

EMERGING ISSUES

Australian Energy and Resources Sector 2021

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On behalf of McCullough Robertson's Resources and Renewables Industry Group, we are pleased to bring you the 2021 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 will significantly affect the Australian Energy and Resources Industry going forward, with a specific focus on the resource rich states in Australia.

We are also delighted to profile our extensive team of experts who continue to be available to provide you with support as required.

Please contact either of us or any of our other team members for further information.

We hope you find this edition informative.



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THE ENERGY SECTOR

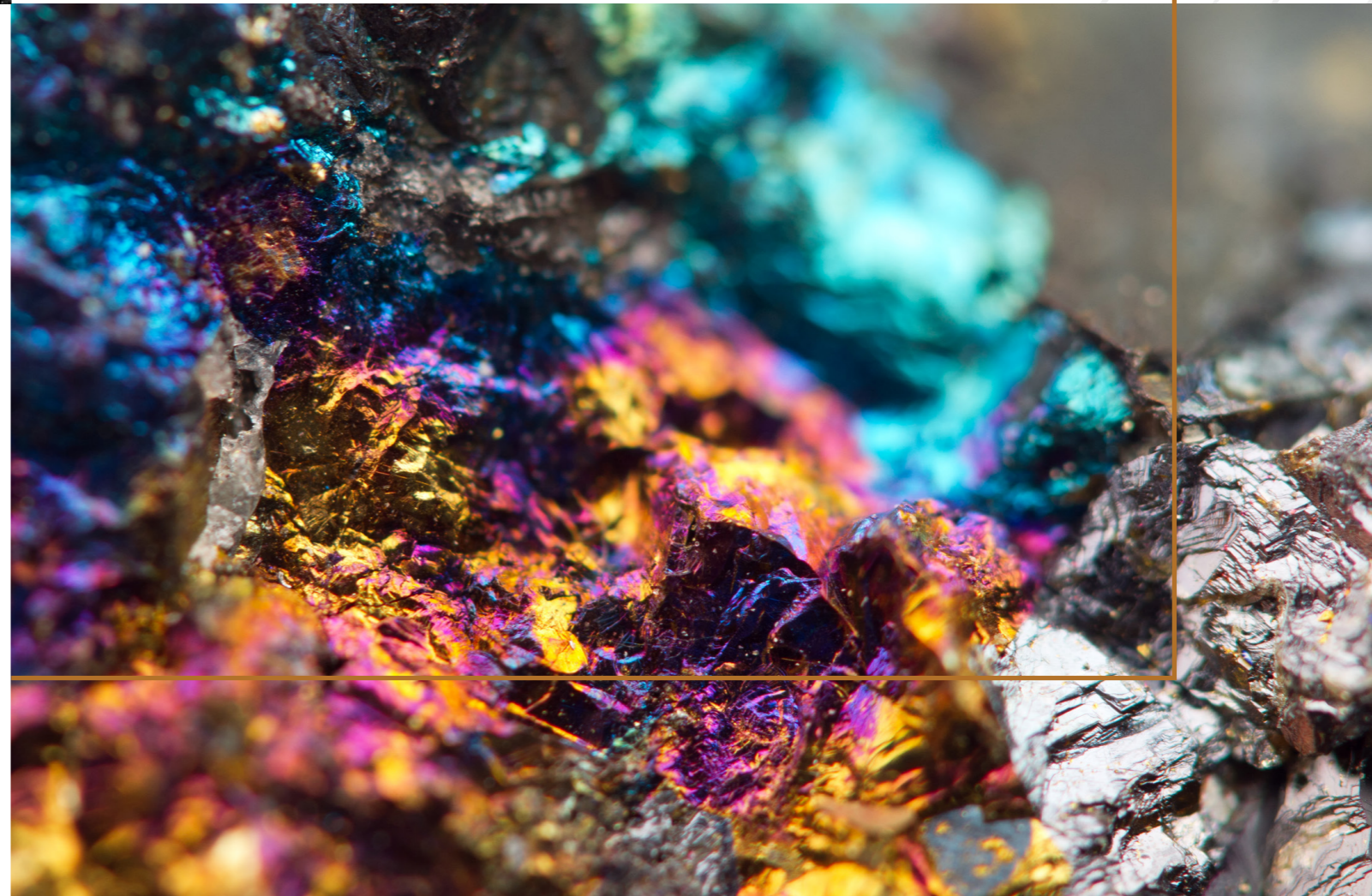
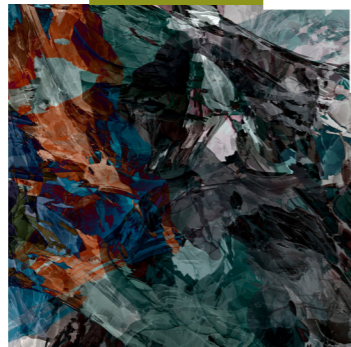
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THE RESOURCES SECTOR



COVID-19 AND THE RESOURCES SECTOR

Like all things in 2020, the Australian resources sector experienced extreme highs and lows.

