MINING SECTOR UPDATE

AUSTRALIA AND PAPUA NEW GUINEA

MAY 2019

INTRODUCTION

Welcome to the May 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:

- tips and insights relating to the NSW Land and Environment Court's refusal of development consent for the Rocky Hill Coal Mine
- the potential to commercialise learnings from the use of autonomous vehicles in the resources sector
- a foreign investment approval update
- the High Court of Australia's decision on native title compensation in the Timber Creek case
- the *Nature Conservation (Special Wildlife Reserves) and Other Legislation Amendment Act 2019* (Qld), which establishes a new class of protected area in which mining is prohibited
- amendments to the *Mineral Resources Act 1989* and the *Petroleum and Gas (Production and Safety) Act 2004*

RECENT ANNOUNCEMENTS

Newcrest to acquire 70% interest in Canadian orebody

ASX listed **Newcrest Mining Limited** has announced that it has entered into an agreement with Canadian miner **Imperial Metals Corporation** to acquire a 70% joint venture interest in the **Red Chris** copper-gold mine in British Columbia. Newcrest will become the operator of the mine, which has estimated resources of 20 million ounces of gold and 13 billion pounds of copper.

The company plans to use experience gained from mining its **Cadia Valley** gold mine in Australia to maximise the potential opportunities of Red Chris. The deal (announced on 11 March 2019) will cost Newcrest US$806.5 million and is subject to customary conditions precedent.

You can read Newcrest's ASX announcement here.

Pure Alumina to acquire Canadian alumina producer Polar Sapphire

In a statement released on 21 March 2019, ASX listed **Pure Alumina Limited** announced that it has signed a binding agreement to acquire the Canadian high purity alumina (HPA) producer **Polar Sapphire Limited** for A$27.1 million.

Pure Alumina expects the acquisition of Polar will allow it to rapidly expand HPA production to meet the exceptional growth in demand for the product, and to fast track its plans to commence commercial production of HPA this year.

The Pure Alumina ASX announcement can be read in full here.

Westgold to sell its Higginsville Gold Operations to RNC Minerals

ASX listed **Westgold Resources Limited** has announced that it has entered into an agreement to sell its **Higginsville Gold Operations** in Western Australia to Canadian based **RNC Minerals**.

The deal, announced on 26 March 2019, will involve Westgold selling its subsidiaries that hold the assets and tenements of the Higginsville project in return for A$25 million in cash and A$25 million in RNC shares.

The Westgold ASX announcement can be read in full here.

RECENTLY COMPLETED DEALS

Sipa Resources acquires Clara gold project in Queensland

On 27 March 2019, ASX listed **Sipa Resources Limited** announced its acquisition of the **Clara Project**, a gold project in North Queensland. The Clara Project is located along the same structure in which ASX listed **Moho Resources Limited** recently discovered gold.

This project, along with the company's recent acquisition of the **Barbwire Terrace MVT Zinc Project** in Western Australia last year, form part of Sipa's strategic plan to secure early positions in under-explored mineral deposits.

The Sipa ASX announcement can be read in full here.

acquisition of the Clara Project, a gold project in North Queensland

aims to position the company as a 'fully integrated participant in the lithium raw materials and chemicals value chain'

MARKET RUMOURS AND OPPORTUNITIES

Pilbara Minerals considering sale of stake in Pilgangoora Lithium-Tantalum Project

ASX listed **Pilbara Minerals Limited** announced on 28 March 2019 that it is considering selling a 20% to 49% interest in its **Pilgangoora Lithium-Tantalum Project** in Western Australia. Pilbara Minerals will consider a range of potential transactions and aims to position the company as a 'fully integrated participant in the lithium raw materials and chemicals value chain'. *The Australian* on 16 April 2019 reported that the lithium project has been valued by Foster Stockbroking at between A$2.3 billion and A$2.54 billion.

The Pilbara Minerals ASX announcement can be read in full here.

The Australian on 16 April 2019 reported that buyers interested in Pilgangoora may include ASX listed **Rio Tinto Limited**, 'cashed-up' ASX listed **South32 Limited**, **Albemarle Corporation**, **Livent**, **SQM** and **Tianqi Lithium**.

Gold Fields may be seeking buyers for stake in Red 5

The *Australian Financial Review* reported on 12 April 2019 that **Gold Fields Limited**, a mining company based in South Africa, is seeking buyers for its 19.9% stake in ASX listed **Red 5 Limited**, a gold producer that operates the **Darlot** and **King of the Hills** gold mines in Western Australia.

The article suggests that Petra Capital has been engaged to find buyers for the A$30 million stake.

Barrick Gold and Newmont may be considering sale of Kalgoorlie Super Pit

The Australian reported on 16 April 2019 that following **Newmont Mining Corporation's** US$10 billion acquisition of **Goldcorp**, which will see Newmont become 'Newmont Goldcorp', the sale of the Kalgoorlie **Super Pit** mine in Western Australia could be back on the cards.

The Super Pit is a joint venture between **Barrick Gold Corporation** and Newmont, with Newmont the operator.

