

EMERGING ISSUES

Australian Energy and Resources Industry 2022

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On behalf of McCullough Robertson's Resources and Renewables Industry Group, we are pleased to bring you the 2022 edition of *Emerging Issues for the Australian Energy and Resources Industry*.

Emerging Issues highlights the legislative and policy developments over the past 12 months which directly impact the future of the Australian Energy and Resources Industry including a specific focus on the resource rich States in Australia.

We are also delighted to profile the core members of our extensive project team. They, along with our other colleagues at McCullough Robertson, continue to be available to provide you with support across your operations and investments. Please contact any of our team members for further information.

Finally, we hope you find this publication of value and we welcome any feedback you may have regarding its content.



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2022 Resources market update

There is no shortage of activity in the resources industry in Australia. The overall market has fared well through the highs and lows of 2021, and there are clear indications that the industry will continue to prosper in 2022.

The full impact of Russia's invasion of Ukraine on the Australian market is yet to be determined, and fluctuations in commodity supply, demand and price are constant. It is wise to expect and prepare for supply chain disruption.

The conflict has already resulted in import sanctions on Russian commodities around the world, causing reduced supply and sharp rises in commodity prices, which are expected to intensify in the coming months. Coal, oil, gas and iron ore producers are well placed and expected to benefit from higher commodity prices.

Otherwise, we continue to see opportunities across the country for Australia to become a global leader in critical minerals production, as well as increasing activity in the mergers and acquisitions space. The recent announcement of investment in Australian critical minerals by the United States (US) is also expected to provide a boost to a number of projects in that sector.

Commodities update

Coal

Global energy shortages saw Australian coal producers emerge as winners from 2021, despite minor setbacks presented by new waves of the pandemic. Following a volatile 12 months, metallurgical coal prices saw historic highs during the second half of 2021, with supply chains adapting to China's informal import restrictions on Australian coal and export earnings well above pre-pandemic levels. It then closed out Q1 2022 even higher – peaking at US\$460 a tonne – as a result of import sanctions on Russian coal across the globe. Q1 2022 has also seen a dramatic rise in the thermal price. Coal prices are expected to remain in a strong position as Australian suppliers scramble to keep up with global demand.

Oil and gas

Oil-linked contracts captured a surge in oil prices throughout 2021. Demand outpaced supply in a recovering global economy, with prices topping out at US\$85 a barrel in October and November 2021. Prices declined towards the end of the year, coinciding with announcements relating to the Omicron outbreak. With import sanctions on Russian oil and gas, prices have surged in early 2022.

Iron ore

Unlike coal, oil and gas, iron ore experienced a significant drop in 2021. Prices reached record highs of US\$230 a tonne mid-year, and then saw a sharp decline as a result of China's emissions-related steel production cuts. While there was demand from other parts of the world, that demand was not able to offset the impact of the weaker Chinese market. Like coal, oil and gas, reduced supply as a result of import sanctions on Russian iron ore has seen a sharp rise in iron ore prices in early 2022.

Gold

Despite a forecasted fall proving true in early 2021, the gold price finished the year on a strong note, reaching over US\$1,870 an ounce and averaging US\$1,800 throughout the year. The market is seeing continued demand for gold due to the prolonged uncertainty of the pandemic, inflation surges (particularly in the US), and now, supply shortages caused by the Russian-Ukraine conflict.



Lithium and others

Lithium prices have increased dramatically as the global demand for electric vehicles (EV) has gained momentum. Spodumene (a pyroxene mineral consisting of lithium aluminium inosilicate) surged to US\$1300 a tonne in 2021, a huge increase from the 2020 average of US\$400. Aluminium, nickel, zinc and copper prices are also benefiting from the increased demand for EVs.

Exploration

[BDO reported](#) a peak in spending of ASX-listed explorers, increasing 32% between the third and fourth quarter of 2021 to reach an eight-year high. BDO also reported the listing of 62 exploration companies since September 2020, bringing the total to 704 companies. Battery mineral companies, particularly in lithium and cobalt, are noticeably driving increased investment and financing. Growth in the exploration sector is expected to continue, with companies maintaining strong cash balances.

Such growth will not come without its challenges, including skilled labour shortages, travel restrictions and resource availability between an increasingly saturated playing field.

Critical minerals

The International Monetary Fund has predicted a sixfold increase in demand for critical minerals over the next two decades. This demand is a result of governments around the world committing to more robust net zero emissions targets and providing green stimulus incentives to advance development of renewables technologies, as well as the current sanctions on imports of Russian commodities.

For these reasons we are seeing a positive surge in investment in the exploration, processing, manufacturing and innovative uses of critical minerals in Australia. This investment in Australia is being driven by a need to secure predictable alternate supply chains in safe and stable regulatory jurisdictions (like Australia) compared to supply that was previously monopolised by other economies.

The US has clearly signalled its support of Australia's critical minerals industry by announcing on 31 March 2022 its commitment to fund Australian critical minerals projects through its export financing arms. The regulatory hurdles, previously preventing US

financing agencies from investing in such projects, are expected to be managed by President Joe Biden – invoking Cold War powers to boost domestic supply of minerals crucial for defence equipment and EVs.

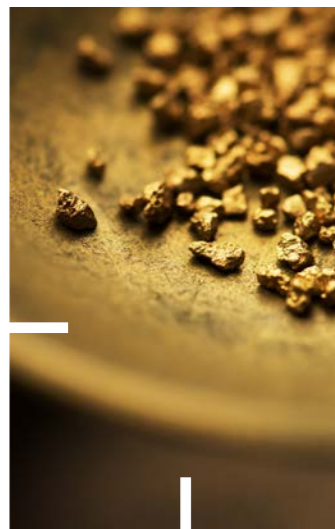
If lithium production over the past decade is any indication of our potential, Australia is in prime position to leverage its ample resources and become a leading producer of many 'new economy' minerals – with **cobalt, vanadium, graphite and rare earth elements** currently attracting attention.

These four minerals will play a vital role in EV and energy storage technologies, in particular:

- 1. cobalt** production is expected to increase by more than double by 2023 to meet an increase in consumption – with usage primarily in laptops, mobile phones and EVs. There is no shortage of opportunity in Australia to meet that exponential increase. Whilst Australian cobalt exports currently amount to 4% of the global mined supply, Australia is home to 19% of global resources. In recent history, Australia's cobalt production has been dominated by Glencore's Murrin Murrin nickel-cobalt mine in Western Australia, producing approximately 67% of mined cobalt. Other projects, such as Cobalt Blue Holdings' Broken Hill Project in New South Wales, which is planning to produce and refine its cobalt, are at varying stages of development, as seen in the [Australian Critical Minerals Prospectus 2021](#);
- 2. vanadium** though mostly used in steel alloys, has an emerging role in vanadium redox flow batteries. These batteries have a longer service life than lithium batteries (approximately 20 years compared to 10 years) although due to the advantages of both batteries, they may be used as a complementary application. Australia has the third largest source of vanadium, however to date, the resource has largely remained untapped. Multicom Resources is the proponent of Queensland's first vanadium mine, Saint Elmo, located near Julia Creek in the state's north west;

3. **natural graphite** has many uses in conventional and industrial applications, including in refractories, batteries, foundries, and lubricants. To date, exploration activity in Australia has uncovered the world's seventh largest economic resources of graphite, with South Australia making up for most of the resources (65%), followed by Western Australia (18%) and Queensland (17%). There are no producing graphite projects in Australia, however a number of projects are under development; and
4. **rare earth elements** are a group of metals used in a variety of applications – such as 'permanent' magnets, catalysts, polishing and batteries. Australia has 3.4% of the world's resources and is the fourth largest producer, largely due to Lynas Rare Earths' Mt Weld deposit in Western Australia.

Each of these minerals feature in the official US, European and Canadian critical mineral lists – lists which designate the minerals considered to be critical for the sustainable economic success and national security of those economies. This highlights the enormous scale of potential global demand for these minerals and the opportunity for Australia to meet supply requirements.



Merger and acquisition activity and trends

With some major mining players making publicised moves to lower emissions or become increasingly critical mineral focused (for example, [BHP's announcement](#) of its plans to divest thermal coal assets and lower quality coking coal assets by August 2022), there is plenty of opportunity to capitalise on well-established assets. Some notable transactions include:

The acquisition by **Stanmore Resources** of **BHP's** 80% stake in BHP Mitsui Coal (and along with it, the Poirrel and South Walker Creek metallurgical coal mines) for \$1.8 billion, positioning Stanmore as one of Queensland's largest coal mining companies.

Regis Resources' \$903 million acquisition of **IGO's** 30% stake in the Tropicana gold mine in Western Australia, being one of Australia's highest producing gold mines. IGO announced its intention to focus on battery minerals, such as its Kwinana lithium factory.

The purchase of **Peabody's** Millennium mine by **MetRes**, which saw coking coal mining operations come back to life under the operation of M Mining in mid 2021.

The injection of \$500 million into **Pembroke Resources** to secure funding for the development of the approved Olive Downs Coking Coal Project, forecast to begin producing metallurgical coal as early as 2023.

In order to secure key projects, we have seen some deal makers look to bridge price expectation gaps in ways that spreads and limits risk for all parties.

Most notably, we are seeing many buyers utilise contractual royalty arrangements as a component of purchase price consideration. A private mining royalty, at its essence, is a contractual right to future income stream which is agreed to be paid by the developer or owner of a project by reference to the success of the project.

The increasing prevalence of these private royalty rights has meant that terms and conditions are standardising, and solutions are being found to overcome certain anomalies regarding taxation (in particular stamp duty and capital gains tax), performance security and compliance with Australia's foreign investment rules.

The considerable market uncertainty caused by COVID-19 has led to difficulties in valuing projects. Parties are favouring more contingent price mechanisms such as these private royalty arrangements and similar arrangements like 'earn-outs', which enable parties to share risk. This allows buyers to reduce upfront cash consideration by sharing some of the upside success with the seller following completion of a transaction.

Government roadmaps

Australia's potential in the critical minerals space is indisputable. However, funding remains a key barrier to getting projects off the ground. In addition to the commitment by the US to fund a number of critical minerals project in Australia as noted above, closer to home, our own Federal Government has committed in the latest budget to \$250.5 million over the next five years to develop junior players in the industry. The funding comprises of a \$200 million Critical Minerals Accelerator Initiative grant program to assist emerging Australian critical mineral projects reach market readiness, as well as a \$50.5 million commitment to establish a virtual critical minerals Research and Development centre to promote innovation and develop intellectual property in critical minerals process. This comes shortly after the release of the [Australian Critical Minerals Prospectus 2021](#), seeking to attract investment in 40 critical mineral projects.

State governments are publishing roadmaps and announcing funding to facilitate the exploration of critical minerals in Australia, with a significant focus on boosting regional employment and diversification in the resources industry. Of note:

- in late 2021, the Queensland Government released the [draft Queensland Resources Industry Development Plan \(QRIDP\)](#) which proposes a number of changes to Queensland's resources industry by 2050. These changes are broadly aimed at fast-tracking new economy mineral projects,
- as an element of the QRIDP, the Queensland Government announced a \$10 million investment to build a common user critical minerals demonstration plant in Townsville. The intention is that the facility will initially be used by vanadium companies. However, it will eventually be available to other companies ready to produce other high-value mineral products, such as graphite and high purity alumina. The Queensland Government is also developing a four-year implementation plan to support the delivery of the North West Queensland Economic Diversification Strategy for the North West Minerals Province, which accounts for 75% of Queensland's base metal and minerals;
- in late 2021, the New South Wales Government released its [Critical Minerals and High-Tech Metals Strategy](#), outlining the Government's plan to establish a critical minerals hub in the State's central west, promote exploration for critical minerals resources, activate the industry through proactive development of supply chains and attract investment for critical minerals resources, downstream processing and recycling; and
- following the release of its [Strategic Statement on Coal Exploration and Mining in 2020](#), the New South Wales Government announced it will excise the Hawkins-Rumker region (near Rylstone), comprising 7,000 hectares of exploration area, as a prospective new



coal mine site. Notwithstanding the Hawkins-Rumker announcement, the New South Wales Government has continued to recognise the significant value existing coal projects in the State generate for the economy. An example of this is its recent decision to overturn an Independent Planning Commission decision to block the expansion of the Dendrobium mine, by declaring the expansion 'state significant infrastructure'. The declaration allows proponent, South32, an opportunity to submit a new environmental impact statement for assessment by the New South Wales Department of Planning and Environment. In early April 2022, the Independent Planning Commission also granted conditional approval for the expansion of Whitehaven's Narrabri coal mine in the Gunnedah region despite strong community opposition due to climate impacts.

Looking forward

We've seen a sense of confidence return to the industry as Australia emerges from what is hoped to be the final stages of the pandemic and responds to global supply shortages. The spike in exploration expenditure is a clear indicator of prospective production in Australia, particularly in the pursuit of battery and EV minerals.

Australia clearly has the resource endowment and prospects for market growth to significantly benefit from the global pursuit of decarbonisation. The critical minerals industry also presents ample opportunity for mining companies to diversify into these markets to complement existing assets.

Throughout the pandemic, vulnerabilities in the global supply chain for renewable sources of energy have been on show, with coal and gas continuing to uphold the energy demand for now.

Governments are making efforts to streamline approvals pathways, as seen with Queensland's recent QRIDP. However, expansions of existing projects and reactivation of old projects remain a trend, while difficulties securing approval for new greenfield projects persist. ■



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2022 Energy and renewables market update – a year of uneven change

Like a lot of things in recent times, market trends and policy developments in the renewable energy sector were sometimes overshadowed by the pandemic. Despite this, over the past year we saw a number of significant market trends and policies developed across Australia, as well as the continuation of some less than ideal trends, specifically a divided, state-by-state approach to renewable energy development.

Renewable energy proponents continue to face the same ongoing issues which have impacted the sector for years, namely grid connection timing and access. This catalyst of delay has been exacerbated by COVID-19 induced supply chain and access disruption, making it even more difficult for developers and contractors to deliver projects on time and on budget.

State Policy update

Australian state governments have continued to introduce energy policies designed to meet their 2050 net zero emissions targets, for example:

- 1. Queensland:** in June 2021, the Queensland Government [announced the Queensland Renewable Energy and Hydrogen Jobs Fund](#), designed to help develop a clean hydrogen industry in Queensland, mine minerals needed for new technologies, build hydrogen plants, batteries and EVs and increase manufacturing across the renewables sector supply chain. In **September 2021**, CleanCo commenced construction of the first Queensland

Renewable Energy Zone (**REZ**), involving the connection of the Kaban Green Power Hub to the State's electricity grid. CleanCo has signed a Capacity Purchase Agreement for Kaban, agreeing to buy 100% of the wind farm's renewable energy. This is in conjunction with CleanCo's preliminary work to establish an energy and hydrogen precinct at Swanbank and \$14 million major maintenance works at Wivenhoe Pumped Storage Hydroelectric Power Station.