The global pandemic tested companies' abilities to be flexible and agile, and forced leaders across the sector to shift their strategies and objectives for the immediate future and beyond. Overall, the Australian resources industry reported strong export earnings in 2020 as a result of rising commodity prices and Australia's success at managing the impacts of COVID-19 compared to other economies around the world.

Travel restrictions and social distancing requirements caused disruptions to workforces across the economy, including those in the mining and resources sector. Nonetheless, the resources sector remained resilient over this challenging period, and undoubtedly played a central role in the country's fight against the economic fallout of the pandemic. This was partly due to the industry qualifying as an 'essential' service which exempted workers from certain border restrictions, fly-in fly-out workers quickly adapting their working arrangements to keep operations going, and companies transporting employees via charter rather than commercial flights to site.

Iron ore prices rose sharply in 2020 as a result of growing, stimulus-driven demand in China and ongoing disruptions to supply from Brazil. On the other hand, metallurgical and thermal coal prices were more volatile, reflective of the extreme uncertainty caused by China's unofficial ban on Australian sourced coal. Normally, Chinese imports of Australian coal grows sharply in the first quarter of the year, but whether this trend will hold true for 2021 is largely dependent on PRC Government policy and trade relations. There is a real risk that import restrictions will continue into 2021, causing Australian exporters to realign their trade partners.

This shift is already happening. In June 2020, Australia and India announced a Memorandum of Understanding on critical minerals, which focuses on strengthening avenues of trade, investment and research and development in critical minerals between the two countries. Similar strategic arrangements with the Republic of Korea and Japan are also anticipated. The strong focus on the Australian critical minerals sector will continue throughout 2021 and for years to come.

Exploration

Exploration companies reported record high cash balances in 2020, as a result of a strong period of capital raising. BDO Australia reported that the number of companies raising funds for over \$10 million increased from 28 in June 2020 quarter, to 46 in September 2020. Increased funding, however, did not always translate into increased spending in 2020, meeting resistance caused by economic uncertainty, fluctuating travel restrictions and limited supply of drilling and other exploration support services. Companies have also been reluctant to compromise their cash positions as the fall out from the global pandemic continues to trickle down. Even so, as investor confidence returns, it is expected that investment expenditure will soon follow.

Gold rush

One winner during the Covid-19 crisis was gold miners, as 2020 saw gold prices peak at an all time high of over US\$2,000 per ounce, averaging approximately US\$1,780 an ounce across the year. The increased demand for gold markets was a direct consequence of COVID-19, driven by its status as a safe haven asset. A combination of Government support to investors, a weakening of the US dollars, and revival of US inflation expectations were other key drivers of increased prices this year.

Despite the surge in demand for gold in 2020, prices are forecast to fall in 2021 and 2022 as hopes for a successful vaccine rollout and global economic recovery are expected to reduce gold markets' appeal to institutional and retail investors. In December 2020, the Office of the Chief Economist forecast that 'the lower US dollar gold price, in combination with forecasts of a strengthening Australian dollar, is expected to push the Australian dollar gold price lower over the outlook period, averaging US\$1,595 an ounce in 2022'.

In light of these movements, there have been a number of acquisitions in the gold sector, one of the most notable being the buyout of Kalgoorlie's Super Pit in 2020; where Northern Star and Saracen paid a combined USD\$1.5bn (AUD\$2.3bn) to return the mine to Australian control.

Western Australian mining company Ramelius Resources continued its acquisition spree by acquiring 100% of the shares in Spectrum Metals. As anticipated by the market, following this acquisition Ramelius also moved to add to its portfolio the Penny West gold project, which is one of the high-grade undeveloped gold assets in Western Australia.

Looking forward

The beginning of 2021 is already looking far better than the beginning of 2020, and there is a sense of optimism amongst the mining and mining services sector. Although investment levels are unlikely to return to their pre-pandemic positions just yet, there are significant opportunities emerging for Australia's energy and resources sector, with a number of new projects already in the pipeline.

As the global and national energy framework continues to develop over the coming years, there is expected to be an increased uptake of renewable initiatives on mine sites, together with other measures aimed at capturing or otherwise reducing emissions.

Exploration expenditure is also expected to increase this year. This forecast is based in part on the level of capital raising by gold companies looking to reactivate mines or commence exploration and drilling programs to expand resources. A number of gold projects advanced to the 'committed' stage this year following record high prices, while coal and gas projects were slower to move on from the feasibility stage.