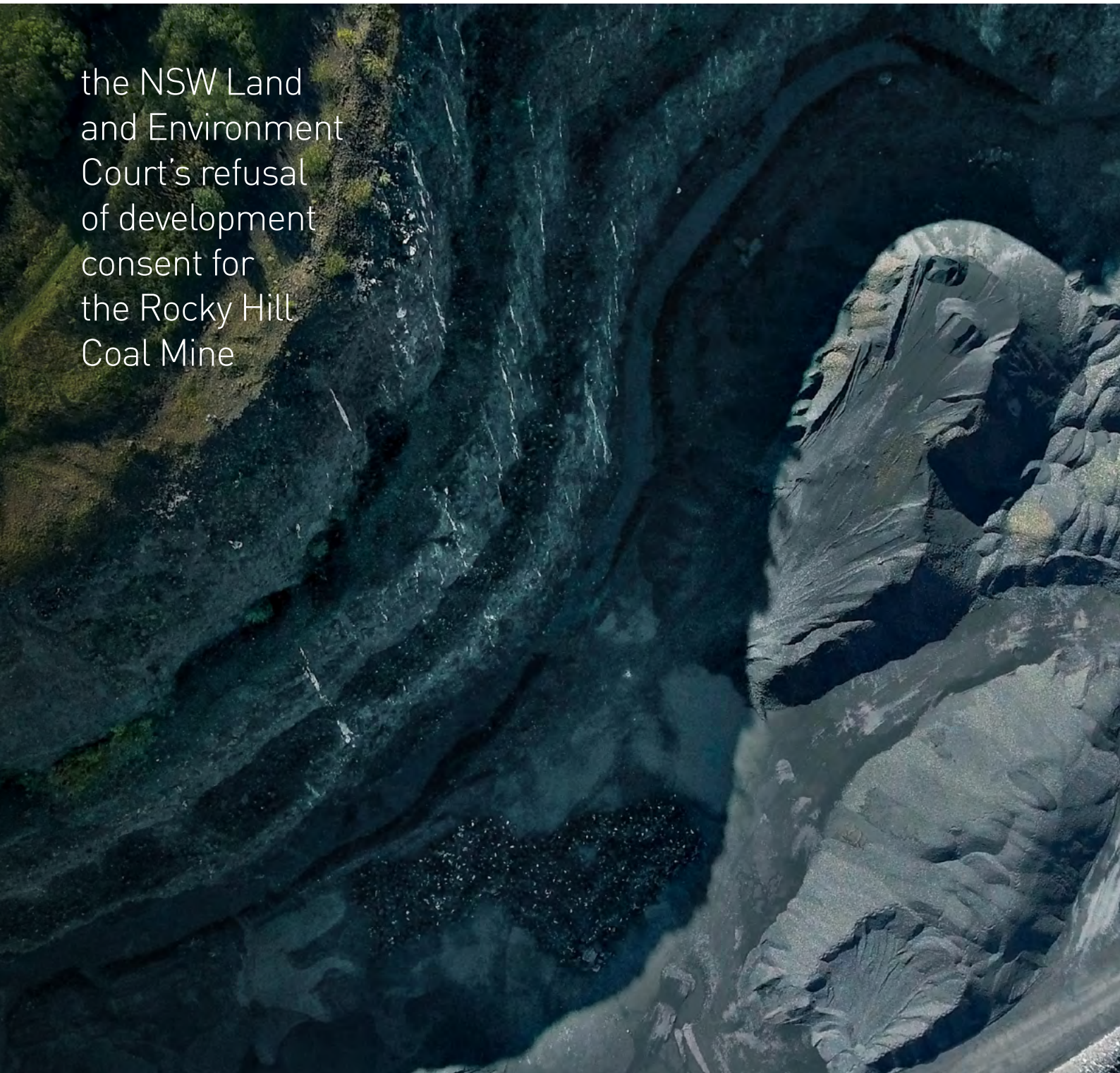
Undisclosed sources in the article state that the Super Pit is 'non-core' to its owners, who have numerous North American assets.

The article states that Newmont Goldcorp may sell its North American gold mining assets, which will likely attract interest from ASX listed companies **Evolution Mining** and **St Barbara Limited**.

SPECIAL EDITION
THE ROCKY HILL DECISION

For an in depth analysis of the recent Rocky Hill Coal Mine decision in New South Wales, view our special edition of the Mining Sector Update here. In the special edition, we discuss:

- the NSW Land and Environment Court's refusal of development consent for the Rocky Hill Coal Mine
- some practical tips for project developers in response to the Rocky Hill decision
- the implications of the Rocky Hill decision for mining, extractive industry and other fossil fuel development projects in other Australian jurisdictions



REGULATORY UPDATES

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COMMONWEALTH

Mining the potential of autonomy

Australian mining giant ASX listed Fortescue Metals Group is using its expertise in autonomous mining technology to shift gears, and investigate its application in the urban transport environment.

On 22 March 2019, Fortescue announced that it is launching an autonomous transport research and development centre called the 'Fortescue Future of Mobility Centre' in Karratha, Western Australia to develop, test and trial autonomous vehicle technology.

Through partnerships with the local community and technology and research organisations (including University of Technology Sydney), Fortescue is aiming to accelerate the rollout of autonomous mobility technology in urban environments.

According to CEO Elizabeth Gaines, Fortescue intends to explore 'all facets of the future of mobility, including software, hardware and various forms of mobility solutions, to see where the opportunities lie'.