- 2. Victoria:** in August 2021, the Victorian Government announced the [Victorian Renewable Energy Innovation Initiative](#) to support the commercialisation of innovation and emerging renewable energy technologies in the State. The first round of funding from this initiative saw \$37.9 million provided to the completion of feasibility and pre-construction activities on several offshore wind projects. Victoria has also identified REZ' around the State to overcome connection issues in 2020. Such issues forced solar farms in the region to cut their output by 50% or more to prevent grid congestion. This included a \$540 million fund in the 2020-21 budget to finance the six REZ' across the State.

3. New South Wales: in October 2021, the New South Wales Government launched the [New South Wales Hydrogen Strategy](#) to drive new investment and jobs. The strategy will provide up to \$3 billion in incentives and is forecast to more than halve the cost of green hydrogen production in New South Wales. This is in addition to the \$70 million committed to developing the State's hydrogen hubs in the Illawarra and Hunter regions, primarily driven by the port facilities and export capacity in these regions. Like Victoria, New South Wales is in stages of planning REZs. The first two zones were officially declared in **November 2021**, the 'Central-West Orana REZ' and the 'New England REZ'. The New South Wales Government has been swamped with expressions of interest, with applications over four times greater than the capacity needed to fill the planned 8-gigawatt REZ in New England. The degree of interest shows significant investor confidence in the State's [Electricity Infrastructure Roadmap](#).

4. South Australia: in December 2021, the South Australian Government announced the first funding recipients for the EV Smart Charging Trials Grant Program. This program was among the policies introduced to increase the uptake of EVs in the State during the 2020-21 budget. The \$3.6 million program was designed to ensure electronic vehicles support the grid and use the cheapest, cleanest power. The first funding recipients included AGL Energy and the City of Adelaide. The South Australian Government has since committed a of a further \$12.25 million to the program.

These new policy announcements are in addition to the continuation of a number of State-based renewable energy policies announced over the last few years - some with mixed results.

A common trend across all jurisdictions is the adoption of REZs, and, to a lesser extent, upgrades to the grid and distribution network. This policy approach provides a clear signal to the market, however, without further infrastructure upgrades, the REZ policy approach is unlikely to deliver its full potential.

Federal Policy update

In October 2021, the Federal Government released its long awaited [Australia's Long-Term Emissions Reduction Plan](#), designed to achieve the now agreed, but not legislated, net zero emissions by 2050 target. This announcement was the culmination of pressure and lobbying from industry groups, and most notably key Australian allies such as the United Kingdom (UK) and the US.

The plan is based on five key principles, with an enabling role for government, being:

1. technology, not taxes – no new costs for households or businesses;
2. expand choices, not mandates – expanding consumer choice, both domestically and with trading partners;
3. drive down the cost of a range of new energy technologies – bringing a portfolio of technologies to parity is the objective of [Australia's Technology Investment Roadmap](#);
4. keep energy prices down with affordable and reliable power – the plan will consolidate Australia's advantage in affordable and reliable energy, protecting the competitiveness of industries and the jobs they support; and
5. be accountable for progress – whole-of-economy goals will continue to be set, consistent with Kyoto-era and Paris Agreement targets.

The updated Technology Investment Roadmap emphasises investment in clean hydrogen, energy storage, low emissions steel and aluminium, carbon capture and storage, as well as ultra-low cost solar. The Federal Government has flagged an overall investment of \$20 billion which it hopes will unlock between \$60 billion and \$100 billion of additional investment from the private sector and State Governments, leading up to 2030.

This new federal policy has continued the Government's current approach, preferring a somewhat undefined technology-based pathway to net zero by 2050 rather than market-based mechanisms. The announced plan has been criticised for attributing 15% of emissions reductions to future technology breakthroughs

that will close the gap to net zero. However, Prime Minister Scott Morrison stated that 'the rate of technological advance is a given' and that the future breakthroughs would come from the 'evolution and the momentum' of earlier technology developments.

Australia's renewables policies will be tested, sooner rather than later, as Australian trading partners and other major economies are proposing the introduction of carbon tariffs. The European Union (EU) is planning to introduce a carbon border adjustment mechanism no later than 2023, with the goal of avoiding emission cuts on the continent being undermined. This mechanism will tax imports with greater carbon intensity than is allowed in energy-intensive domestic industries, to prevent carbon leakage. Cement, iron and steel, aluminium, fertiliser and electricity, are the first to face potential costs from 2026. Similarly, the US Democrats have also included a 'polluter import fee' in their \$3.5 trillion budget plan, targeting nations that lack aggressive climate policies. This fee would be approximately equivalent to the costs faced by American companies under State and Federal environmental regulations and is in line with the Biden administration's move towards aggressive policies, to reduce greenhouse gas emissions. The conflict in Ukraine will undoubtedly continue to create uncertainty and tension with the US and EU imposing embargoes, such as we are seeing with oil and gas, however, it seems likely that Australia can stand to benefit in the short term.

Modelling from Victoria University shows that the hit to the sector and jobs would be extensive if China, South Korea and G7 nations follow the EU's lead and impose carbon tariffs on Australia's iron and steel. This modelling predicts a \$4 billion decline in Gross Domestic Product and \$12.5 billion drop in national income should Australia not cut its national carbon emissions in line with major trading partners - including up to 70,000 jobs being lost.

Australia's policies, like many around the world, have been attacked for doing too little, and if the world is to keep global warming well below two degrees, it is clear that more needs to be done. In comparison to the EU and US introducing carbon tariffs, the Federal Government's 'technology, not taxes' policy appears to be going against international sentiment for climate policy.

Sector activity

This past year has seen a number of notable projects progressing around the country.

In a step toward its goal of Tasmania becoming the 'battery of the nation', a Development Application for a wind farm on Robbins Island, was lodged by UPC Robbins Island with the Circular Head Council. Described as one of the windiest places on earth, Robbins Island averages wind speeds of around 36 km/h. The 'Robbins Island Renewable Energy Park' could generate up to 340 megawatts of energy if constructed. The Development Application comes after four years of technical and environmental studies, and if approved, will be one of the largest investments ever in Tasmania, valued at more than \$1.6 billion.

Neoen, a French renewable energy and storage developer, has begun stage one of works on the Goyder South wind farm, which will grow to be a wind, solar and battery storage project in South Australia. Stage one could generate 412 megawatts of energy with future solar and battery storage to deliver 24/7 renewable energy. The project will ultimately include up to 1,200 megawatts of wind generation, 600 megawatts of solar power and 900 mega watts of battery energy storage.

The past year also saw a rush of mergers and acquisitions activity within the renewable energy sector, and we've already seen this trend extend into



2022. According to Rystad Energy, between 8 and 9 gigawatts of renewable energy capacity changed hands in Australia in 2021, up from 2 to 3 gigawatts in 2020.

In 2021, Palisade Investment Partners and First Sentier won the auction for a 50% stake in the Macarthur Wind Farm from Morrison & Co. The Macarthur Wind Farm, located in Victoria, is the largest wind farm in the southern hemisphere, predicted to be worth up to \$1 billion. The 420-megawatt wind farm is fully contracted to AGL Energy through to January 2038, under a 25-year offtake arrangement. The remaining stake is held by AMP Capital, who paid \$880 million (on an enterprise value basis) for its 50% stake in 2019.

In January 2022, UK-based Foresight Solar Fund acquired the remaining 51% stakes in two Queensland solar farms, now holding 100% ownership in each. Both solar farms have 20-year power sales contracts with the Queensland Government, and Foresight expects to refinance senior debt linked with the two solar farms from the Bank of Tokyo-Mitsubishi and Clean Energy Finance Corporation. In October 2021, Indonesian solar developer SUN Energy, announced it will purchase the largest solar farm in Western Australia, the Merredin Solar Farm. A binding agreement was signed between SUN Energy and the seller, China-based project developer Risen Energy. Risen Energy and SUN Energy will jointly explore development post transaction completion.

In March 2022, the Queensland Government announced that its State-owned transmission company, Powerlink, would connect the MacIntyre Wind Precinct to the grid, as part of a \$170 million agreement. Construction of the MacIntyre Wind Precinct will start in the second quarter of 2022. The Precinct is expected to consist of two wind farms and, upon completion, 'provide enough power to meet the energy needs of 700,000 homes'.

National Electricity Market Developments – roof top solar and capacity payments

6. The continued and increased penetration of intermittent renewable energy from sources such as solar and wind in the Australian market demonstrates the need for the National Electricity Market (**NEM**) to be updated. Significant public discussion arose from the announcement of two specific proposals in 2021, the inclusion of a capacity payment component and charging rooftop solar owners a grid connection fee.

Capacity payments

Different countries and markets have taken alternative approaches to energy-only and capacity markets.

- the NEM in Texas (US) is an energy-only market. It uses scarcity pricing to ensure enough supply to maintain its reliability requirements.
- the UK introduced the Capacity Market in 2015 to ensure security of electricity supply by providing a payment for reliable sources of capacity. The Capacity Market was designed to support the development of more active demand management in the UK's electricity market. It also encouraged investment to replace older power stations and provide backup for more intermittent and inflexible low carbon generation sources. The required capacity is determined by the Government and then bought on the market via an auction from the lowest bidder. There are also penalties if the provider fails to deliver. However, the market has been criticised for its high cost (of around £3.8 billion), the vast majority of which went to existing power plants with only 3.5% being awarded to operators to build new generation plants.

- in the EU, systems with capacity mechanisms coexist with energy-only markets where electricity producers can only rely on their earnings from sales on power markets. European Union Electricity Regulation requires annual adequacy assessments to mitigate against under-supply.

In Australia, the updated design for the NEM and rewrite of the rules is a common issue of discussion, as traditional energy sources become subject to growing market pressures and increasing consumer demand for emissions-free energy. We have seen that the discussion over a capacity market has morphed into an argument for coal vs battery storage. Given the States' very cool response to capacity payments being directed to coal and gas-fired plants, it is likely that any significant developments in respect of the NEM will be further delayed.



Rooftop solar

Draft guidelines released by the Australian Energy Regulator in mid January 2022 provide detail around the proposed 'solar tax', which will be charged to households if their host distribution network operator provides that supporting additional rooftop PV exports is increasing the costs of operating the network. The rule proposal is effectively a response to the 'glut' of power provided by residential rooftop solar during the day when it is not needed, and these residences needing to take power from the grid at peak times (mornings and evenings).

Although the rules are friendlier to rooftop solar owners than some may have anticipated (i.e. by placing the onus on the network operator to demonstrate a cost incurred), they are still viewed as a tax on people who invested in rooftop solar either for cost saving or environmental reasons. Furthermore, social advocacy groups note that the capital costs of solar prevent families on lower incomes from installing solar, therefore preventing them from obtaining the benefit of ongoing cost savings on power bills.

Whatever the outcome of this debate, the supply issues which are associated with rooftop solar, or other forms of renewable energy, continue to impact the sector, further highlighting and exacerbating the need for root-and-branch reform to the outdated NEM.

Where to from here

The renewable energy sector in Australia is now well past its infancy, although still behind other markets in areas such as offshore wind and battery storage. The rapid price reduction in and consumer support for low emissions technology means this is an area poised for continued growth Australia-wide.

Although the usual policy indecision and grid connection issues continue to impact the sector, it has certainly past the point of no return. With ever-growing private sector support and the basic economics which point to renewable energy being cheaper than all other fuel sources, the only question which remains is how quickly will Australia transition? ■



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Why your ESG policy is more than just lip service

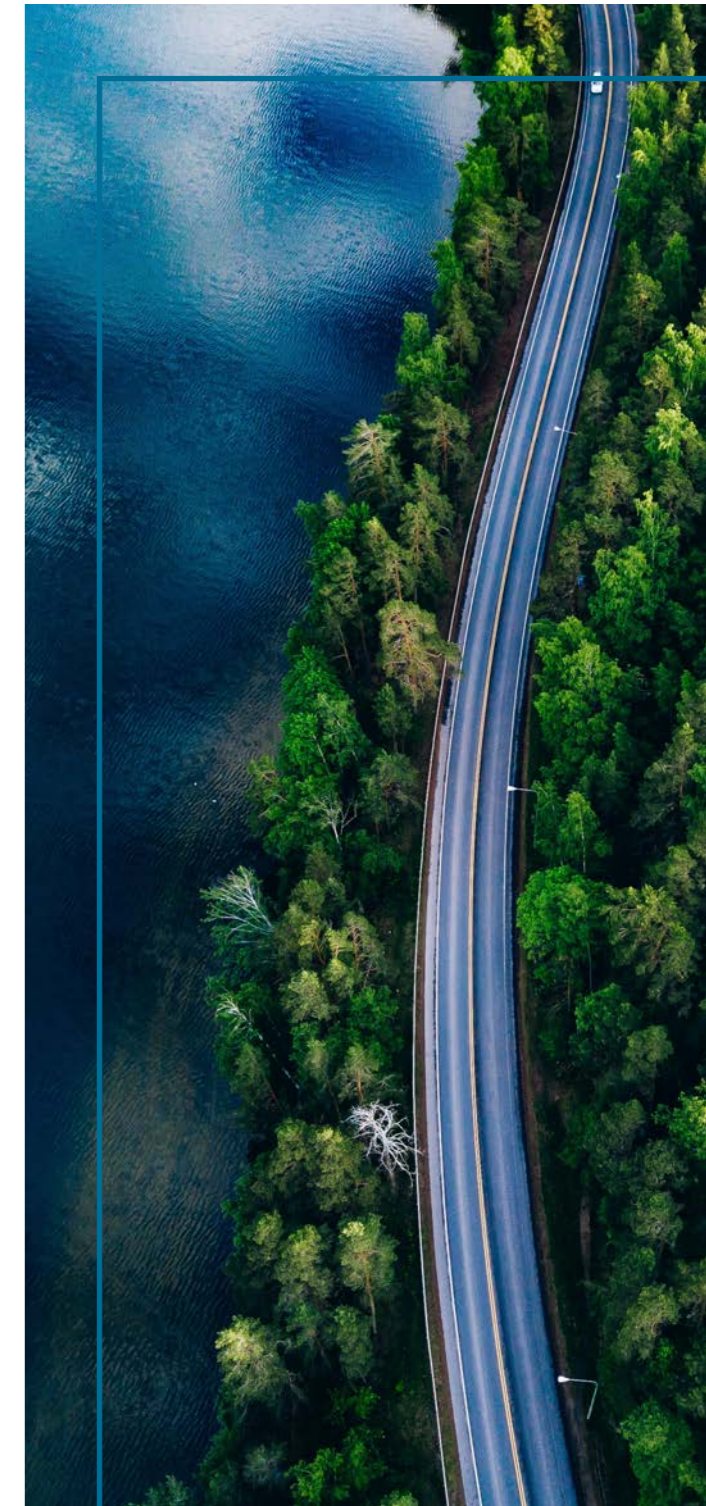
In the last 12 months, the popularity of socially responsible investment and demand for companies to address environmental and sustainability concerns in their operations has surged. Investors are increasingly measuring and comparing corporate performance by reference to environmental, social and governance (ESG) criteria. More than ever before, directors are under pressure to disclose their strategy for responding not just to ESG risks but also the opportunities created in their businesses.

