sector's environmental rehabilitation and financial assurance framework. Significantly, new requirements for the progressive rehabilitation and closure of mined land will commence by November 2019. To comply with these new requirements, proponents conducting certain mining activities will be required to prepare and submit a Progressive Rehabilitation and Closure Plan (**PRCP**).

The Department of Environment and Science has now released a draft PRCP Guideline (**Guideline**), accessible here. Although in draft-form, this Guideline provides important clarification on what the PRCP should look like and contain. It is important for those undertaking, or considering undertaking, mining activities in Queensland to be aware of these developments.

A reminder about the Bill

The *Mineral and Energy Resources (Financial Provisioning) Bill 2018* (**Bill**) was passed in November 2018.

In addition to the financial assurance scheme reform (which you can read our full analysis of here), the Bill introduces the concept of a PRCP to the *Environmental Protection Act 1994* (**EP Act**). These PRCP reforms will commence no later than 1 November 2019, on a date known as the 'PRCP start date'.

You can read our previous analysis of the PRCP reforms here.

What are the main effects of the PRCP reforms?

Applicants for environment authorities

Applicants for site-specific environment authorities (**EAs**) for a new mining activity relating to a mining lease must develop and submit a proposed PRCP along with their EA application. The PRCP must be comprised of:

1. the PRCP schedule; and
2. the rehabilitation planning part.

If approved, the PRCP schedule will be attached to the EA. It will be overridden by the EA in the event of an inconsistency between the two.

Holders of existing environment authorities

Holders of an existing EA for a mining activity relating to a mining lease approved through a site-specific application will not avoid these reforms.

The Department of Environment and Science (**DES**) will issue such persons with a transition notice within three years after the PRCP start date. The notice will specify a date by which a PRCP must be developed and submitted. Once approved, the PRCP schedule will replace any existing Plan of Operations. Again, the EA will override the PRCP schedule in the event of an inconsistency.

For those planning on submitting a proposed PRCP before they receive a transitional notice, it is important to note that the administering authority is not required to begin its assessment of a PRCP until it has issued a transitional notice in relation to the EA.

What can we learn from the Guideline?

Although in draft form, the Guideline provides useful instruction on the information required to be included in the PRCP and the decision-making criteria that will be applied in assessing PRCPs.

Contents of the PRCP

The PRCP must be completed in the approved form, a draft of which is accessible here.

Rehabilitation planning part

The rehabilitation planning part of the PRCP is intended to support and justify the PRCP schedule. The Guideline sets out and explains the information which is required by legislation and regulation to be provided, including information on project planning, post-mining land use and stakeholder consultation.

The Guideline makes it clear that there are different requirements for applicants for environmental authorities and holders of existing authorities (for example, in relation to project planning, applicants for environmental authorities must include certain 'baseline information', while for transitional applications the PRCP can note where this information is not available).

PRCP schedule

The PRCP schedule must include:

1. either a post-mining land use (**PMLU**) or non-use management area (**NUMA**) for all land within the relevant resource tenures, rehabilitation or improvement areas;
2. identification of when land becomes available for rehabilitation or improvement;
3. rehabilitation or management milestones to achieve the PMLU or NUMA outcomes;
4. milestone criteria that demonstrate when each milestone has been completed;
5. completion dates for each milestone; and
6. any conditions considered necessary and desirable.

It will consist of separate tables for PMLUs and any NUMAs, an example of which is given at Appendix 3 of the Guideline.

Applicants for site-specific environment authorities (EAs) for a new mining activity relating to a mining lease must develop and submit a proposed PRCP along with their EA application

REGULATORY UPDATES (CONTINUED)

The Guideline suggests that proponents take the following steps to develop their PRCP schedules:

1. Complete the final site design, being a map showing the maximum disturbance footprint, resource tenure boundaries, PMLUs and NUMAs for the land within the tenure.
2. Divide each PMLU into rehabilitation areas (areas of land in the PMLU to which a rehabilitation milestone for the PMLU relates) and each NUMA into improvement areas (areas of land in the NUMA to which a management milestone for the NUMA relates).
3. Determine when land becomes available and when the first milestone must commence, noting that land must be rehabilitated as soon as practicable.
4. Develop relevant milestones (with reference milestones set out at Appendix 4 of the Guideline).
5. Develop site-specific milestone criteria.
6. Propose timing for when each milestone will be completed.

What are the decision criteria for approving a PRCP schedule?

The administering authority must consider the following factors:

1. The site-specific EA application, which will be used to inform whether the PRCP is adequate to manage environmental risks.
2. The proposed PRCP, focussing on whether the information provided in the rehabilitation planning part justifies the PMLUs, NUMAs and proposed rehabilitation milestones. In particular, the PRCP schedule must:
    a. provide for any void located in a flood plain to be rehabilitated to a stable condition;
    b. provide for the land to be rehabilitated as soon as practicable after the land becomes available; and
    c. only include a NUMA where sufficient evidence is provided to demonstrate that rehabilitating the land would cause a greater risk of environmental harm than not carrying out rehabilitation, or the risk of environmental harm caused by not rehabilitating the land is confined to the area of the tenure and the applicant considers, having regard to each public interest consideration, that it is in the public interest for the land not to be rehabilitated to a stable condition.
3. Responses to information requests, particularly where the response is insufficient to assess the proposed PRCP schedule.
4. The standard criteria as defined in Schedule 4 of the EP Act, including the precautionary principle, intergenerational equity, conservation of biological diversity and ecological integrity and best practice environmental management.
5. The Guideline, focussing on whether the information required under the Guideline has been provided in the rehabilitation planning part of the PRCP.