Although Fortescue is the fourth largest producer of iron ore in the world (after ASX listed BHP Billiton, ASX listed Rio Tinto and NYSE listed Vale), it is on track to become the first mining company to operate a fully autonomous haulage system (**AHS**) truck fleet by April next year. Fortescue introduced its first autonomous truck in 2012, and now has a fleet of 109 AHS trucks which have safely travelled over 26 million kilometres.

The company is also already running an autonomous light vehicle trial at its Christmas Creek iron ore mine in the Pilbara region of Western Australia.

Although not typically known for mainstream technology advances, mining companies have been positioning themselves at the forefront of autonomous vehicle development over the past seven years. Western Australia has emerged as a world-leading autonomous hub, having more operational autonomous vehicles than any other location – currently, over 200 are driving around in the Pilbara – and by having the first government to put a code of practice in place for safe mobile autonomous mining in 2015.

What are others in the industry doing?

Global miners Rio Tinto and BHP Billiton have been listed amongst 2019's Most Innovative Companies by the Boston Consulting Group. Rio Tinto is a new entrant to the list this year.

In terms of their activities involving autonomous technology:

Rio Tinto	• Late last year, Rio Tinto successfully deployed its AutoHaul technology – the world's largest robot and first heavy-haul long distance autonomous rail operation. • The company has announced that it will almost double the number of driverless trucks operating in the Pilbara by the end of the year (from 80 to more than 140). • In 2018, Rio Tinto worked with the South Metropolitan TAFE in Perth and the Western Australian government to develop Australia's first automation qualifications. Rio Tinto's media release on the partnership is available here.
BHP Billiton	• BHP's half-year results prominently listed technology as a key factor in its long-term growth and indicated that its autonomous drill and truck studies were progressing. • BHP's US$3.06 billion South Flank mine now being built in the Pilbara will deploy autonomous drilling rigs from the outset. An initial fleet of 40 haul trucks will have drivers when first deployed to site, but will be gradually replaced by AHS.

Coal miners on the east coast are also moving to adopt the technology, with ASX listed Whitehaven Coal recently announcing that it will deploy its first fleet of autonomous trucks at its Maules Creek operations in New South Wales by October 2019.

Where is the industry heading?

The mining industry is particularly well-placed for the implementation of driverless technology, not least because of the high vehicle utilisation rates on mining sites, and the sector's continued focus on production efficiency and safety. The AHS trucks use pre-defined GPS courses to navigate roads and intersections, and to determine the locations, speeds and directions of other vehicles. Utilising autonomy effectively means that more material can be moved efficiently and safely, allowing productivity to increase significantly.

Although the AHS trucks are generally developed, built and owned by vehicle manufacturers – such as Komatsu or Caterpillar – the extent to which miners like Fortescue have control of the data that is generated by these machines on their sites is where the potential value lies. This is something that mining companies using this technology should seriously consider, particularly if they want to commercialise their learnings.

control of the data that is generated by these machines on their sites is where the potential value lies

REGULATORY UPDATES (CONTINUED)

The research and development centre that Fortescue has established is just one way to do this. It might be that we soon see commercial partnerships formed between Australian miners, international technology companies and education and research institutions, aimed at developing technologies in the autonomous vehicle and AI space.

Without doubt, as the commercial value of the data being generated by major mining and resources companies is better appreciated, there will be significant developments in how that data is dealt with from both a legal and commercial perspective.

This data may yet become the most valuable resource mined from Australian soil.

Corrs Chambers Westgarth is hosting a discussion regarding technological advances in the resources industry and the use of integrated operations centres to drive efficiency gains. Industry experts **Global io** will share their insights on the design, implementation and management of Integrated Operations environments and will break down the myth that such technology is only available to the mega miners. Corrs will explore some of the legal issues associated with implementing and managing such environments.

The event will be held on Tuesday, 21 May 2019 in the Corrs Brisbane office, kicking off at 5:15 pm. For more details, or to reserve your spot, email sarah.clouston@corrs.com.au.

High Court rules on compensation for extinguishment of native title rights

On 13 March 2019 the High Court handed down its decision in what is commonly known as the 'Timber Creek' case.

Background

Timber Creek is both a tributary of the Victoria River and a town in the Northern Territory. In 2006 the Ngaliwurru and Nungali people (the **Claim group**) were determined by the Federal Court to hold native title rights in those areas. In 2011 the Claim group commenced proceedings for compensation under the *Native Title Act 1993* (**NTA**), claiming that certain compensable acts in relation to the Claim group's native title rights gave rise to a right to receive compensation from the Northern Territory Government.

Earlier proceedings

At first instance and on appeal, the Court held that compensation was payable in respect of the economic loss suffered by native title holders, as well as non-economic loss occasioned by extinguishment or impairment of their native title rights.

The economic component was considered to relate to a portion of the freehold value of the area concerned, while the non-economic component was intended to reflect the loss of connection to the land that native title holders may suffer on extinguishment of their native title rights.

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Principles determined to apply by the High Court

The High Court held that the Federal Court's bifurcated approach of considering economic and non-economic loss was appropriate to the assessment of compensation for the extinguishment of native title rights.

Economic loss

In determining the economic loss component of the compensation, while noting that there may be some artificiality in the approach, the High Court applied the compulsory acquisition law principle in the well-known case of *Spencer v The Commonwealth* (1907) 5 CLR 418. Under this approach, the freehold value of land is determined by calculating what a willing but not anxious purchaser would have been prepared to pay to a willing but not anxious seller to secure the extinguishment of the rights and interests in the land in question.