Globally, shareholders are driving the level of disclosure by increasingly directing their investments to those companies with evidenced and sophisticated ESG disclosures. They are also acting against companies and their boards, resulting in regulators around the world taking notice. This has been most notable with companies like ExxonMobil which replaced three directors last year, following shareholder support for ESG initiatives reaching 32%.

Australia does not currently have a specific regulatory framework requiring ESG disclosure or standards for such disclosure for companies and their directors. Presently, ESG disclosure obligations are regulated indirectly, through companies' reporting obligations and the ASX listing rules, and through the enforcement of directors' duties. These indirect means of enforcement present both a risk and an opportunity for Australian companies, making ESG considerations not the 'nice to have' it once was, but a fundamental operating requirement.

Director's duties

A director's duty to act with care and diligence, requires directors to balance potential benefits and foreseeable risks and also to arm themselves with the information necessary to make these decisions. Directors must not only turn their mind to the information before them, but actively seek out what else is required to exercise their own judgement and make informed decisions. This position was re-enforced by the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, which put directors on notice by making it clear that '[w]ithout the right information, a board cannot discharge its functions effectively'.



Directors of listed companies carry the additional burden to include disclosure of the company's business strategies. Directors in breach of their disclosure obligations may face removal by shareholders or civil penalties under the *Corporations Act 2001 (Cth)* (**Corporations Act**). Serious breaches of directors' duties, false or misleading disclosure, and dishonest conduct, may lead to criminal charges, resulting in significant criminal fines and prison sentences of up to 15 years.

Such severe penalties may easily be avoided by directors seeking out and considering the information a reasonable person in their position would need to make properly informed decisions. ESG criteria provides a mechanism for directors to obtain that knowledge, and the more disciplined a company's ESG framework, the more comfort its directors can have.

It is important to remember that there may well be instances where short to medium term profit may outweigh action by companies to move towards practices which prepare them for various climate change scenarios. A director who is aware that climate change, will or is likely to have, an adverse impact on a business does not necessarily have to advocate for change if they have a reasonable foundation for the inaction. An ESG informed risk analysis and reporting regime that underpins this decision making will allow a director to demonstrate they acted reasonably in the course of their decision making.

ASX reporting

ESG reporting is not completely absent from Australia's regulatory landscape. In 2003, the ASX Corporate Governance Council introduced its Corporate Governance Principles and Recommendations (**CGPR**), and since then, listed companies have been required (under Listing Rule 4.10.3) to disclose in their corporate governance statements the extent to which they have adhered to the CGPR and, where they have strayed, specifying how and why. Significantly, CGPR recommends that material exposure to environmental or social risks is disclosed, including how the risk is managed. These reporting standards however are not keeping pace with consumer and international demands for more detailed and data based reporting.

Traditionally, Listing Rule 4.10.3 has focused on direct physical risks posed to a company and its business, such as:

- extreme temperature changes affecting a company's operations;
- supply chains;
- transport needs; and
- employee safety.

In the last few years however, companies have started to include more detailed ESG reporting in response to this requirement and consumer and international demands. Risks are no longer limited to direct physical risks, but also include the need to respond to the risk of climate change under certain scenarios – essentially, what a company will do if global temperatures rise by more than 2 degrees, or 1.5 degrees. The focus is shifting towards transition risks, i.e. how companies will manage the policy, legal, technology, market and reputation risks they encounter, as they are faced with the transition to a lower-carbon economy.

Listed companies are contractually bound to comply with the Listing Rules, which are given legal effect under the Corporations Act. Where the ASX identifies a disclosure breach, its response may be as simple as making the company release a corrective announcement to the market. However, if the ASX perceives the breach as severe, it may suspend trading in a company's securities.

The ASX is not the only source of enforcement actions. The Australian Securities and Investments Commission (**ASIC**) may commence proceedings pursuing civil or criminal penalties. Shareholders too have shown they are more than willing to take action for what they perceive to be wrongful actions, or inaction, by boards. It is therefore increasingly important that a robust ESG mechanism is in place to ensure that directors are not at fault.

Greenwashing

The growing demand from consumers for more sustainable products and ESG-conscious companies has seen the rise in a practice known as 'greenwashing'. Greenwashing occurs when a company exaggerates its environmental credentials, or brings in superficial processes that may address only a small part of a company's carbon or environmental footprint. The best-known example of this is Volkswagen, who was caught cheating on emissions tests whilst spruiking its green technology.

Greenwashing may breach misleading or deceptive conduct prohibitions contained in the Australian Consumer Law, the Corporations Act and the *ASIC Act 2001 (Cth)*, and expose directors to risks including prosecution and shareholder backlash.

These potential breaches are being tested by shareholders:

- Santos currently faces a potential landmark claim, with shareholders commencing proceedings in the Federal Court of Australia (**Federal Court**) over misleading claims, for example, that Santos provides 'clean energy' because natural gas is a 'clean fuel'. The shareholders also claim Santos' net-zero strategy to be misleading because it is unevicenced and based on misinformation.
- in what appears to be an increasingly frequent trend, both BHP and AGL Energy have recently been subject to shareholder resolutions relating to their respective commitments to Paris Agreement targets.
- third parties, including financiers, are also feeling these risks. In November 2021, the Federal Court ordered that the Commonwealth Bank of Australia (**CBA**) produce documents to the trustees of a shareholder concerned that CBA's involvement in several projects worldwide was inconsistent with its own employment & safety framework and policy. HSBC has also been subject to accusations that its promotion of its green credentials is misleading, due to its funding of fossil fuel projects.

With a rise in the number of websites and forums dedicated to 'arming' consumers, and to 'calling out' unsubstantiated claims, we expect there will be more cases filed in the future. Implementing and acting on a resolute and substantiated ESG process will offer a defence to greenwashing claims, and companies will quickly realise that this also provides opportunities through the advanced identification of risks.

ASIC Commissioner, Cathie Armour, has put companies on notice that the Commission will be increasing its scrutiny of greenwashing. Ms. Armour said that ASX listed companies found to be greenwashing may face enforcement action. Prospectuses too face unprecedented scrutiny, with ASX hopefuls being told that ESG-related statements must be supported by detailed plans. ASIC's four core messages to directors on ESG reporting are listed below:

ASIC's four core messages to directors for 2022 on ESG reporting	
1.	Understand and reassess both existing and emerging risks
2.	Consider how comfortable you are with the current level of oversight
3.	Consider statutory requirements relating to operational and financial reviews, including continuous disclosure announcements
4.	Listed companies with material exposure to climate risk should consider reporting under the TCFD recommendations

Safeguards

The key for companies will be the way in which they tie ESG disclosures with their financial reporting, to present investors with a precise account of the opportunities and risks that lie ahead. Although the ASX released the first edition of its ESG reporting guidance back in 2011, there is still no universal reporting standard and a lack of regulatory guidance in Australia. The quality of reporting is currently investor driven, in part due to the real threat of shareholder action. Change is not far off however – the UK, EU, Japan, Singapore and

New Zealand are mandating specific disclosures in line with recommendations of the Task Force on Climate-related Financial Disclosures (TCFD), while the US Securities and Exchange Commission has a draft proposal for climate-related disclosures and is considering the framework it will adopt.

There is not a 'one size fits all' approach for Australian businesses. The Australian Prudential Regulation Authority (APRA) last year released its draft guidelines for managing climate risks, which align with the TCFD framework. At the same time, TCFD updated its guidance on metrics, targets and transition plans, identifying investor emphasis on transition planning in 2022 as companies pivot to attract funds. These tools must be at the forefront of board discussions, fostering pro-active planning rather than re-active responses.

A number of companies in the energy and resources sector are now participating in the Clean Energy Regulator's 'Corporate Emissions Reduction Transparency Report' (CERT Report). The CERT Report publishes information submitted by participants detailing net emissions, pledges and progress towards reducing operational emissions and switching to renewable energy, among other initiatives.

Businesses that start including ESG reporting and risk analysis, will be better placed to address the risks and benefit from the rewards of a market increasingly focused on sustainability and climate change. Carrying out an ESG analysis does not mean a company needs to become net zero overnight. It is simply a mechanism through which boards and companies can effectively meet their obligations to consumers and regulators and be better prepared for the challenges that climate change will bring to their businesses. ■



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Critical Minerals – a whole supply-chain approach

As the world races to a net zero emissions target, Governments and companies across the globe are increasingly grappling with the practicalities of achieving net zero emissions target by 2050, consistent with the Paris Agreement. Economies have accelerated efforts to reduce emissions, which has seen an exponential increase in clean energy technology. This upwards trend – which isn't even close to reaching its peak – combined with increasing global focus on securing critical mineral supply chains is causing the whole world to increase its focus on critical minerals.

The term 'critical minerals' is generally a reference to mineral or metal elements which are crucial in the development of future technologies. These include lithium, graphite, cobalt, vanadium, scandium, copper, nickel and rare earth elements – each an essential component in solar panels, wind turbines, batteries and other low emissions technologies as well as being essential for EVs.

The types of critical minerals required to produce these technologies vary:

1. lithium, nickel, manganese and graphite are required to manufacture rechargeable batteries found in EVs;

2. cobalt (a by-product of copper and nickel ore processing) is commonly used to manufacture batteries, catalysts and pigments;
3. rare earth elements (REE) are used in catalysts, batteries and powerful magnets required by wind turbines; and
4. silver and copper which are more common metallic minerals which are essential components for the manufacturing of a wide range of technologies.

Whatever their use, critical minerals play a starring role in the energy decarbonisation narrative. However, there are real concerns that current availability, and reliability of supply and investment, fall short of meeting global requirements, which will ultimately lead to delayed implementation and increased costs for the transition to clean energy technology.

Australia's role

Australia's reputation as a safe and stable economy, complemented by its clear and robust regulatory and governance framework around its resources, makes it an attractive choice when considering responsible and secure critical mineral supply. What distinguishes Australia from other economies is the potential for domestic markets to add value in the whole supply-chain of critical minerals, from production, to processing and through to manufacturing.

In terms of production, decades of sophisticated exploration, development and commercialisation of traditional energy resources has laid the foundation for Australia to take advantage of the growing demand for critical minerals across the entire supply-chain. We expect the sector will leverage its history to explore, develop and commercialise critical minerals, just as it has successfully done for traditional energy sources.

Historically, Australia has not played a large role in the processing or manufacturing of critical minerals, largely due to the monopoly that existed in the overseas markets. However, recent Government support for these industries will make it possible for onshore critical minerals processing and domestic manufacturing opportunities to become a reality. These stages of the supply chain (previously somewhat untapped by domestic proponents) present highly attractive investment opportunities, whereby Australian players in this market could have competitive advantage by utilising the country's political and economic stability, research, development and training programs, and robust environmental, labour and regulatory standards.

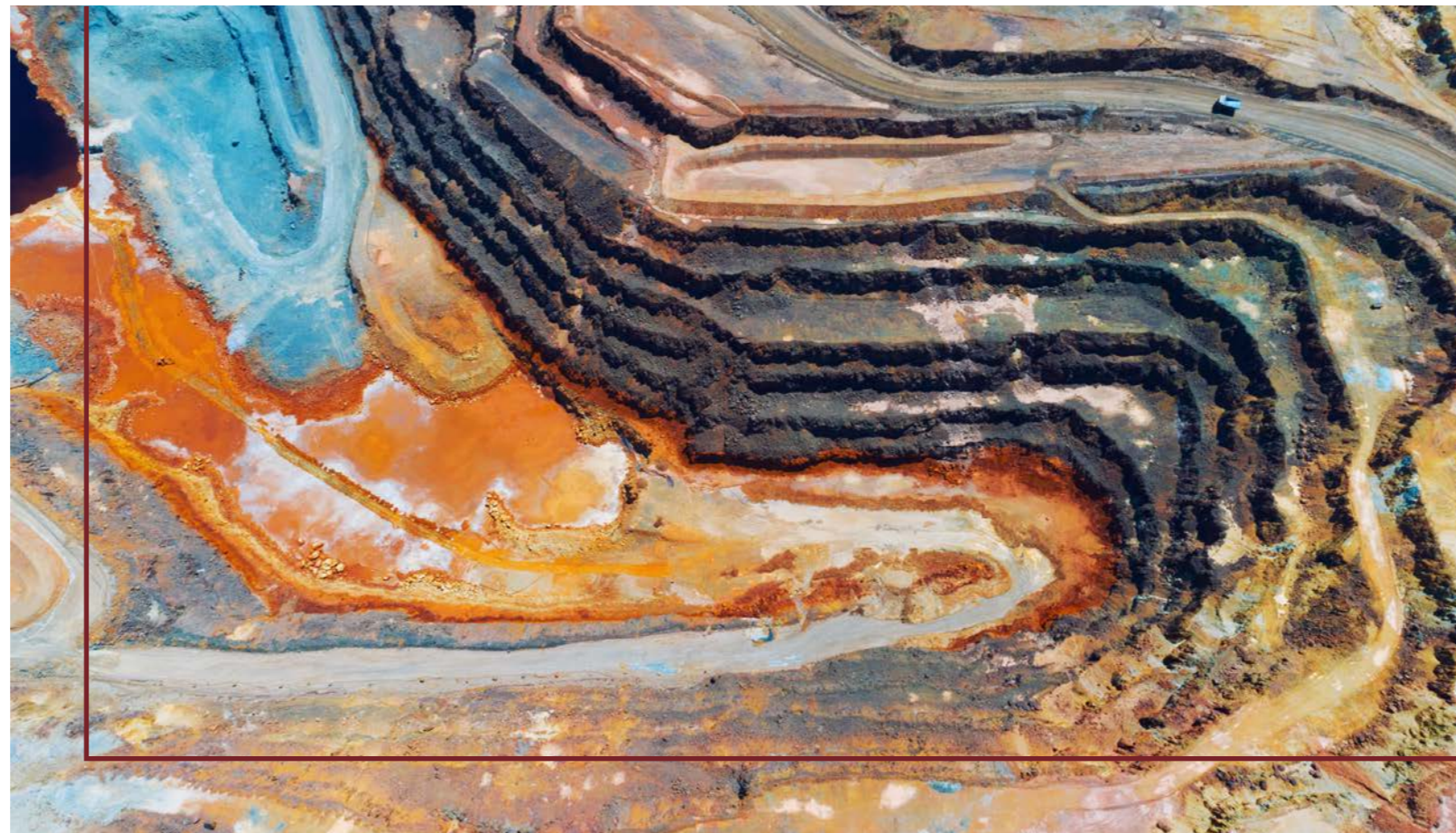
It is clear that the Federal Government has identified the importance of the critical minerals industry, notable from the suite of Government incentives, initiatives and grants that have been announced and deployed to promote development of Australia's critical minerals offering, across all stages of the supply chain.