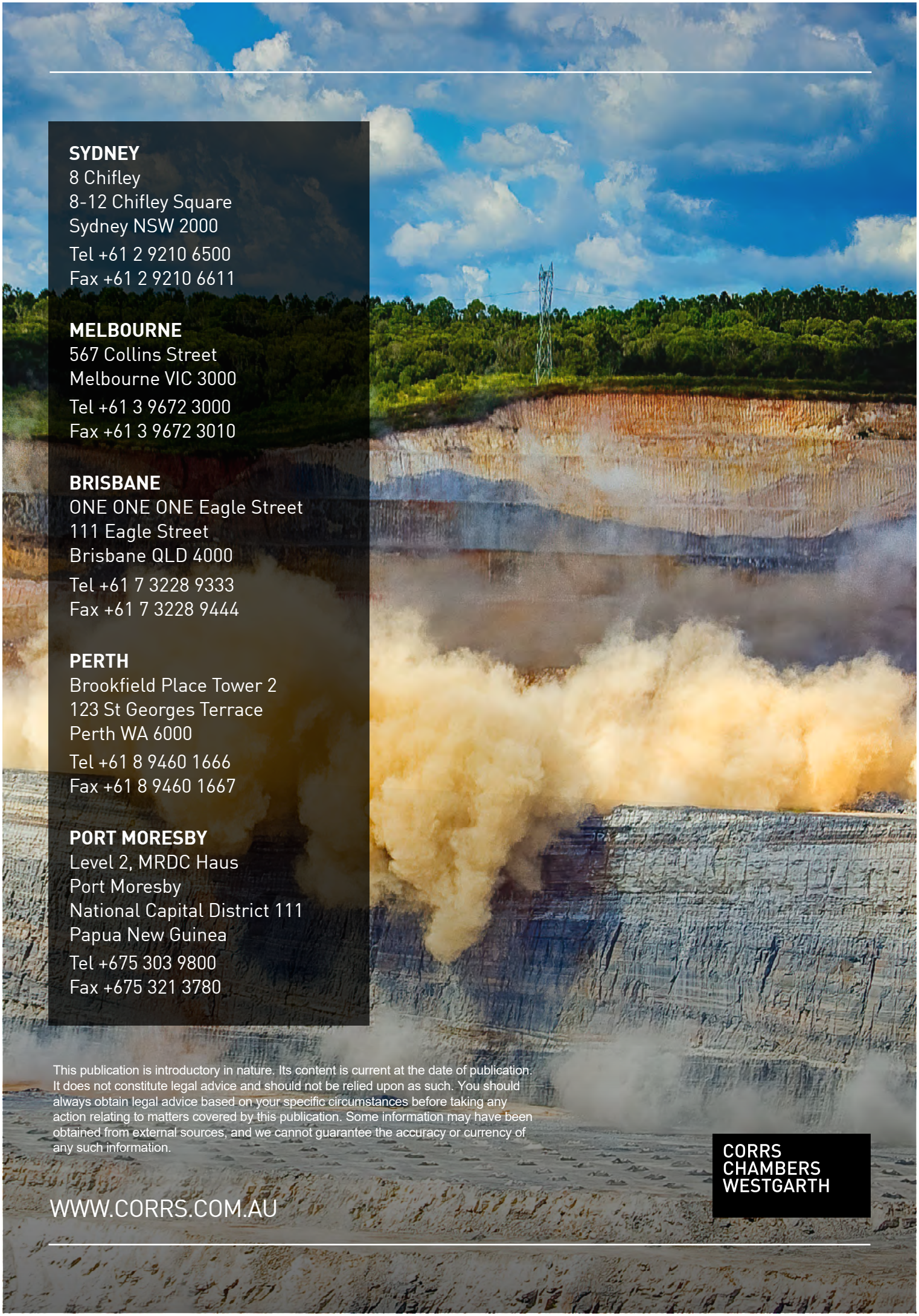
The PRCP will not be approved unless:

1. each proposed NUMA under the schedule has been properly identified as a NUMA;
2. if a public interest evaluation is required for a proposed NUMA under the schedule – the report for the evaluation recommends it is in the public interest to approve the area as a NUMA; and
3. the administering authority is satisfied the schedule provides for all land the subject of the schedule to be rehabilitated to a stable condition or managed as a NUMA.

What's next?

Submissions on the Guideline and draft application form were due in June. Until a final guideline is issued, those undertaking, or considering undertaking, mining activities in Queensland should familiarise themselves with the key aspects of the PRCP regime and start planning their applications.

When the time comes to submit applications, the DES encourages applicants to arrange a pre-lodgement meeting with the administering authority to ensure their proposed PRCP will be compliant.



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