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

In the Timber Creek case, the Claim group's native title rights and interests were categorised as 'usufructuary, ceremonial and non-exclusive.' The trial judge discounted the freehold economic value by 20%, and the full Federal Court by 35%. The High Court determined that the percentage reduction should be 50% to account for the nature of the Claim group's native title rights and interests. The High Court observed that:

- the inalienability of native title rights and interests (ie the fact that they cannot be sold or otherwise transferred) is irrelevant to an assessment of the freehold value of native title rights and interests; and
- the economic value of native title rights and interests in developed areas might in many cases prove to be greater than the economic value of comparable native title rights and interests in remote locations.

However, the Court speculated that any sense of loss of connection to country resulting from the extinguishment of native title rights in higher value developed areas is likely to prove less than the sense of loss or connection to country with respect to lower value, remote areas. This is because, depending on the facts of the case, the sense of connection to country in higher value, developed areas may have declined as the result of encroaching development before the act of extinguishment or other compensable diminishment. In this situation, the compensation for non-economic loss may be lower in respect of technically higher value land.

Non-economic loss

Compensation for non-economic loss reflects what the High Court preferred to call the 'cultural' or 'spiritual' impact of extinguishment (the loss of connection with the land). 'Cultural loss' was held to more accurately describe the non-economic loss component of the compensation than the term 'solatium', which was used in the earlier decisions.

In relation to cultural loss, the High Court noted the significant body of evidence heard by the trial judge about the Claim group's connection to their land, and the impacts of the loss of that connection. In hearing that evidence, the trial judge was attempting to determine the nature of the essentially

the Court held that compensation was payable in respect of the economic loss suffered by native title holders

the first High Court case that has comprehensively dealt with the interpretation of the NTA compensation provisions

spiritual relationship which the Claim group had with the country and to translate the spiritual hurt from the effects of the compensable acts into compensation. The High Court acknowledged the trial judge's concession that the process was complex, and to some extent intuitive.

The task for the High Court was to determine whether, having regard to all of that evidence, the amount awarded for cultural loss ($1.3 million) was so extremely high as to make it an entirely erroneous estimate of the damage. The High Court decided that the amount awarded by the trial judge (upheld by the Full Court) was not excessive.

Simple interest – significant component of award

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

Conclusion

This is the first High Court case that has comprehensively dealt with the interpretation of the NTA compensation provisions, and the principles to be applied in determining compensation under those provisions. The principles applied by the High Court, however, were not dramatically different to the earlier Federal Court decisions.

There are currently other compensation cases pending and there is no doubt others will follow. The Commonwealth, States and Territories will need to be making appropriate provision in their budgeting for this area of liability to traditional owners whose native title rights have been extinguished.

While not specifically dealing with compensation for the impacts of future acts on native title rights, the case will be of considerable relevance in that context as well, given that the NTA statutory future act regime allows for compensation to be claimed on the doing of a future act that involves extinguishment or, as is the case with most future act provisions of the NTA, involves impairment of native title rights by way of application of the non-extinguishment principle.

In the next edition of the Mining Sector Update, we will consider who will ultimately bear the compensation liability for impacts on native title – it could be you!

Update: Foreign Investment Approval

Foreign investment in Australia is regulated, and whether notification of a proposed transaction is required will depend on the identity of the investor, the type of investment, the industry sector and the value of the proposed investment.

Thresholds

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

Most thresholds used to determine if approval by the Foreign Investment Review Board (**FIRB**) is required are updated on 1 January each year to account for annual indexation. **The thresholds below are current as at 1 January 2019**.

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

Non-land proposals		
Investor	**Action**	**Threshold – more than:**
Privately owned investors which directly invest through an entity from a Free Trade Agreement (FTA) partner country that has the higher threshold[(a)]	Acquisitions in non-sensitive businesses	$1.154 billion[3]
	Acquisitions in sensitive businesses[1]	$266 million[3]
	Media sector[2]	$0
	Agribusinesses	For Chile, New Zealand and United States: $1.154 billion
		For Canada, China, Japan, Korea, Mexico, Singapore and Vietnam: $58 million (based on the value of the consideration for the acquisition and the total value of other interests held by the foreign person (with associates) in the entity)
Other private investors	Business acquisitions (all sectors)	$266 million[3]
	Media sector	$0
	Agribusinesses	$58 million (based on the value of the consideration for the acquisition and the total value of other interests held by the foreign person (with associates) in the entity)
Foreign government investors	All direct interests in an Australian entity or Australian business	$0
	Starting a new Australian business	$0

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REGULATORY UPDATES (CONTINUED)

All notifiable transactions require prior approval by the Treasurer

Land proposals[5]		
Investor	**Action**	**Threshold – more than:**
All investors	Residential land	$0
Privately owned investors which directly invest through an entity from an FTA partner country that has the higher threshold[(a)]	Agricultural land	For Chile, New Zealand and United States: $1.154 billion
		For Canada, China, Japan, Korea, Mexico, Singapore and Vietnam: $15 million (cumulative)
	Vacant commercial land	$0
	Developed commercial land	$1.154 billion
	Mining and production tenements	For Chile, New Zealand and United States: $1.154 billion
		Others: $0
Privately owned investors from non-FTA countries and FTA countries that do not have the higher threshold	Agricultural land	For Thailand, where land is used wholly and exclusively for a primary production business: $50 million (otherwise the land is not agricultural land)
		Others: $15 million (cumulative)
	Vacant commercial land	$0
	Developed commercial land	$266 million
		Low threshold land (sensitive land)[4]: $58 million
	Mining production tenements	$0
Foreign government investors	Any interest in land	$0