First announced in March 2022, the Federal Government committed \$250.5 million in the 2022 Federal Budget over the next five years to assist Australian critical mineral projects get off the ground. This funding is divided into the following two broad categories:

- \$200 million towards the Critical Minerals Accelerator Initiative, designed to provide grants to assist Australian critical minerals' producers advance projects through the planning, design, pilot and demonstration phases; and
- \$50.5 million for the establishment of a virtual Critical Minerals Research and Development Centre to build Australian intellectual property in critical minerals processing.

Earlier, in July 2021, the Federal Government announced its funding of eight companies in the resources technology and critical minerals sectors, to scale-up local downstream processing of critical minerals. The funding is part of the Government's \$1.5 billion [Modern Manufacturing Strategy](#) announced in October 2020. The projects which were awarded this funding included:

- \$14.8 million to Lynas Rare Earths (Western Australia) to develop a world-first process to refine rare-earth ore using permanent magnet and EV production;
- \$6 million to Core Lithium (Northern Territory) to construct a pilot processing facility for the production of battery-grade lithium hydroxide at Darwin Harbour's Middle Arm Industrial Precinct; and
- \$3.9 million to Australian Vanadium Limited (Western Australia) to manufacture large-scale vanadium redox flow battery systems used to support residential power grids or off-grid generation sources, such as mining, agriculture and remote communities.



The Federal Government has also committed to establishing a \$2 billion [Critical Minerals Loan Facility](#) for Australian critical minerals projects, aimed to help projects overcome the traditional barriers that have inhibited processors and manufacturers to access finance to develop their technology and scale operations. Export Finance, which manages the Critical Minerals Facility, stated that proponents may be able to access this facility where projects align with the Federal Government's Critical Minerals Strategy (**Strategy**).

The Strategy sets out actions to refine Australia's critical minerals market in three key areas, particularly:

1. attracting investment into Australia's critical minerals sector and downstream processing activities;
2. spur innovation to lower costs and increase competitiveness; and
3. connect current and pipeline critical minerals projects with infrastructure development.

The significant opportunities in Australia have been identified globally which is evident by the US announcing on 31 March 2022 its commitment to fund Australian critical mineral projects through its export financing arms. Ms Gina Raimondo, current US Secretary of Commerce, together with Australian Trade Minister Dan Tehan, have formally committed to breaking down barriers to facilitate investment in such a project, which will partly be enabled through the expected enactment by President Joe Biden of wartime powers that will enable the US Government to fund the production in Australia.

Closer to home, in:

1. **Queensland:** In November 2021, the Queensland Minister for Resources announced the release of the North East Queensland Mineral Deposit Atlas, which collates data in relation to ten specific mineral deposits in far north Queensland. The deposits are dominated by tin and tungsten, but also include a zinc skarn and a nickel-dominated laterite deposit, as well as indium, molybdenum, copper, silver, cobalt and scandium. This is a free tool designed to develop Queensland's 'new economy' mineral wealth and potential along this north-east corridor and follows the release of the North-West atlas, which details a further 28 mineral deposits.
2. **New South Wales:** In late November 2021, the New South Wales Government released its 'Critical Minerals and High-Tech Metals Strategy', setting out the State's plan to build its existing potential and position as a major global supplier and processor of critical minerals and high-tech metals. This includes establishing Australia's first 'critical minerals hub', which will seek to support the development of downstream industries such as circular economy and processing, renewable energy as well as critical minerals and high-tech metals processing.

Where to from here?

Long-term, it is hoped that Australia will become a regional hub for critical minerals production, processing and manufacturing, with significant research and development advancements. We have already seen impressive progress being made in this space:

1. in July 2021 Everledger, an independent technology company, announced that it won a \$3 million pilot project from the Federal Government. The project uses blockchain technology to create a 'digital certification' for critical minerals throughout the supply chain, designed to assist companies adhere to compliance regulations, streamline processes and reduce costs.
2. in October 2021, the Queensland Government, Japan Oil, Gas and Metals National Corporation (**JOGMEC**) and the University of Queensland announced a tripartite agreement to commence a study to examine whether cobalt can be retrieved economically from copper tailings in order to be used in battery manufacturing.

Standing in the way of Australia becoming a regional hub for critical mineral processing and mining are the same issues that face any mining project, such as project costs and environmental compliance matters. The location of key mineral deposits and the 'chemical intensive' nature of processing activities also impose obstacles when it comes to commercialising a mineral deposit. Currently, China maintains its dominance in supply and processing of critical minerals due to its lower production costs and comparatively less rigorous environmental and safety requirements. However, with supply chain issues an ongoing concern in this sector, there is support for Australia to mine and process more critical minerals on-shore.

All signs indicate that Australia is well-positioned to leverage itself as a premier destination for critical minerals production, processing and manufacturing. The clean energy transition will have far-reaching consequences for mineral demand for the foreseeable future and there is a real sense of opportunism in relation to the important role that we will play in the development and transition to clean energy technology, through a whole-of-supply-chain approach. ■



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Finding the balance – Australia's gas-led economic recovery



The oil and gas sector has retained its position as the key enabler of Australia's post-COVID-19 economy recovery plan after seeing continued investment from Federal and State Governments.

The development of key infrastructure and projects along the east coast has paved the way for lucrative investment opportunities for stakeholders in the area. However, 18 months on from the Federal Government's announcement of its gas-led recovery initiative, the sector has also met with its share of obstacles.

Continued investment

The 2022 Federal Budget confirmed the importance of building on the progress made through 2020 and 2021 to drive Australia's gas-led recovery by allocating a further \$58.6 million to the sector, including:

1. \$38.7 million for targeted support of critical gas infrastructure projects to alleviate the forecast gas supply shortfall;

2. \$3.5 million to design and implement the Future Gas Infrastructure Investment Framework to support the Commonwealth's consideration of medium to long-term critical gas projects identified by future National Gas Infrastructure Plans (**NGIP**);
3. \$5.6 million to strengthen the Government's energy system planning framework by delivering a further NGIP in 2022;
4. \$4.6 million to develop initiatives that empower gas-reliant businesses to negotiate competitive contract outcomes, including developing a voluntary standardised contract framework; and
5. \$6.2 million to accelerate the development of the Wallumbilla Gas Supply Hub in Queensland.

National Gas Infrastructure Plan

On 26 November 2021, the Federal Government released its first full NGIP and Future Gas Infrastructure Investment Framework to identify short and long-term development pathways for Australia's gas supply and infrastructure.

The NGIP presents a sequenced blueprint for the development of Australia's East coast gas market out to 2041. It contains a strategic approach to gas infrastructure investment by indicating to the market key gas project opportunities. Some of the key findings identified in the NGIP include:

1. in the long-term and without immediate action, progressive decline in production from existing projects will lead to shortages of gas supply. At least one new basin will need to be brought online before 2030 to meet projected East coast domestic gas demand and export contracts;
2. critical basins to unlock out to 2030 include the Narrabri Gas Project in New South Wales, the Beetaloo Sub-basin in the Northern Territory, and the North Bowen and South Galilee basins in Queensland;
3. strategic expansions to existing pipeline capacity and the construction of entirely new pipelines will be needed to transport gas supplies to East coast markets; and
4. expanded transportation capacity from North to South is required as Northern supply expands and Southern supply declines.

Queensland snapshot

In the long-term, the North Bowen and South Galilee basins are positioned to play a key role in Australia's gas-led recovery, with the Federal and Queensland Governments committing a combined \$10 million to examining the feasibility of a new pipeline to link the North Bowen basin to the East coast market. These funds will be used to accelerate the identification of an optimal route and location for future gas infrastructure, and to collect technical, economic and regulatory information needed to assist the feasibility studies.

The infrastructure development sequence provisionally identified in the NGIP to connect new basins to the East coast market includes:

1. a new pipeline to connect the Galilee basin to the Queensland Gas Pipeline by 2028;
2. a new pipeline connecting Moranbah into the East coast gas market by 2028; and
3. twinning the Queensland Gas Pipeline to facilitate the Beetaloo and Galilee/North Bowen supply by 2028.

The Queensland Government continues to identify the oil and gas sector as an essential energy source for the State's manufacturing sector. Specifically, 20,000 square kilometres will be made available for domestic gas production, which will assist the sector to secure the gas needed to produce and process critical minerals and other requirements in the manufacturing supply chain. The Queensland Government contends a more affordable gas supply

will support jobs in Queensland's broader supply chain as well as providing gas to firm electricity supplies, allowing the integration of greater volumes of renewable electricity.

The North Bowen Basin, which has traditionally focused on coal production, has the potential to bring more gas to Queensland's domestic and export markets by opening up areas for new gas production and capturing unutilised gas from coal mines. Additionally, a gas pipeline connecting the North Bowen Basin can, potentially, reduce fugitive gas emissions from Queensland's resources industry and contribute towards the State's transition to a low-carbon economy.

Increasing supply to the East coast will not only mean more affordable gas for domestic consumers, but will provide more royalties for the State. The calculation of royalty amounts is a lot more certain for producers following the introduction of a new volume-based model for calculation in June 2020. This model replaces the old complicated and burdensome regime with a straightforward method of calculation based on the volume of petroleum produced, multiplied by the benchmark price per GJ, multiplied by a percentage rate on a sliding scale.

Northern Territory snapshot

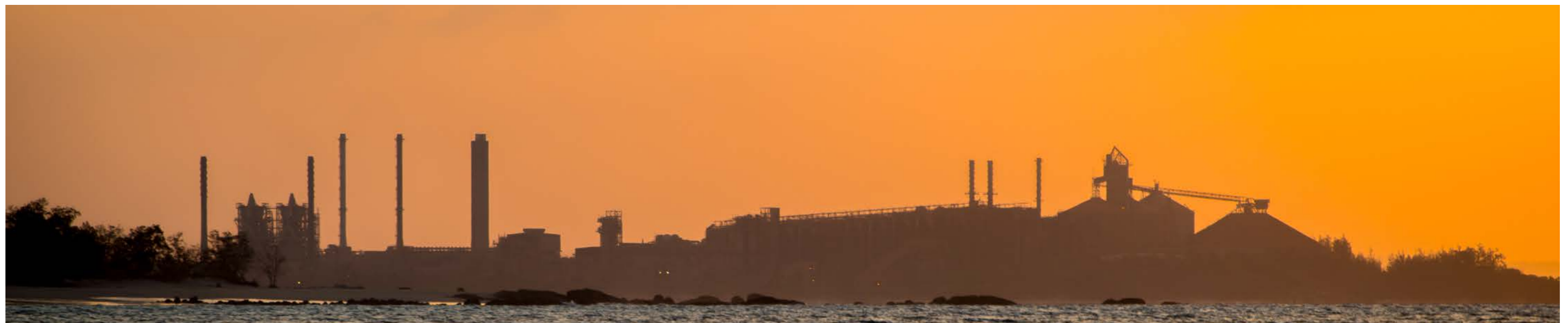
The NGIP identifies that new basin supply is likely to come from a combination of the North Bowen and South Galilee basins as well as the already progressed Beetaloo Sub-basin. The Federal Government has committed \$220 million in funding to support the Beetaloo development which draws

on economic, engineering and scientific studies commissioned by the Federal and Northern Territory Governments.

Prospecting of the Beetaloo Sub-basin is already well underway, with the Santos/Tamboran joint venture, Origin/Falcon joint venture and Pangaea Resources all investing in the region. Although progress at Beetaloo had stalled as a result of the moratorium placed on onshore unconventional gas development by the Northern Territory Government, since the moratorium was lifted in April 2018, eight exploration wells have been drilled or are in the process of being drilled.

The infrastructure development sequence identified in the NGIP to connect the Beetaloo Sub-basin to the East coast market includes:

1. a new pipeline to connect early stage Beetaloo volumes to existing infrastructure by 2025, then upgraded sequentially from 2028;
2. expansions to the Amadeus, Northern, and Carpentaria Gas Pipelines to transport initial Beetaloo volumes by 2025;
3. twinning the Northern and Carpentaria Gas Pipelines to transport higher Beetaloo volumes by 2028; and
4. if the Beetaloo basin development goes large scale, a new pipeline to connect the Northern Gas Pipeline at Mt Isa to the new Galilee Gas Pipeline by 2028.



While the Beetaloo Sub-basin development is a positive indication of the potential investment opportunities for stakeholders in the oil and gas space, it is not without issue. Since 2021 and already in 2022, environmental activists have frequently rallied against Santos to voice concerns about the impacts the Beetaloo Sub-basin development will have on the environment. It is likely that similar environmental and community protests will continue across the East coast as gas developments continue to take shape.

New South Wales snapshot

Santos endured similar setbacks with respect to its Narrabri Gas Project. However, those obstacles are now firmly in the past since the project received Federal Government approval in November 2020 and the New South Wales Land and Environment Court dismissed the appeal against the decision of the New South Wales Independent Planning Commission to approve the project. The Narrabri Gas Project is now under development and is expected to provide for up to 50% of New South Wales' gas needs.

Gas-fired backfire or stoking the flame?

Despite the Federal Government's commitment to a long-term gas-led recovery, in the short term, the oil and gas sector has lagged behind other industries. The number of jobs lost in the gas sector since May 2020 was 3,800 (offset by strong increases in employment in many other industries, including manufacturing and non-oil and gas mining industries). In terms of economic growth, the contribution of gas to the post-COVID-19 economy recovery has declined by 2% since before the pandemic.

The sector has always been extremely capital intensive with long planning and build times, as evidenced by the NGIP's indicative timings on the construction of new gas infrastructure. Successful growth in the sector is also dependent on environmental and regulatory approvals before construction of key infrastructure can begin.

However, with Federal and State Government support, we predict that the opportunities will continue to outweigh the risks for the further development of this sector. ■



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A race to development – Australia's hydrogen journey continues

In 2021, Australia's hydrogen industry continued to grow at a rapid pace. The race is on to establish an economically viable foothold in the global hydrogen industry, and governments and private corporations are competing to place themselves at the forefront of the sector. Not only does a competitive hydrogen production and export industry have the potential to produce a range of significant economic, employment and technological benefits, it is becoming an increasingly dominant factor underpinning corporate, Federal and State Government net zero carbon plans.