(a) Agreement country investors are Canadian, Chilean, Chinese, Japanese, Mexican, New Zealand, Singaporean, South Korean, United States and Vietnamese investors, except foreign government investors, and any country for which TPP-11 subsequently comes into force. **In order to qualify for the higher threshold, the investment must be made directly from an entity formed in the relevant country, and not through an Australian subsidiary or a subsidiary formed in another country**.

1. Sensitive businesses include media; telecommunications; transport; defence and military related industries and activities; encryption and securities technologies and communications systems; and the extraction of uranium or plutonium; or the operation of nuclear facilities.
2. For investment in the media sector, a holding of at least 5% requires notification and prior approval regardless of the value of investment.
3. Threshold based on the higher of total assets or total issued securities value.
4. Low threshold land includes mines and public infrastructure (for example, an airport or port).
5. Threshold based on the value of consideration for the acquisition (unless otherwise stated).

Fees

A fee must be paid for each foreign investment application, with some limited exceptions.

Fees are indexed on 1 July each year. Where there is an increase in fees for a financial year, the new fees will apply to applications made and notices given as of 1 July of that financial year.

To monitor any changes in these fees as of 1 July 2019 please visit here and here.

With a focus on the types of actions which may arise in the mining sector, the below table provides an overview of current fees payable to FIRB for an application:

Fees for commercial land and entities and businesses*			
	Consideration for the acquisition is $10 million or less	Consideration for the acquisition is above $10 million and not more than $1 billion	Consideration for the acquisition is above $1 billion
Commercial land (vacant and developed)	$2,000	$25,700	$103,400
Actions relating to entities and business#	$2,000	$25,700	$103,400

These actions include:

- Acquiring an interest in securities in an entity or issuing securities in an entity
- A foreign government investor acquiring a direct interest in an Australian entity or Australian business
- Acquiring a direct interest in an Australian entity or Australian business that is an agribusiness
- Acquiring interests in assets of an Australian business or a direct interest in an Australian business that is an agribusiness

Fees for agricultural land*			
	Consideration for the acquisition is $2 million or less	Consideration for the acquisition is above $2 million and not more than $10 million	Consideration for the acquisition is above $10 million
Agricultural land*	$2,000	$25,700	$103,400

* Where a transaction involves the sale of more than one title, the fee is not calculated by aggregating a fee for each title. Rather, the fee is calculated by calculating the fee for the title which has the highest apportioned consideration in the transaction. For example, a foreign person is acquiring a $5 million agricultural land property with over five titles as part of the one agreement. The highest title has an apportioned consideration of $1.5 million. Hence the total fee for this acquisition is $2,000.

new fees will apply to applications made and notices given as of 1 July of that financial year

REGULATORY UPDATES (CONTINUED)

foreign purchasers should familiarise themselves with the guidance provided by the ATO

Fees for mining, production or exploration tenements (regardless of consideration)	
Acquiring an interest in a mining or production tenement^	$25,700
A foreign government investor acquiring a legal or equitable interest in a mining, production or exploration tenement	$10,200 (Note – the higher fee applies if also caught by non-foreign government investor specific provision above)
A foreign government investor acquiring an interest of at least 10% in securities in a mining, production or exploration entity	$10,200

^ A foreign person (other than a foreign government investor) acquiring an interest from an Australian government body or an entity wholly owned by an Australian government body may be exempt.

Other Issues for Consideration

Foreign owners of agricultural land, certain water entitlements or contractual water rights are also reminded of their obligations under the Register of *Foreign Ownership of Water or Agricultural Land Act 2015* (Cth) (**the Act**). The Australian Tax Office (**ATO**) administers the register of foreign ownership of water and agricultural land (**the Register**).

Foreign owners of agricultural land and water covered by the Act were required to give notice of their existing holdings to the ATO, and going forward, foreign persons who purchase agricultural land or water as covered by the Act are required to complete the Land and Water Registration Form (**the Form**) on the ATO website. The timeframe for registration differs depending on if the purchase is agricultural land or water, and foreign purchasers should familiarise themselves with the guidance provided by the ATO. Foreign purchasers of residential real estate also have obligations to complete the Register using the Form where it is stipulated as a formal condition to FIRB approval. In particular, since 1 July 2017 the ATO has imposed such a condition on FIRB approvals for foreign purchases of residential real estate.

STATE

A new class of protected areas: Special wildlife reserves and the impact on mining industry participants

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On 29 March 2019, the Queensland government passed the *Nature Conservation (Special Wildlife Reserves) and Other Legislation Amendment Act 2019* (Qld) (**the Amendment Act**). The Amendment Act establishes a new class of 'protected area' where 'incompatible land uses' such as mining and forestry are prohibited.

The Amendment Act is unique to Queensland. The Explanatory Memorandum provides that the establishment of special wildlife reserves aims to 'encourage private investment in Queensland's protected areas'.