Although it is encouraging to see both private and public sector advances in this space, major supply chain issues and challenges must be overcome in order for hydrogen to become cost effective and competitive.

Hydrogen developments in 2021

In 2021, we saw many significant developments in the hydrogen industry as Federal and State Governments further accelerated funding and policy initiatives, which have supported private investment in all States and Territories.

Government investment, incentives and global partnerships

Following its key hydrogen and net zero plans in 2019 and 2020, the Federal Government has announced further details of its investment, incentives and partnerships within the hydrogen industry. For instance:

1. in May 2021, the Australian Renewable Energy Agency (**ARENA**) announced a conditionally approved \$103.3 million towards three commercial-scale renewable hydrogen projects as part of the Renewable Hydrogen Deployment Funding Round;
2. in September 2021, the Federal Government announced an additional \$150 million in funding for hydrogen hubs in 'priority locations' in each State and Territory (except the ACT). The additional funding forms part of the \$464 million Clean Hydrogen Industrial Hubs Program and is part of the \$1.2 billion committed to developing the hydrogen industry; and
3. in October 2021, the Federal Government released 'The Plan to Deliver Net Zero, The Australian Way'. The highly anticipated plan details how Australia can achieve net zero emissions by 2050, particularly through the development and commercialisation of the hydrogen industry.



Furthermore, State Governments are also spending large in the hydrogen space, making announcements off the back of their hydrogen strategies and development plans in 2020, including:

1. in June 2021, the Queensland Government announced the establishment of the \$2 billion Queensland Renewable Energy and Hydrogen Jobs Fund (committing an extra \$1.5 billion to the existing \$500 million Queensland Renewable Energy Fund); and
2. in September 2021, the Western Australian Government announced a further \$61.5 million in developing the State's renewable hydrogen industry.

Private investment and project pipeline

It has not only been the State and Federal Governments rushing head first into hydrogen. In 2021, we saw significant private investment as corporations looked to position themselves as leading players in the hydrogen supply chain. Although the hydrogen industry is still in its 'market activation' or 'pre-competitive' phase, many new projects have been added to the growing pipeline in 2021, including:

1. Aqua Aarem's 'Desert Bloom Hydrogen Project' in Tennant Creek, Northern Territory, which has a project value of approximately \$15 billion at full scale;
2. Fortescue Future Industries' 'Global Green Energy Manufacturing Centre' in Gladstone, Queensland, which has a total project value of over \$1 billion;
3. Dalrymple Bay Infrastructure Limited's 'Hay Point Hydrogen Export' project (in partnership with other entities) in Hay Point, Queensland; and
4. Woodside Energy Limited's 'H2Perth' project in Kwinana, Western Australia, which has a project value of approximately \$1 billion.

Challenges for the industry

While government and industry will continue to identify every potential opportunity to place themselves in the best position to become a hydrogen powerhouse and fulfil their net zero targets, the pipeline of significant investment and large-scale commercialisation of hydrogen is facing complex hurdles, encouraging the need for long-term planning and sustained investment. The following key challenges are not new, but continue to create logistical and financial barriers to widespread development. They include:

1. integration with other energy sources/ infrastructure – technology will need to be developed to integrate hydrogen energy with other energy sources i.e. electricity grid, gas etc. This will be a significant factor in reducing costs and streamlining energy production as well as assisting in establishing a domestic market for hydrogen to help underpin the export industry;
2. transport – technology will need to play a vital role in reducing the cost of transporting hydrogen safely and efficiently on a large scale. Compared to natural gas, transporting liquid hydrogen is much more expensive as it needs to be cooled at a much lower temperature, and also has a lower energy density; and

3. cost of production and economies of scale – this is the most important challenge. Hydrogen needs to be cost-competitive to export and be used domestically. The development of innovative technology is key to achieving the Federal Government's cost goal of \$2 per kilogram of hydrogen. Although the continued drop in the price of renewable energy is helpful in addressing this issue, other costs such as storage, transport and water access complicate this commercial proposition.

2022 outlook

The large-scale support and investment from the public sector over the past year will continue to play a part in incentivising further investment in the industry. Whilst we expect to see further growth and new projects over the past year, we see most of these largely remaining in the feasibility and planning phase in the short term.

It is evident that governments and corporations are investing significant resources in hydrogen in an effort to gain an early foothold in the industry, and more strategically, to use the resource as a major contributor in helping achieve their net zero targets. However, there are many challenges and issues in the hydrogen supply chain that pose headwinds for the industry in its current form. Ultimately, innovations in technology to help integrate hydrogen into existing infrastructure and energy sources, and reduce both domestic and export transport costs, will be the key for hydrogen to be cost effective and competitive in the near future. These developments will continue to rely upon significant government investment to lead the way, which seems readily available, at least in the short term. ■



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Trends in overseas and alternative funding – tips to keep the horse before the cart



As touched on in [‘Why your ESG policy is more than just lip service’](#), and ‘The Rise of Alternative Funding for Resources Projects’ article in our 2021 edition of [Emerging Issues](#), the focus on shifting from shareholder profits to a wider stakeholder presence continues to be seen and felt in the banking and finance sector. The move from traditional financing sources continued throughout 2021, and obtaining funding remains a major project development hurdle for resource proponents. Following the 2021 G20 conference – at which Australia’s climate change policies received global scrutiny – we have seen mounting pressure on the providers of finance, from listed funds and schemes to international and domestic lenders, to limit funding and investment in coal, gas and oil projects. For example, three of the four domestic banks were criticised for being part of a global banking consortium which recently partly funded the Woodside-Global Infrastructures Partners gas project.

Banks, superannuation funds, and other prospective lenders need to manage the increasing stakeholder expectations that investment decisions will be made with consideration of net zero emission targets, and a focus on complying with the Paris Agreement.

Each of the big four domestic banks have signed the Equator Principles, another risk-management framework which specifically assists lenders manage ESG risk across projects. With banks increasingly mindful of shareholder sentiment in this regard, miners and operators are turning to alternative sources of funding, many of which can only be found overseas, opening up a variety of issues and considerations.

When considering unconventional lending streams, it is important to explore the common, yet complex issues facing lenders and borrowers.

Common issues for lenders

Foreign investment approval

The most obvious and pressing hurdle for any foreign owned entity seeking funding for a project (or any foreign owned potential financier looking to take security in respect of a project) is the regulatory requirements of the Foreign Investment Review Board (**FIRB**).

FIRB traces through the ownership of any project or foreign entity looking to take a security in respect of a project, up to its ultimate shareholders. Therefore, funding a project by, or through, a foreign-based (and in particular, government owned) entity means that FIRB approval will be required. It is essential that the time required for the application to be prepared and approved by FIRB, as well as the associated costs, are factored into any such transaction.

The requirement to obtain FIRB approval is not always immediately obvious in typical lending scenarios, particularly where the security package does not include taking a security interest in land. However, in the resources industry, where financiers generally require that security for their funding includes a mortgage over a tenement, project site or a shared security in a land-rich Australian corporation, the grant of such security will require FIRB approval.

The time required to obtain FIRB approval can often present issues for project proponents. Time pressures of a transaction may not always allow FIRB approval to be obtained prior to financial close,

and the grant of relevant securities is sometimes made conditional on such approval being obtained. Critically for lenders, security arrangements conditional in this manner are not effective until FIRB approval is received – meaning that the relevant security interests do not have the priority protection afforded registration under the *Personal Property Securities Act 2009* (Cth) or the indefeasibility of title afforded by a mortgage over real property and tenements. This means that the secured party cannot enforce its security over those particular assets, and is effectively taking ‘insolvency risk’ in respect of the borrower and the relevant project assets until FIRB approval is obtained. This highlights the need to consider the nature of security on offer and to keep FIRB front of mind from the early stages of a transaction.

As alternative financing arrangements become more common, the scope of potential security interests and arrangements broaden. For example, royalty, streaming and production-based sources of financing involve the taking of security over the revenue producing assets, such as the tenements from which the resource is produced, the product itself and the contracts for sale for that product. The means of taking effective security over such assets vary, and financiers and borrowers should be aware of exactly what security is being taken and the steps necessary to perfect it. Where ‘royalty funding’ and associated security intersects with separate ‘project funding’, intercreditor arrangements will need to be agreed and documented as between the relevant secured parties.

Taxation considerations

Another relevant issue in the context of financing provided by non-Australian lenders is Australian interest withholding tax (**IWT**). Broadly, there is a tax of 10% on interest paid by:

1. Australian resident borrowers who incur the interest expense in carrying on their business in Australia; or
2. non-resident borrowers carrying on business in Australia, at or through, a permanent establishment in Australia, (together, **Borrowers**), to
3. financiers not resident in, or not acting through a permanent establishment in, Australia.

The Australian Taxation Office (**ATO**) imposes upon Borrowers the obligation to remit the amount of IWT and pay it to the ATO. However, finance documents typically place an obligation on the borrower to ‘gross-up’ any amount so withheld. This means that Borrowers are required to make an additional payment to the financier in respect of the tax withheld (in other words, ‘grossing up’ the amount that the Borrowers are obliged to pay to the financier to account for the IWT).

To avoid this additional impost, parties should spend time in the early stages of a transaction to structure the financing in the most tax and cost-efficient manner possible as well as to determine whether it is the lenders or the borrower who will commercially bear the impost of IWT. The jurisdiction and nature of the contracting parties should be carefully considered as many countries have double tax agreements with Australia which reduce IWT to nil in certain circumstances (for example, in respect of interest paid to ‘financial institutions’).

There are other exemptions which may reduce the IWT payable, the most common being the ‘public offer’ exemption.

Foreign lenders

As with domestic Australian lenders, international lenders are also succumbing to shareholder pressure with regard to the funding of coal, oil and gas projects. We have consequently seen a variety of unconventional lenders satisfy borrowing demand in the form of syndicated facility agreements. In those arrangements, a security trustee will often be appointed on behalf of the lenders and will take security against the borrowers’ assets. Under Australian law, forming a security trust will often have transfer duty consequences for the lenders. The impact of this will be seen particularly when financiers enter and leave the syndicated facility agreement, and specialist revenue advice should be obtained in relation to any such trust acquisitions and any further declarations of trust as the beneficiaries (lenders) change from time to time.

Relevantly, there are duty exemptions for security trusts under Australian law. For example, in Queensland there is an exemption where:

1. the only dutiable property of the trust are existing rights of the holder of a mortgage, charge, bill of sale or other security over dutiable property; and
2. the existing rights have been given in favour of the trustee (security trustee) for the sole purpose of being held for the benefit of the beneficiaries of the trust who have provided or will from time to time provide financial accommodation.

Legal Opinions

Australian legal counsel are often required to issue legal opinions to foreign lenders. Typically, these opinions relate to the enforceability of the finance documents and securities under Australian law but can also extend to other project documents, IWT and the applicability of section 128F of the *Income Tax Protection Act 1936* (Cth). This will require specialist tax advice and the need for such legal opinions should be discussed in the early stages of structuring funding arrangements.



London Interbank Offered Rate

The start of the 2022 New Year marked the long-awaited deadline for banks no longer being required to submit to the London Interbank Offered Rate (**LIBOR**). If not doing so already, parties should consider whether any references to LIBOR in existing project documents need to be amended to refer to other Interbank Offered Rates (**IBOR**) and should look to update such reference rates in transaction documents going forward.

Measure twice cut once

As alternative funding sources become more common, lenders and borrowers should carefully consider the above factors early on in negotiations, as this will undoubtedly save time and costs and give the parties ample time to consider restructuring and taxation consequences. ■



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Spotlight on mine rehabilitation showing no signs of dimming

The focus on mine rehabilitation in Australia has remained strong throughout 2021 and into early 2022, with many jurisdictions continuing to promote higher standards of progressive rehabilitation. Whilst the regulatory frameworks are becoming more rigorous, these changes bring new opportunities for businesses across the sector.

Over the last decade, we have seen changing community expectation with respect to post-mine-closure landforms. It is no longer acceptable for mining voids and damaged landscapes to remain.

Mining companies are now required to identify and plan for post-mining land uses (**PMLUs**), well before first dirt is turned.

New South Wales

In July 2021, the New South Wales Government significantly reformed its mine rehabilitation framework by introducing standard rehabilitation and reporting conditions for all mining leases. These changes aim to set clear, achievable and enforceable requirements for progressive rehabilitation.

The primary objective of these reforms is to achieve sustainable final land uses following the completion of mining. Mining proponents are now required to demonstrate that the rehabilitation of land and water disturbed by mining is safe and stable, and can support the future final land use(s) approved through the development consent. Traditional PMLUs remain common, including a return to native vegetation, grazing or cropping land and water storage areas. However, with increased demand for renewable energy supply now in Australia, novel final land uses are becoming more prevalent, including pumped hydro and solar projects on mine rehabilitated land.

The new mining lease conditions replace the current requirement to prepare mining operation plans and require mining lease holders to:

1. prepare a management plan to identify and achieve rehabilitation outcomes;
2. carry out rehabilitation risk assessments;
3. develop a program to demonstrate an approach to progressive rehabilitation;
4. rehabilitate land and water as soon as reasonably practicable after disturbance occurs; and
5. report annually on rehabilitation performance.

Further, the New South Wales Government now requires mining lease holders to prepare a:

1. rehabilitation objectives statement;
2. rehabilitation completion criteria statement; and
3. final landform and rehabilitation spatial plan,

for each mine. The regulator will only approve these documents if they are satisfied that the approved final land use will be achieved through implementation of the rehabilitation completion benchmarks. These reforms are expected to result in more efficient mine planning and earlier completion of rehabilitation. It will also mean that mining companies are less likely to revisit 'old ground' if rehabilitation is already completed or underway.

Existing mining lease holders will be given a transitional period until 2 July 2022 for large mines and 2 July 2023 for small mines before these obligations take effect. Large mine operators have been busy preparing to comply with the new rehabilitation requirements, a trend we expect to continue over the coming months as the 2 July deadline looms.

Queensland

The Queensland Government has also prioritised better rehabilitation and sustainable PMLUs in recent years, with significant 2019 reforms now entering the third and final year of transitional arrangements. To recap, 2019 saw the introduction of:

1. progressive rehabilitation and closure plans and schedules (**PRCPs**), which replace plans of operation and require sites to be rehabilitated progressively; and
2. a far more comprehensive financial provisioning scheme (**FP Scheme**), which replaces the financial assurance regime for resource activities.

These reforms came with transitional periods for existing operations, which are now nearing an end. Specifically, holders of environmental authorities granted prior to 1 April 2019 for resource activities must have been transitioned into the FP Scheme by 31 March 2022, and holders of site-specific environmental authorities granted prior to 1 November 2019 for mining lease activities must be transitioned into the PRCP framework by 31 October 2022.

The regulator has been working hard to issue transition notices before the cut-off dates, and resource companies have been actively responding to these notices. Preparing draft PRCPs is proving an onerous task for many operators, as they require

extensive detail, forward-planning and step-by-step milestones for each PMLU and any non-use management areas (**NUMAs**), and community consultation must occur throughout the drafting process and beyond.

Further, given that the new PRCP framework significantly tightens the circumstances under which NUMAs may be approved (including voids which have no PMLU), many operators are seeking to have existing documents which demonstrate final landforms recognised by the regulator as 'land outcome documents' (**LODs**), as these documents may allow NUMAs to occur without having to meet the new requirements.

The regulator appears to be closely scrutinising potential LODs and the bar for approval seems high – we expect the scrutiny will continue given the Queensland Government's push towards sustainable PMLUs.

Separately, in another step aimed at strengthening rehabilitation, Queensland appointed its first Rehabilitation Commissioner in September 2021 – James Purtill, who is well known to industry. The Commissioner will engage with a variety of stakeholders on resource rehabilitation and act as an independent adviser to the State. As this position is still relatively new, we expect increased involvement from the Commissioner throughout 2022 in shaping Queensland's ever-changing rehabilitation landscape.



The business of rehabilitation

With the spotlight on mine rehabilitation showing no signs of dimming, it is no surprise that some companies are taking advantage of the unique business opportunities it presents. Innovative PMLUs are becoming more common, with:

1. the Kidston Project in Queensland converting a disused gold mine into a pumped hydro facility;
2. the proposed Maxwell Solar Farm in New South Wales erecting 125,000 solar panels over an old rehabilitated open cut coal mine;
3. a former coal mining void in Western Australia becoming a large recreational lake (Lake Kepwari); and
4. NQ Minerals establishing a project to reprocess high-grade tailings at the Hellyer Gold Mine in Tasmania.

Companies are also capitalising on other opportunities. One example is **New Century Resources** positioning itself as a leading tailings management and economic rehabilitation company after securing long-term tailings service contracts with existing mining operations.

From rehabilitating old mines and reinstating them, to devising innovative PMLUs which may independently generate profit, and embracing rehabilitation as part of broader branding strategies (particularly in the era of ESG), one thing is certain: the regulatory requirements may be growing, but so too are the opportunities. ■



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Raising the bar on cultural heritage engagement

There has never been a more opportune time for resources and renewables companies to take stock of their Indigenous engagement strategies. The spotlight is firmly focused on the veracity of corporate ESG policies (of which Indigenous engagement is merely one element), the [Juukan Gorge Final Report](#) which has highlighted inadequacies in engagement under native title and cultural heritage legislation, and Aboriginal Peoples increasingly seeking to rely on Federal cultural heritage protections where State-based regimes are said to not be providing sufficient protection.

Juukan Gorge: a way forward

Following the parliamentary inquiry into the destruction of 46,000-year-old caves by Rio Tinto in Western Australia in May 2020, the Juukan Gorge Final Report was released by the Standing Committee of Northern Australia on 18 October 2021. The Final Report made three key findings and eight recommendations for the overhaul of Australia's native title and cultural heritage legislation at a Federal, State and Territory level.

Relevantly, the Final Report recommendations include that:

- a new framework for cultural heritage protection be implemented at a national level by way of new legislated national minimum standards for State and Territory laws, including an ability for the Commonwealth to override decisions made under inadequate State or Territory laws that would destroy sites contrary to consent, and the ability for traditional owners to effectively enforce Commonwealth protections through civil actions; and
- a review of the *Native Title Act 1994* (Cth) be undertaken to address inequalities in the negotiating position of Aboriginal and Torres Strait Islander Peoples in the future act regime, including the right to negotiate process, consideration of a requirement for proponents to adhere to the principles of Free, Prior and Informed Consent (FPIC) and a prohibition on 'gag clauses' and clauses restricting access to Commonwealth heritage protections (although, this recommendation arguably goes beyond the Standing Committee's terms of reference).

There have been some developments in terms of reform of State laws, namely:

- new legislation commenced in Western Australia in December 2021 to wholly replace the legislation that existed at the time of the Juukan Gorge incident. The *Aboriginal Cultural Heritage Act 2021 (WA Act)* includes increased penalties for harming Aboriginal Cultural Heritage (ACH), a new definition of ACH to include intangible elements, and new categories of activities which may harm ACH including new approvals processes for each category. The WA Act also enshrines the principles of FPIC through the concept of 'informed consent' – which requires the proponent to provide the Aboriginal party 'full and proper' disclosure of information about the proposed activities (including the preferred method of carrying them out, as well as feasible alternative methods available to the proponent) prior to the Aboriginal party's entry into an ACH management plan;

- a review of Queensland's 20-year-old cultural heritage legislation has been ongoing since May 2019. Since the release of the Final Report, the Queensland Government has released the 'Options paper: Finalising the review of Queensland's Cultural Heritage Acts', which expressly references its reliance on the Final Report. There are proposals for change across three key areas: improving ACH protection, redefining 'Aboriginal party' and leadership of First Nations peoples in cultural heritage management and decision making; and
- following calls over many years for a standalone piece of cultural heritage legislation in New South Wales, a reform process is being progressed by Aboriginal Affairs New South Wales within the Department of Premier and Cabinet, which will build on the model initially proposed by the *Aboriginal Cultural Heritage Bill 2018* (NSW). The objectives of the reforms include incorporating decision-making by Aboriginal Peoples and delivering improved protection, management and conservation of ACH.

As the Final Report is not binding on Federal, State or Territory Governments, the question is to what extent the recommendations will be implemented. Regardless of whether and how quickly any legislative change in a particular jurisdiction is forthcoming, companies should view the Final Report as a call to action with respect to cultural heritage business practices, as the protection of ACH will continue to be a central focus for the industry as part of broader ESG endeavours (which typically call for more than mere compliance with the law). A good place to start for companies seeking to be proactive in improving cultural heritage practices is to review existing and pending agreements for anything that could improve relationships with traditional owners (for example, the removal of gag clauses).



The rise of ATSIHPA applications

The use of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (**ATSIHP Act**) is increasingly being relied upon by Aboriginal Peoples where they assert State-based cultural heritage laws are not providing adequate protection. Under the ATSIHPA Act, the Federal Government can make a declaration for the protection and preservation of significant Aboriginal areas and objects, including by restricting any development activities in the area of the declaration.

This pathway for protection has existed since the legislation came into being, however applications are likely to become more prevalent in the wake of the Juukan Gorge Final Report, which effectively called into question the effectiveness of State-based regimes for the protection of Aboriginal cultural heritage. There are currently three declarations in force under the ATSIHP Act (all in New South Wales), and there are various applications under consideration in both Queensland and New South Wales, with a number of these applications relating to proposed mining developments.

Critically:

- it is not a requirement that an application under the ATSIHP Act be made by the relevant cultural heritage party for an area – that is, any Aboriginal person may apply for a declaration for protection;
- the risk of an application being made under the ATSIHP Act will exist throughout the life of a project – for example, it is not limited to pre-grant of a mining tenement, but rather, may occur at any time after grant; and
- it is entirely separate to any native title process, and cannot be contracted out of (given that an application can be made by any Aboriginal person – and not only the native title party for a particular area).

In our experience, the best approach to mitigating the risk of an application being made under the ATSIHP Act, is proactive management and engagement with traditional owners in the areas within which a company is operating, or proposing to operate in. At times, this may involve managing Aboriginal and Torres Strait Islander Peoples who do not technically have a 'seat at the table' under the relevant cultural heritage legislation. ■



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Impacts of biodiversity offsetting requirements in approvals

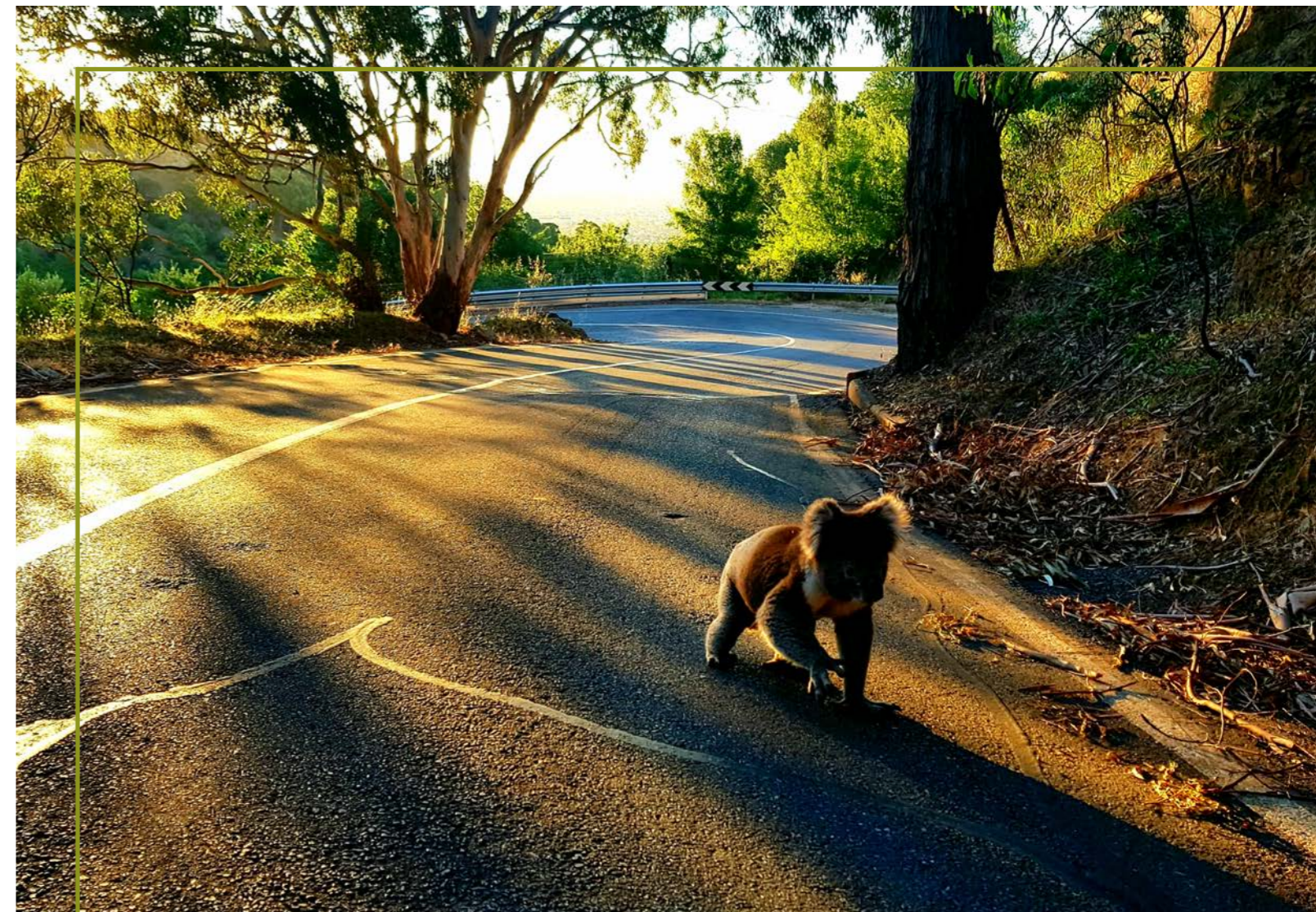
Most new and expanding resources and renewables projects across Australia are now required, through conditions of approvals, to offset residual impacts on biodiversity if these impacts cannot be otherwise avoided or mitigated. Offsetting obligations requires developers to compensate for the unavoidable loss of threatened and vulnerable species and ecosystems as a result of these projects.

Whilst the specifics of biodiversity conservation legislation and policies differ in each State and Territory, the overarching offsetting options are generally aligned. These offsetting options commonly include the purchase of biodiversity credits, land-based offsets, payment of a financial settlement to the relevant Government to fund

broader strategic biodiversity conservation, research projects or the implementation of improved land management practices.

However, the Federal and State-based biodiversity offsetting regimes remain complex, costly and in many cases are failing to achieve the environmental conservation outcomes for which they were designed.

A number of significant issues with the current schemes in each jurisdiction are impacting the viability of new projects, with further reforms required to ensure that economic development in the resources and renewables sector is not constrained.



Current issues

Current issues impacting the effectiveness of Federal and State based biodiversity conservation regimes include:

1. 'like-for-like' offsetting rules – in some circumstances, conditions of approval require 'like-for-like' (substantially the same) offsets which means that the biodiversity credits purchased, or created, must be for the same or a very similar class of native flora and fauna that will be impacted by the development. In Queensland, many developers struggle to find land-based offsets with the right characteristics and for this reason, financial offsets are more frequently utilised in Queensland;
2. upfront complexities with establishment of biodiversity conservation sites – only a limited number of landowners have established biodiversity conservation sites on their properties as a result of the lengthy, costly and complicated requirements to be satisfied by a landowner before entering into a conservation agreement with the Government. These requirements often include expert ecological site assessment, preparation of detailed land management plans, as well as obtaining legal, financial and tax advice. Industry groups are advocating for the Federal Government to provide greater support for landowners to establish biodiversity conservation sites, which will in turn generate more biodiversity credits in the market;
3. black box calculators used to determine offsetting requirements – offset requirements for a project are currently determined by complex calculators that quantify impacts and required offsets. These calculators also specify the monetary contribution that can be paid by a developer in lieu of a land-based offset. However, in New South Wales, the required monetary contribution unpredictably fluctuates depending on the credit market and often results in exorbitant biodiversity offsetting costs. As a result of the disproportionate outcomes, developers in New South Wales are more commonly pursuing self-funded offsetting options;
4. lack of alignment with Commonwealth offsetting requirements – offsetting requirements under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) and State based biodiversity conservation legislation are not currently aligned, notably with the Commonwealth regime imposing a limit on financial offsets (in most cases, at least 90% of a Commonwealth offset must be land-based). These issues often result in developers being required to comply with stricter offsetting obligations under Federal approvals. As such, further reforms to the EPBC Act are required to create a single process for environmental assessment, approvals and conditioning of offsets; and
5. patchwork of conservation land – the range of biodiversity offsetting options available to developers often results in a 'patchwork' of conservation land that is not connected or sourced for strategic reasons. Both environmental and industry groups have encouraged Governments to prioritise the identification of State, regional and local conservation corridors to deliver better long-term environmental outcomes.