A special wildlife reserve can be declared on freehold land, certain Aboriginal land and Torres Strait Islander land, land subject to a lease under the *Land Act 1994* (Qld), and land that is a reserve under the *Land Act 1994* (Qld). For each special wildlife reserve a conservation agreement and an associated management program can be negotiated.

An overview of the Amendment Act and its implications for mining industry participants is discussed below.

What is the process for the establishment of a special wildlife reserve under the Act?

Proposal for declaration of a special wildlife reserve

Section 43A of the *Nature Conservation Act 1992* (Qld) (**the Act**) provides that where – after considering the 'State interest' and the 'area's exceptional natural and cultural resources and values' – the Minister is satisfied that an area should be declared as a special wildlife reserve, the Minister must prepare a proposal for the declaration and give written notice of the proposal to the following persons mentioned in section 43A(5) of the Act:

- each person who has an interest in land (including a mining interest, geothermal tenure or GHG authority) in the proposed reserve area; and
- each holder of an exploration permit under the *Mineral Resources Act 1989* for land in the proposed reserve area; and
- each holder of an authority to prospect under the *Petroleum Act 1923* or the *Petroleum and Gas (Production and Safety) Act 2004* for land in the proposed reserve area; and
- each holder of a mining interest (including a mining claim, mineral development license, mining lease and petroleum lease), geothermal tenure or GHG authority to which land in the proposed reserve area is subject.

A person who receives notice of a proposed declaration of a special wildlife reserve may then make submissions to the Minister about the proposal by the day stated in the notice. The declaration of a special wildlife reserve is via a regulation made under the Act. An area cannot be declared a special wildlife reserve unless that area is the subject of a conservation agreement.

REGULATORY UPDATES (CONTINUED)

A conservation agreement for a declared special wildlife reserve is binding on the landholder of the relevant land

Making of a conservation agreement

Section 43B(1) states that the Minister **must** enter into a conservation agreement for a proposed special wildlife reserve where there is:

- agreement between the Minister and the landholder of land that the land should be a special wildlife reserve;
- agreement between the Minister and the landholder of land on the terms of the agreement for the reserve; and
- an approved management program in place, which outlines the management outcomes for the protection, presentation and use of the special wildlife reserve and actions to achieve the outcomes.

However, section 43B(2) places a very important limitation on the Minister. If the rights or interests of a person mentioned in section 43A(5) (ie the persons mentioned in paragraphs (a) to (d) above) will be materially affected by the conservation agreement, then the Minister **must not** enter into a conservation agreement without the person's written consent.' As a result, the written consent of persons mentioned in section 43A(5) who are 'materially affected' by the conservation agreement is a precondition to the Minister entering into a conservation agreement.

However, it is unclear what 'materially affected' means in section 43B(2). The meaning of these words is important because if a person's interests are not 'materially affected', then the Minister would not have to obtain written consent before entering into a conservation agreement.

Terms of a conservation agreement

If a conservation agreement is entered into, the following are prohibited under that agreement:

- the granting of a mining interest, geothermal tenure of GHG authority in relation to the land (including any renewal or upgrade of an existing tenure);
- the carrying out on the land of activity under the *Forestry Act 1959*; and
- the granting of a license or permit under the *Fossicking Act 1994* in relation to the land.

A conservation agreement entered into under section 43B for a proposed special wildlife reserve does not take effect and become binding under section 43K until the reserve is declared under the Act.

A conservation agreement for a declared special wildlife reserve is binding on the landholder of the relevant land, the landholder's successors in title, and any other person with an interest in land who consented to the agreement.

Terms of a conservation agreement must be consistent with the management principles contained in section 21B of the Act. These principles include, for example, the permanent protection of the area's exceptional natural and cultural resources and values.

Previous inconsistent uses

Under Section 43H, if land is declared as a special wildlife reserve, previous uses of the land by a person other than the landholder which are inconsistent with the management principles and conservation agreement for the special wildlife reserve can only continue if the Chief Executive grants a 'previous use authority'.

A 'previous use authority' allows the previous use to continue for no longer than the 'allowable term'. 'Allowable term' means:

- if the previous use was under an authority (meaning an agreement, lease, license, permit or other authority) the unexpired term of the authority; or
- otherwise for 3 years after the declaration of the reserve.

Importantly, a 'previous use authority' must not be renewed.

What are the effects of the Act for mining industry participants?

- If you are a person mentioned in section 43A(5) of the Act, the Minister must give you written notice of a proposal to declare an area a special wildlife reserve.
- You will then have the opportunity to provide submissions to the Minister on the proposal.
- If you are a person mentioned in section 43A(5) of the Act **and** your rights or interest will be materially impacted by a conservation agreement, then the Minister cannot enter into a conservation agreement without your prior written consent. Without a conservation agreement an area cannot be declared to be a special wildlife reserve.
- If you are exploring mining investment opportunities, the existence of a special wildlife reserve will be a risk relevant to the due diligence process.
- The Act amends the *Land Act 1994* so conservation agreements are recorded in the land registry and considered a 'registered interest' for the purpose of certain tenure dealings. However, with the exception of notation on land title, it is unclear how information about the existence of a special wildlife reserve will be accessible. It is not clear whether 'special wildlife reserves' will appear under the 'constrained lands' layer on MinesOnline Maps when doing searches of mining and petroleum tenures.

REGULATORY UPDATES (CONTINUED)

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Update: Changes proposed to exploration tenure management in Queensland

The *Natural Resources and Other Legislation Amendment Bill 2019* (**NROLA Bill**) was introduced to Queensland Parliament on 26 February 2019 seeking to amend the *Mineral Resources Act 1989* (**MRA**) and the *Petroleum and Gas (Production and Safety) Act 2004* (**P&G Act**) to 'improve the State's exploration tenure management system'. The proposed changes under the NROLA Bill will have consequences for a variety of operators in the resources exploration sector.

The amendments notably include a cap on the length of exploration permits, the introduction of outcomes-based work programs, and key changes to relinquishment requirements for exploration authorities.

Exploration permit caps

The amendments put a 15 year cap on the overall life of exploration permits (**EPs**) under the MRA which intends to facilitate more timely exploration of areas and to promote authority holders to make business decisions within a reasonable timeframe on whether to progress to a higher form of authority or to relinquish the area. This intent is supported by a continuation provision which allows an EP to remain in force beyond 15 years where there is an application for higher tenure pending assessment. In practice, the permit term will generally be made up of an initial term of five years with two renewals of up to five years each, possible through the ordinary application process. The Minister is also given power to allow a one-off extension to an EP of up to three years if an 'exceptional event' has occurred which has prevented the carrying out of exploration activities. Exceptional events are defined as situations that affect the whole resource exploration industry and include events such as natural disasters or a global financial crisis.

While the 15 year cap does not apply retrospectively to existing EPs, the amendments do put a limit on the extent of further renewals available to existing EPs. Current EP holders can only renew their existing permits for a total of ten more years after the next available renewal point. For example, an EP previously granted and due for renewal in 2022 will be able to be renewed for up to ten years and expire in 2032.

Outcomes-based work programs

The NROLA Bill introduces a new 'outcomes-based' work program as an alternative to the current activities-based work program for EPs and authorities to prospect (**ATPs**). This type of work program allows the authority holder more flexibility in planning and conducting the exploration program by not having to mandate specific activities.

An outcomes-based work program for both EPs and ATPs will require four components:

1. The outcomes proposed by the exploration program;
2. The strategy for pursuing these outcomes;
3. The data and information proposed to be collected during the exploration program to achieve the outcomes; and
4. The estimated human, technical and financial resources proposed to be committed during the term of the exploration program.

The previous requirement to provide a year by year description of resources proposed to be committed to exploration for activities-based work programs is removed under the amendments.

An applicant will be able choose (subject to the Minister's approval) either an outcomes-based or an activities-based work program where it is a non-competitive application. However the default position for competitive process applications will remain as activities-based, although the Minister will have a discretion to choose to elect that an outcomes-based work program be used in a competitive process if deemed appropriate. Competitive process in this context includes calls for tender and applications lodged on the same day a moratorium is removed.

Changes to relinquishment requirements

The NROLA Bill seeks to streamline the current relinquishment requirements under the MRA and P&G Act by reducing the number of relinquishments required and by providing a longer timeframe for EP and ATP holders to conduct their exploration activities before the first relinquishment.

Under the MRA

EP holders will be required to have their first relinquishment by the end of year five, which will be 50% of the original area, and the second relinquishment at the end of year ten, being 50% of the remaining area. This provides a more flexible timeframe for exploration than the current regime which requires a 40% relinquishment by the end of year three, then 50% of the remaining area at year five.

Parts of EP areas that have been converted to a higher form of tenure (either a mineral development licence or mining lease) will be able to be counted towards these new relinquishment requirements.

For existing EPs, the effect of these changes will depend on which term the EP is in and how much area has already been relinquished at the time the requirements come into force.

Under the P&G Act

ATP holders under the proposed regime will only have one relinquishment requirement of 50% and this will occur after six years. This changes from the current requirement of an 8.33% reduction in area each year. This change will not affect existing ATP holders.

The amendments also remove the restriction under the P&G Act for relinquishments to be only by whole blocks, allowing also for relinquishment by sub-blocks giving greater flexibility to the authority holder.

The NROLA Bill seeks to streamline the current relinquishment requirements under the MRA and P&G Act

REGULATORY UPDATES (CONTINUED)

Additional amendments

The Minister is given power under the amendments to unilaterally impose, vary or remove a condition of an EP or ATP where an exceptional event (as described above) has impacted on the exploration activities under the authority. The reason given for this is to reduce administrative burden by allowing the Minister to deal with large numbers of exploration authorities at once, instead of requiring all authority holders to individually apply to have their conditions varied where an event impacts the resource industry as a whole.

Other amendments specific to the P&G Act include removing the 75 sub-block area limit for both potential commercial areas and petroleum leases, as well as allowing for the amalgamation of potential commercial areas and petroleum leases.

Next steps

The NROLA Bill was referred to the State Development, Natural Resources and Agricultural Industry Development Committee for consideration who tabled a report on 18 April 2019 recommending that the Bill be passed.

If this happens, the amendments will commence on a date to be proclaimed within 12 months of the Bill passing.

INTERNATIONAL

Mining, agriculture and construction equipment: A new UNIDROIT financing regime is coming

UNIDROIT (the International Institute for the Unification of Private Law) is finalising the MAC Protocol, which will establish an international legal framework for financing mining, agriculture and construction equipment. The Protocol is expected to be adopted this year. It may affect a wide range of Australian entities, especially those in the mining, agriculture, construction and banking industries. We take a preliminary look at its scope, main provisions and potential effects on Australian players.