Over the last two years stakeholders across multiple sectors, including the resources and renewables industry, have advocated for further reforms to the biodiversity offsetting regimes across Australia. Concerns with the current frameworks have driven independent reviews and parliamentary inquiries to identify appropriate reforms to improve the effectiveness of these offset systems. Proponents of resource and renewable projects remain hopeful that these reviews will unlock major constraints within the current system and deliver realistic, achievable and affordable biodiversity offsetting outcomes in the near future. ■



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The steady rise of carbon capture and storage

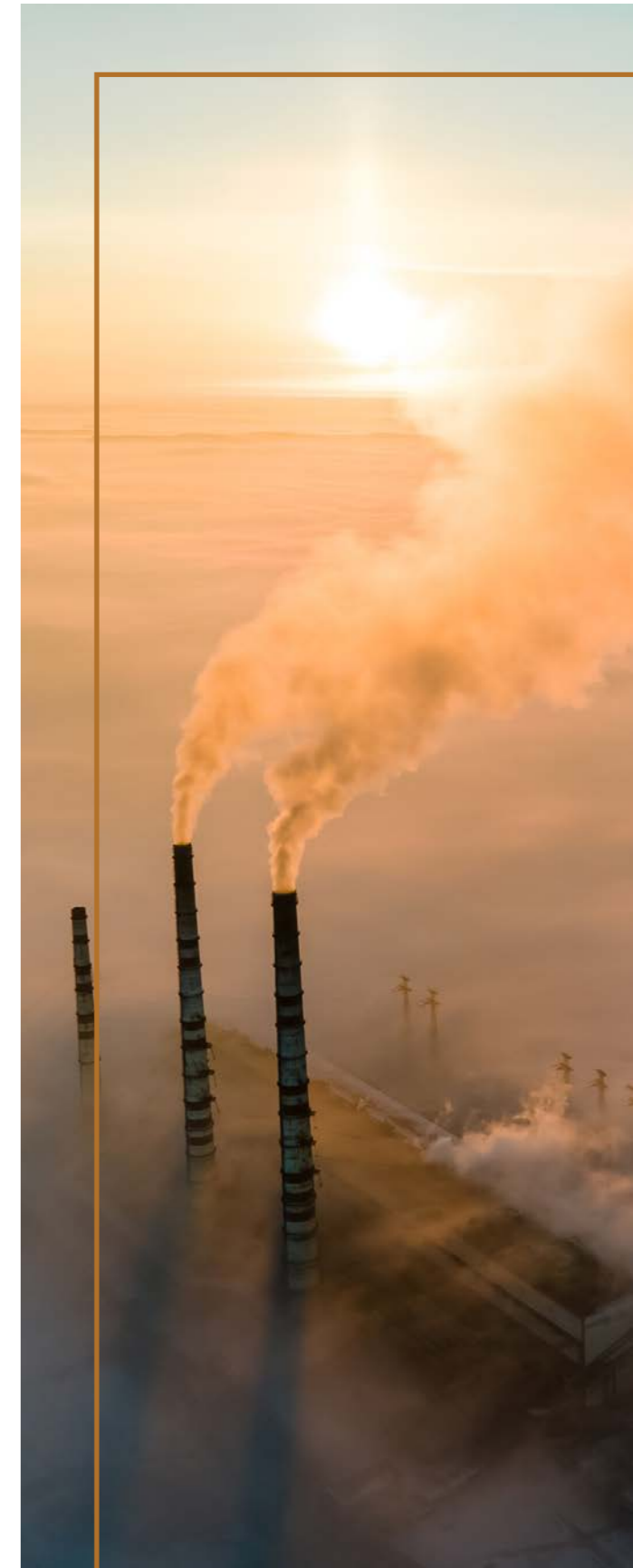
In Australia, market incentives for companies to commit to climate targets and reduce emissions have seen a stronger than ever before carbon price, and increased innovation and investment in carbon technology by industry.

Carbon market

The Emissions Reduction Fund (**ERF**) is Australia's carbon crediting scheme through which carbon abatement can be bought and sold by the Federal Government or on the voluntary market. The ERF also includes a safeguard mechanism to ensure large emitters keep their emissions within historical levels.

In 2021, the voluntary purchase of carbon offsets drove the price of an Australian Carbon Credit Unit (**ACCU**) up by 180% over 12 months. Spot prices for ACCUs rose to \$47 per tonne in 2021, and to a record \$57 per tonne in January 2022. The ACCU price has since experienced some volatility due to proposed changes to the fixed delivery contracting regime [announced by the Federal Government](#) on 4 March 2022 (which would effectively result in an over supply of ACCUs on the voluntary market), but is expected to bounce back once the market corrects itself following the changes.

There are many winners in a strong carbon market – those with stakes in ERF projects, such as carbon project developers, service providers, investors, financiers, landholders and native title groups. Meanwhile, large emitters required to purchase ACCUs to manage excess emissions arguably cop the brunt. However, there are other ways for resources companies to become involved in and benefit from the carbon industry, both financially and from an ESG perspective – that is, companies could participate as proponents or investors themselves in ERF projects, a relevant example for industry being carbon, capture and storage (**CCS**).



Carbon, capture and storage

CCS projects can be registered to generate ACCUs under the ERF. CCS involves capturing, transporting and injecting greenhouse gases from oil and gas production, hydrogen production, heavy industry and coal-fired power generation into geological storage sites for permanent storage.

Since being identified as one of several priority low emissions technologies in the Australian Government's Low Emissions Technology Statement in 2020, CCS has become a key component of Australia's decarbonisation strategy. The technology is being pursued with keen interest from a number of players in the resources industry who have the means and incentive to develop the technology for implementation alongside existing operations.

In line with the Government's priorities, the Clean Energy Regulator released a new methodology to credit emissions storage through CCS in late 2021. The methodology is designed to incentivise projects to capture greenhouse gases that would have been released to the atmosphere from industrial processes or oil and gas activities. The current CCS methodology is due to sunset in 2031.

For the first time, CCS projects have been included in the Department of Industry, Science, Energy and Resources' major projects report published in December 2021. The report highlights a number of CCS projects under development and, more broadly, that CCS projects represent a notable component of project value in the current investment pipeline.

Despite the current attention on CCS, the reality is that it is yet to live up to its promise as a cost-effective solution to large-scale emitting activities. To date, it has only been operational for small-scale activities that contribute relatively little to global emissions. A large source of scepticism in the technology has been borne from the failure of the first significant CCS project in Australia – being Chevron's Gorgon Plant in WA, where Chevron failed to store the 9.5 million tonnes of carbon that it promised in its first five years of operation. Following the failure, Chevron committed to investing \$40 million into lower carbon investment, as well as acquiring and surrendering 5.23 million tonnes of greenhouse gas offsets.

Where to from here?

It is a 'watch this space' as to whether priority status in the Government's emissions reduction plans and high levels of investment in research and development will see this change. Both private and Government investment in the past 12 months has significantly increased. For example, the Australian Government granted Glencore's Carbon Transport and Storage Co (CTSCo) project \$5 million to trial the viability of the technology at the Millmerran Power Station, as well as \$15 million to Santos to fund their Moomba liquefied natural gas export project. Santos is expected to store significant quantities of carbon dioxide annually and has successfully registered its CCS project as an ERF project, thereby allowing Santos to generate and sell ACCUs.

State Governments are also currently formulating policy and legislation to provide greater regulatory certainty for CCS projects. As an example, the Western Australian Government [announced](#) on 9 March 2022 that it plans to introduce a bill relating to CCS later this year. ■



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Health and safety – enforcement escalation in the resources industry



Health and safety law enforcement in the resources industry has undergone a seismic shift. Safety regulators and prosecutors are more focused than ever on seeking penalties against senior officers of resource companies following incidents on site, and their enforcement approach is now targeting the entire organisational chart.

The targeting of enforcement against individuals

While the health and safety laws have remained relatively stable over the past decade (apart from the introduction of industrial manslaughter in many jurisdictions), the way in which the laws are being enforced has changed considerably. Senior resources officers are being charged with offences carrying potential imprisonment terms, with this tough regulatory approach actually seeing directors imprisoned following workplace accidents. This is a reality across all jurisdictions, for example:

1. Queensland, 2019:
 - a. an executive officer of a mining operator was sentenced to **18 months' imprisonment** with a six-month non-parole period, in relation to the death of a young worker crushed by an unguarded conveyor;

- b. a company director was sentenced to **12 months' imprisonment**, suspended after four months in custody, and his company fined \$1 million, for not installing a safety rail which resulted in a fatal fall from height; and
- c. Victoria, 2019, two directors were **imprisoned for 10 months** (wholly suspended), and their company fined \$3 million, following a fatal forklift accident at an auto recycling plant in the country's first industrial manslaughter conviction;

2. a director was **imprisoned for six months** for using a forklift to carry an employee inside a bin with steel, which ultimately failed and killed the worker; and
3. Western Australia, 2021, a company director was sentenced to two years and **two months' imprisonment**, and the company fined \$605,000, after two employees, who were installing roof sheets on a new farm shed, fell after strong winds hit.

While these 'big stick' offences were initially introduced to punish the most serious offending, we are now seeing it regularly deployed as the primary tool of enforcement following a fatal incident in the workplace.



Impact on the resources industry

This tough enforcement model is being felt across the entire resources industry.

In addition, rather than a single charge against a mining company, prosecutors are now charging a range of duty holders. For example:

1. a **resources company** and its **director** were fined \$500,000 and convicted and sentenced to six months imprisonment (wholly suspended) for recklessness offences after a worker suffered serious head injuries working from a bucket of a loader at height;
2. a New South Wales **blasting contractor** and its **director** were convicted of recklessness offences, and fined \$432,000 and \$30,000 respectively before discounts for early guilty pleas, following a blast which saw 11 workers and members of the public taking evasive action as flying rock was ejected from a blast at a mine;
3. a Queensland **mining workplace supervisor** was fined \$3,000 for unlawfully certifying a young worker as competent during an induction, weeks before the worker was later killed; and
4. a New South Wales **mining worker** was fined \$64,000 before a discount for an early guilty plea, after the worker installed a defective electrical switchboard that resulted in the death of the mine manager's wife when she touched an energised shower fitting at the nearby living quarters.

Vigilance and chronic unease

Now, more than ever, operators, SSEs, managers, supervisors and workers need to be vigilant about safety. The 2019 [Brady Report](#) into fatal accidents in Queensland mines and quarries, identified that the industry had a fatality cycle and *'unless it makes significant changes to how it operates, the rate of fatalities is likely to continue at current levels.'*

This report further found:

'While there is a theoretical focus in the Queensland mining industry on the identification and controlling of hazards...the industry, in general, falls short in practice. Chronic unease is not evident.'

Safety regulators pay attention to industry publications, such as the Brady Report, and will examine a duty holder's consideration and implementation of recommendations made to improve safety across the sector.

How to manage this risk

Resources companies and their officers must remain vigilant and should focus on the following:

1. know what can go wrong in your business (i.e. identify and assess risk);
2. know what you have in place to control those risks (i.e. eliminate or minimise those risks so far as is reasonably practicable); and
3. know how you are tracking in managing the risk (i.e. monitor and review those risks and controls).

External assurance, through third party audits and inspections, can often give businesses and their officers valuable insight into WHS compliance. Properly implemented, these types of assurance activities can be key evidence of officers and senior resources personnel exercising due diligence and discharging their statutory duties. ■



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Managing technology and supply chain disruption in the renewable energy industry

Industries globally have experienced increasing disruption since the end of 2019, spanning from supply chains through to day-to-day operations. The renewable energy industry has not been immune from this, with many projects being delayed due to component shortages. In an environment of growing uncertainty, there is an opportunity and a need for participants in the Australian renewable energy industry to shift their focus to strengthening domestic supply chains and investing in domestic technologies and innovation.

Supply chain risks

One example of supply chain disruption in the renewable energy industry is the current lack of semiconductors. Though widespread in their application, semiconductors (or 'chips') are used in renewable energy operations to harness, convert and transfer renewable energy. They are critical components in smart meters, sensors, wireless and wireline communications, monitoring and control systems – the technological infrastructure that are essential to enable renewable energy systems to operate.

The growing demand for semiconductors has been hampered by the pandemic, where production facilities across Taiwan, Korea, Malaysia, Vietnam and Japan have been closed for extended periods of time. With the addition of natural disasters and geopolitical tensions, this has created a significant shortage impacting the construction and expansion of renewable energy projects around the world.

Planning for disruption

To address these supply chain risks, renewable energy developers should consider enhancing their disaster recovery and business continuity plans. Learning lessons from the recent global pandemic and the evolving impacts of the conflict in Ukraine, it is wise to prepare a plan that outlines how supply chain elements can be shifted or replaced with secondary suppliers - a "Critical Systems Plan B". This could include:

- implementing panel supply arrangements in relation to the supply of critical renewable energy project components; and
- diversifying the range of suppliers to include overseas and local suppliers where possible, instead of relying on a single supplier that may be located overseas or interstate.

In circumstances where critical systems are provided or supported by third parties, it is also important to ensure that their disaster recovery and business continuity plans meet an acceptable standard. This is particularly important where the third party is providing a cloud solution, or providing support and maintenance services from overseas or interstate, and may be prevented from deploying personnel on site when required. Careful consideration must also be given to the allocation of risk in force majeure and delay clauses, and how these risks flow through the supply chain. Developers should seek further understanding from their suppliers and service providers as to what mitigation strategies and plans they have in place to respond to unanticipated challenges.

How the Australian Government is responding

Australia is well-placed to move beyond being just a supplier of critical minerals required for renewable energy components, into a manufacturer of these parts. Our success will be measured by the resilience and stability of our supply chains, and in December 2021, the Australian Government revealed more of its plan to enable this. The [Sovereign Manufacturing Capability Plan](#) outlines a number of supply chain resilience initiatives – including a focus on increasing Australia’s participation in the semiconductor supply chain. In addition, in October 2021, the New South Wales Government announced funding plans for a new semiconductor hub. This is just one example of how the Australian Government is responding to supply chain disruption.

Whilst it is difficult to protect your operations against all disruption, there are some steps that can be taken to help to mitigate this risk. By creating and continuously reviewing a “Critical Systems Plan B”, and communicating effectively with a range of third-party providers and suppliers, renewable project developers can better manage the risk of unforeseen events in each link of the supply chain. As identified in the Sovereign Manufacturing Capability Plan, all developers, contractors and suppliers also have the opportunity to participate in and shape Australia’s supply chain resilience, particularly in the areas of design, manufacturing and research. ■



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Update on the developments in the shrinking insurance market

Last year we discussed the clear shift by local and international insurers away from investing in or insuring coal operations. In 2022, that trend continues in the coal insurance market, and is expanding into oil and gas projects.

In 2021, the ‘The Insure Our Future’ network (originally Unfriend Coal) (IOF), a global coalition of non-government organisations and social movements, was driving a campaign to make coal and other fossil fuels uninsurable, and highlighted the pressure that placed on coal insurers.