Where does the MAC Protocol fit in?

The Cape Town Convention aims to address uncertainties involved in financing assets that can be moved between countries with vastly differing security and title reservation laws. It establishes an international regime for the creation, enforcement, registration and priority of security interests in certain categories of high-value, uniquely identifiable mobile equipment. The Protocols to the Convention set out the categories of mobile equipment to which the Convention applies.

Australia has already ratified the Cape Town Convention and the associated Protocol on Matters Specific to Aircraft Equipment (commonly known as the Aircraft Protocol). The Cape Town Convention currently has 78 other Contracting States.

The MAC Protocol will cover mining, agriculture and construction (**MAC**) equipment. Various countries have engaged in consultation in preparation for the Protocol's expected adoption in a Diplomatic Conference in November this year. UNCITRAL and UNIDROIT held Australia's first public consultations in August 2018.

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How does the MAC Protocol work?

The Cape Town Convention and Protocols provide for the creation of international security interests and a range of default remedies for creditors. Key features include:

- a system for creditors to create an 'international interest' or 'prospective international interest' (during loan negotiations) in MAC equipment;
- an online International Registry for the registration of these international interests;
- priority of registered interests – provided the debtor is located in a Contracting State, a registered international interest will have priority over existing security interests under domestic law or any subsequently registered security interests;
- remedies that the creditor can exercise in the event of default by the debtor, largely based on contractual agreement; and
- protection of international interests in the event of a debtor's insolvency.

Contracting States can choose by way of declaration whether certain parts of the Cape Town Convention and its Protocols will apply. Australia has already made declarations in relation to the Cape Town Convention and Aircraft Protocol.

What equipment does the MAC Protocol cover?

The MAC Protocol covers certain specified categories of MAC equipment, defined using the World Customs Organization's Harmonised System codes (**HS Codes**). Some of these codes are for fixed equipment.

The categories are still under negotiation. When finalised, however, the relevant HS Codes will be set out in annexures to the MAC Protocol, with separate annexures for mining equipment, agriculture equipment and construction equipment.

Some examples of equipment currently listed in the annexures include:

- **Mining** – rock drilling tools, bulldozers, graders, road rollers, compacting machinery, concrete mixers, tractors and trailers;
- **Agriculture** – fire extinguishers, mechanical appliances for spraying liquid, sand blasting machines, bulldozers, levellers, mechanical shovels, machinery for soil preparation or cultivation and tractors; and
- **Construction** – cranes, rock drilling tools, excavators, tunnelling machinery, snow ploughs, machinery for public works, fire fighting vehicles, trailers.

What will the main effects be?

The MAC Protocol is expected to improve the predictability and enforceability of security, title reservation and leasing rights, and increase the availability of MAC equipment around the world. The Protocol is also expected to reduce credit risk, improve access to finance and open new markets to MAC equipment suppliers. The harmonisation of Australia's security laws with those of other Contracting States is also likely to make Australia more attractive to overseas investors by reducing legal risks and due diligence costs.

improve the predictability and enforceability of security, title reservation and leasing rights

REGULATORY UPDATES (CONTINUED)

UNIDROIT estimates that the MAC Protocol will have a $7 billion positive impact on GDP in developed countries, and a $23 billion impact in developing countries.

How will the MAC Protocol interact with the PPSA?

Security interests in MAC equipment in Australia are currently regulated by the *Personal Property Securities Act 2009* (Cth) (**PPSA**). If Australia adopts the MAC Protocol, it will prevail over the PPSA to the extent that there is any inconsistency between the regimes.

Some potential areas to consider between the regimes are:

- **Registration rules** – The Cape Town Convention requires each asset to be uniquely identified. Although using serial numbers will go some way to solving this problem, UNIDROIT is still grappling with this issue in negotiations.
- **Priority rules** – The PPSA provides for a more nuanced priority system than the system proposed in the draft MAC Protocol. The PPSA has special rules for particular security interests, such as the rules around purchase money security interests (**PMSIs**).
- **Taking-free rules** – The Cape Town Convention does not currently have a 'taking-free' rule. However, the draft MAC Protocol provides that, if a person is a 'dealer', the buyer takes free of security interests. The taking-free provision will not extend to second-hand dealers – buyers will still need to search the register.
- **Inventory finance** – Inventory finance, which usually relates to a significant number of assets, will be difficult to administer using the asset-based Cape Town Convention register. Contracting States will be able to choose whether their domestic law will apply instead.
- **Added complexity** – It is arguable that the MAC Protocol will add another layer of complexity to the PPSA regime. The Personal Property Securities Register could be adjusted so that it can be used as an 'entry point' to the International Registry, but it remains to be seen whether any such changes will be made.

Drawing on experience with the Aircraft Protocol, it will be best practice to register assets to which the MAC Protocol applies under both regimes.

What's next?

The draft MAC Protocol is currently being considered and negotiated by 51 countries, including Australia.

Those in the MAC and banking industries should, however, start considering how this framework will affect them.

(Andrew and Jodie have co-authored the sub-chapter on the PPSA: Implications for Infrastructure and Construction Industries in *CCH's Australian Personal Property Securities Law Reporter*.)


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