Further pressure was applied on insurers last year at the Insurance Development Forum (IDF) summit held on 8 June 2021. At the IDF, Mr Antonio Guterres, Secretary General of the United Nations said:

‘We need net zero commitments to cover your underwriting portfolios, and this should include the underwriting of coal and all fossil fuels.’

On 9 August 2021, the intergovernmental Panel on Climate Change (IPCC), the United Nations body for assessing the science related to climate change, announced in its report its concerns about global warming. The IPCC highlighted that coal and oil and gas operations are contributing to the issue.

Insurers’ exit strategies

We have seen a continuation of insurers exiting coal, including:

1. Lloyd’s of London announcing they are:
 - a. not providing new insurance cover for thermal coal-fired power plants, thermal coal mines, oil sands or new energy exploration activities from 1 January 2022; and
 - b. not renewing insurance coverages for thermal coal-fired power plants, thermal coal mines, oil sands or new energy exploration activities (and companies with business models which derive at least 30% of their revenues from those plants, mines and activities) after 1 January 2030.
2. Allianz, in May 2021, provided further clarity on its coal phase-out plan, by excluding companies from its business who derived a certain percentage of their generated electricity (utilities) or revenues (mining companies) from thermal coal with a view to reaching a 0% threshold by 2040 at the latest.

On 13 August 2021, the IOF reported that more than 30 major insurance companies from around the world have adopted policies which no longer insure new coal projects while others phase out existing cover for current coal operations.

Since the COP26 Climate Change Conference in Glasgow, more insurers have stopped insuring any business in coal, whilst those remaining are imposing strict conditions, including the provision of climate change strategies and ESG reports.

Next steps for coal sector insurance

In December 2021, the Joint Standing Committee on Trade and Investment Growth released its report on the Prudential Regulation of Investment in Australia's Export Industries. The report examined how Australia's prudential regulation framework interacts with operations of the country's biggest export industries, in particular coal. One of the Committee's recommendations was to work *with the resources sector to create a self-funding insurance model that meets the needs of resource companies, contractors, suppliers and associated export infrastructure.*

This recommendation is critical given the already limited pool of insurers willing to insure and invest in coal will continue to shrink. Insurance will become even more limited this calendar year for all participants in the coal sector.

Those offering insurance will continue their approach of looking at imposing higher premiums and onerous conditions, including significantly higher deductibles. To secure cover and the most favourable terms in the market, submissions will have to be more comprehensive, dealing not only with risk, but now the anticipated conditions of social and climate awareness.

The situation remains critical for stakeholders who should be looking at viable alternatives to the traditional insurance offerings. That involves reengineering insurance programs to combat the limitations imposed by the market.

Ultimately, the sector will need to develop a permanent alternative insurance solution. ■



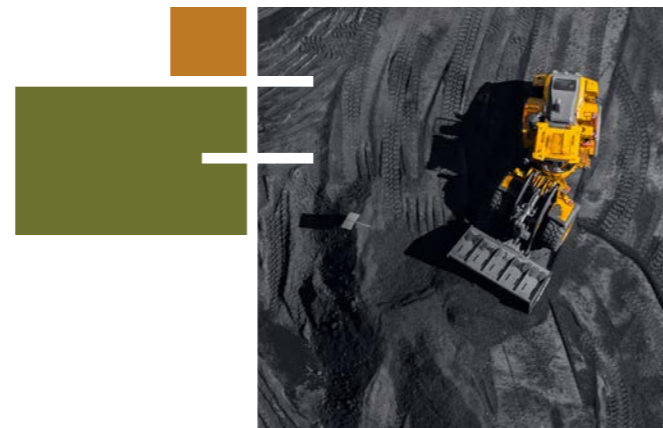
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Mine operations contracts – it pays to get it right



Mining continues to be Australia's largest industry, comprising over 10% of the Australian economy. While this is hardly news, we are currently witnessing an emergence of new (and smaller) industry players or greater participation from 'mid-tier' companies. This is attributable to a number of factors, but most significantly resulting from the divestment by large blue chip companies of their coal assets in the face of ESG pressures, to the explosion in demand for battery metals.

High among the challenges faced by small and mid-tier industry participants is how to translate thin resourcing into a successful mining operation. Often, proponents will seek to achieve this by outsourcing mining operations to a third-party contractor. While the experience and 'track record' of the contractor is critical, the importance of the underlying contractual arrangements should not be underestimated. Getting the contract wrong can have a dramatic impact on a proponent's bottom line.

When negotiating mining operations contracts, there are some key issues that should be considered by mining proponents.

Level of control over mining operations

A threshold issue is the extent to which control over mining operations will be ceded to the contractor.

A proponent's resourcing (and experience) levels may dictate that operations are primarily managed by the contractor. However, generally speaking, the higher the degree of control in the hands of the contractor, the greater the level of contingency in the contractor's pricing.

This is notionally the result of the increased risk borne by the contractor as the manager of the mine. However, 'risk transfer' to a contractor will never be absolute, with contractors certain to insist on the inclusion of various limitations and exclusions of liability in the contractual arrangements (and not unreasonably so, given they will often not hold an equity interest in the project). Therefore, proponents will need to ensure that the risks ultimately retained by them are appropriate given the nature of the commercial (and operational) arrangements.

Therefore, even where key operational decision-making is in the hands of the contractor, the proponent should ensure that the contractual

arrangements clearly provide for it to retain ultimate control over strategic matters, such as production requirements, mine planning and budgeting.

Performance

It is important that the mining contractor is sufficiently incentivised to achieve required production targets and other performance outcomes.

Performance requirements should be clearly set out in the contract, with clear consequences specified for failing to achieve these. This may take the form of a 'key performance indicator' (KPI) regime, with abatements to the contractor's entitlement to payment applying for under-performance, and potentially, bonuses applying for exceeding KPI requirements. For significant or sustained under-performance, there should also be an entitlement for the mining proponent to terminate the contract (see 'Default and termination' below).

While KPI regimes are commonly used, there is generally a limit to the financial penalty applying under contract, as abatements are typically capped. An alternative regime that is becoming more common is for the contractor to be remunerated on

a 'dollar per tonne' basis, meaning the contractor is only paid for tonnes of ore produced. While this may provide added incentive to a contractor to maximise production outcomes, proponents should beware that, given the additional level of risk assumed by the contractor under this model, significant premiums can be included in the 'dollar per tonne' rate.

Regardless of the performance regime selected for a project, it will therefore be important to ensure that the regime is supported by a clearly defined process for measuring the relevant performance metrics (and, ideally, for resolving disagreements in relation to these) in order to mitigate the risk of disputes.

Statutory safety roles

If the contractor is to be in control of day-to-day operations at the mine, the proponent will likely require it to fulfil (and be responsible for appointing) relevant statutory safety roles, such as the 'principal contractor', 'mine operator' and 'site senior executive' (SSE). This has the effect of clearly assigning safety responsibility which is likely to minimise the risk that the proponent (and its officers and senior personnel) will incur statutory liability for safety incidents at the mine.

Given the introduction of industrial manslaughter legislation for the mining sector in Queensland and other jurisdictions, care will still need to be taken by the proponent to ensure that it does not exercise such degree of control over operations that it is found to have caused the death of a worker on site. The fact that the proponent is not the principal contractor or statutory mine operator or is not appointed as the SSE do not provide the proponent or its senior personnel with a complete release of any potential liability for workplace injuries and fatalities.

Default and termination

While terminating the contract is often the last thing on the parties' minds during contract negotiations, it is prudent for proponents to ensure that they have sufficient rights to end the contractual arrangements if required.

The consequences of wrongfully terminating a long-term or high-value contract can be significant. As such, the mining operations contract should set out clear default triggers. Among these, the level of under-performance giving rise to a termination right should be clearly described (in the event of sustained under-performance, the proponent could

do without having to rely on an ambiguous 'material breach' trigger in order to end the contractual arrangements).

Additionally, proponents will often require a right to terminate 'for convenience' to allow the contract to be ended for reasons other than the contractor's default. This may include where it becomes uneconomic to continue mining due to an unexpected fall in commodity prices. While the inclusion of a 'termination for convenience' right is unlikely to be resisted in-principle by the contractor, discussions are likely to focus on the termination payments required to be made by the proponent in the event that this right is exercised. In this context, it is important for the proponent to ensure that the amount of the payment is not so high as to effectively defeat the purpose of the clause being included in the first place.



Liability and insurance

While sometimes regarded as subsidiary to the key commercial principles being negotiated, the liability and insurance provisions in a mining operations contract are of primary importance.

Poorly considered liability provisions with overly broad exclusions and limitations of liability in favour of the contractor can have the effect of undermining the risk allocation that the mining proponent believes is reflected elsewhere in the contract.

In addition, ongoing changes in the insurance market for mining operations may mean that 'boilerplate' insurance clauses (or clauses that have been used in the past), do not reflect the coverage currently available and leave key risks uninsured. Our earlier article, 'Update of the developments in the shrinking insurance market' discusses the current insurance landscape in more detail as more insurers withdraw from the coal sector.

It is critical therefore that the mining proponent takes appropriate legal and insurance advice in relation to these matters.

In the current climate of high (and rising) commodity prices, it may be tempting for proponents to treat contract negotiations as a 'race to the finish line' in order to start production as soon as possible, leaving trickier issues to be resolved down the track. However, experience shows that it is in proponents' longer-term interest to take the time (and to get the right advice) upfront to ensure that their contract is sufficiently robust and drives the correct behaviours and performance outcomes. It is important to note that the negotiation and drafting of mining operations contracts require care and it is not the case that they can simply be regarded as 'off the shelf' precedent documents. ■



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Climate change litigation and what you can do to manage the risks

Australia has the second highest number of court cases on climate change in the world, surpassed only by the US. This reflects growing community and youth engagement with legal mechanisms, and the greater availability of financial and other support for those groups - specifically in relation to climate change issues. As this trend continues, businesses, regulators and policy makers, should remain aware of the risks of climate change litigation and how these can be mitigated.

The issues associated with approvals for specific projects, and operational management of projects, being subject to judicial scrutiny are well traversed. We expect challenges to actions by businesses and decisions by regulators to continue to grow. However, we focus below on newer areas of climate change litigation.

Government – Bushfire survivors’ case

On 26 August 2021, the New South Wales Land and Environment Court handed down judgment in the case of *Bushfire Survivors for Climate Change Action Incorporated v Environment Protection Authority* [2021] NSWLEC 92 (**Bushfire Survivors**). The case involved bushfire survivors seeking civil enforcement orders against the New South Wales Environmental Protection Authority (**EPA**) to regulate greenhouse gas emissions.

The Applicant agreed that the EPA was required to ‘develop environmental quality objectives, guidelines and policies to ensure environmental protection’, and had sought to comply with this requirement through a policy endorsing the Paris Agreement and a long-term objective to achieve net zero emissions by 2050.

The Court held that the EPA’s duty to develop environmental protection instruments included a duty to develop climate change protection instruments specifically, and that the EPA had failed to fulfil its obligations. In particular, the Court considered that the documents presented by the EPA were either not prepared by the EPA or were ‘directed towards ancillary or insignificant causes or consequences of climate change’.

Government – Department duties

In light of the Court’s decision in the Bushfire Survivors case, government authorities, particularly those with environmental obligations, should ensure that all, or at least some, of the policies or documents relied upon:

1. have been prepared by the authority itself;
2. are not merely aspirational or descriptive plans;
3. set objectives or standards, impose requirements, or prescribe action to be taken; and
4. address climate change specifically, should this be relevant to the department’s obligations.

Businesses

Companies have been the primary targets of climate change litigation in recent years for a range of reasons. Recent actions include:

1. allegations of greenwashing, a pejorative term for the marketing strategy in which a company exaggerates its environmental credentials. This is the subject of an ongoing case in *Australasian Centre for Corporate Responsibility v Santos Limited* in the Federal Court. The plaintiff’s claim focusses on statements in Santos’ 2020 Annual Report to the effect that its natural gas is ‘clean fuel’ and that it has a credible pathway to net zero emissions by 2040. The Australasian Centre for Corporate Responsibility (**ACCR**) alleges that these claims constitute misleading or deceptive conduct under the Corporations Act and the Australian Consumer Law;
2. shareholders seeking disclosure of internal documents from the CBA in the matter of *Abrahams v Commonwealth Bank of Australia*, to enable shareholders to determine whether the bank’s projects comply with the goals of the Paris Agreement; and
3. challenges to investment decisions made by super funds, such as in the case of *McVeigh v Retail Employees Superannuation Pty Ltd*. This case involved a superfund member alleging that his superfund had violated the Corporations Act by failing to provide information related to climate change business risks, and plans to address those risks. While the case settled out of court, it evidences marked activism by members of the public scrutinising investments made on their behalf, and the importance for corporate decision makers to consider the potential financial risks arising from investment in industries that cumulatively impact climate change.

Having regard to the above, companies should ensure that:

1. all directors are educated on their duties in the context of climate change;
2. any and all claims made about climate change or the environment, whether it be in a report, statement, policy, or speech, are accurate and cannot be considered misleading;
3. all decisions, including investments, are made after considering any relevant climate change risks; and
4. projects are developed having regard to the goals of the Paris Agreement.

A duty of care?

On 15 March 2022, the Full Court of the Federal Court delivered its judgment in *Minister for the Environment v Sharma* [2022] FCAFC 35 (**Sharma Decision**). The Full Court overturned the primary judge’s finding that the Commonwealth Minister for the Environment owed a novel duty of care at common law to Australian children who might suffer potential harm from the climate change implications of the Minister exercising her powers under the *Commonwealth Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**).

While each judge emphasised different reasons as to why the duty should not be imposed, some of the key reasons for the Sharma Decision were that such a duty:

1. is unsuitable for judicial determination, given the ‘core government policy considerations’ involved;
2. is inconsistent with the existing purpose of the EPBC Act, pursuant to which the Minister is required to discharge her duties; and
3. if imposed, could result in indeterminate liability, given the likely members of the claimant class with the requisite characteristics would not be easily ascertained, and the nature of climate change itself would impact the nature and extent of any prospective liability.

It is not yet known whether the children behind the litigation will bring a special leave application

in the High Court to challenge the Full Court’s decision. The decision certainly highlights the potential limitations in applying strict legal analysis to decisions about projects, which ultimately involve competing political, social and economic considerations, in the context of national and international policy frameworks and commitments about climate change.

Scrutiny by regulators

A broader range of regulators are now also taking an interest in climate change. Beyond environmental regulators, the Reserve Bank of Australia, APRA, the Australian Council of Superannuation Investors and ASIC, all endorse the framework recommendations in the Task Force on Climate-Related Financial Disclosures (**TCFD**).

The TCFD, approved by the United Nations Framework Convention on Climate Change, recommends that, for a company to have adequate oversight and operations, a company must direct its climate change risk practices to four areas: governance, strategy, risk management, and metrics and targets. ■



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