Even though legislative and policy reforms have resulted in some streamlining of the project approval pathway, some projects have still experienced challenges with obtaining the required authorisations to proceed. Uncertainty surrounding global economic conditions and export markets has caused proponents to move away from greenfield projects and turn to expanding existing projects instead. We expect this trend to continue throughout 2021. ■



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THE RISE OF ALTERNATE FUNDING FOR RESOURCES PROJECTS

Resources companies in Australia have historically drawn their funding from conventional sources; however, as Australia's major banks continue to reduce their exposure to the likes of thermal coal (a recent example being ANZ ceasing its relationship with the Port of Newcastle), Australian miners have had to increasingly look elsewhere to secure funding.

Because of this, we are seeing a rise in other funding sources for resources projects from the likes of non-bank financiers through to alternate funding options, such as streaming and royalty arrangements and production-based financing.

All funding options should be considered carefully in the context of the particular project, as different sources of funding will attract varied asset protection, regulatory, tax and compliance treatment. We discuss some of these funding sources and associated issues further below.

Prepayment facilities

Prepayment facilities (or production-based facilities), whereby the financier (off-taker) purchases the product in advance and the borrower (project owner) delivers the product to the off-taker as repayment, have become a common feature of the mining industry, particularly in connection with strategic metals.

Prepayment facilities have evolved over the past few years, becoming more flexible to accommodate individual mining projects. The benefits of these types of arrangements can include expedited closing times and simpler documentation than a traditional financing (particularly where the financier is also a trading partner). In these situations, the project owner may also be able to secure more favourable terms due to potential profits on the trading side.

Streaming arrangements

A streaming agreement is essentially a purchase agreement under which the buyer (financier) pays the purchase price in advance to the project owner (borrower). The purchase price is paid either as an upfront payment or by a series of instalments in exchange for the long-term right to acquire a specified amount or percentage of the streamed product (commonly silver or gold). The streamed product is often a by-product of the project owner's main operations, meaning it can be used alongside other financing arrangements.

Royalty financing

Royalty financing is a form of funding which usually involves an upfront payment from the royalty holder (financier) in exchange for the royalty in relation to the future revenue of the project being granted by the project owner (borrower). There are different ways to calculate the royalty, though a common approach in this context is a percentage of net revenue.

Like prepayment facilities and streaming arrangements, royalty financing can be quicker and more cost effective than a conventional financing and can often be subject to restrictive covenants on the project owner.

Issues to be aware of

While the rise of alternate funding options in the mining industry is positive for cash-strapped miners, project owners need to be alive to the issues which may arise, including:

- Regulatory issues – where a financier is foreign, consideration needs to be given to interest withholding tax (**WHT**) and the requirements of the Foreign Investment Review Board (**FIRB**) specifically – WHT of 10% is typically payable on interest payments from an Australian project owner to a foreign financier unless certain exemptions apply. Furthermore, the granting of security to a foreign financier in connection with a lending transaction could trigger the requirement to notify FIRB unless the financier is in the ordinary business of moneylending and the 'moneylending exemption' applies.
- Inter-creditor issues – where alternate funding is utilised in conjunction with senior debt, an inter-creditor agreement will need to be negotiated and entered into. In this regard, it is important for project owners to consider the scope of security offered to alternate financiers to minimise issues obtaining senior debt in the future.
- Security – for each of these funding options the financier will ordinarily require a mortgage to be registered over the relevant mining tenements.
- Agreement of key terms – all too often we encounter transactions where a project owner has hastily accepted a term sheet, and is forced to 'walk back' or renegotiate terms (causing substantial cost or delay) during the documentation process. Agreement upfront to the key terms (including carve-outs for specific activities and future funding options) is essential to a smooth financing outcome.

- Overcommitment by project owner – in the haste to secure funding the project owner can sometimes commit to obligations and restrictions that provide the financier with greater control over the project's operations than ought be the case. Project owners should resist the temptation to commit to unreasonable obligations and restrictions by thinking the financier will not insist on subsequent compliance even when compliance may not have a positive impact on the project's operations.

Alternate financing in its various forms continues, by necessity, to increase in popularity in the mining and resources sector, particularly from overseas sources. We expect this trend to continue. While alternate funding sources may generally be more accessible than traditional sources, it is important that project owners take the time to ensure arrangements are appropriately documented and that adequate carve-outs for future activities and future funding options are resolved in this process. ■



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THE COAL INSURANCE MARKET – A RAPIDLY CHANGING LANDSCAPE

Local and international insurers are making a clear shift away from investing in or insuring coal operations which has caused it to become increasingly difficult to secure insurance for coal mines and other businesses who derive revenue from coal.

Insurers exiting the market

Insurers have been targeted by activists in their campaign against coal, including the campaign lead by 'The Insure Our Future' network (originally Unfriend Coal) (IOF), a global coalition of non government organisations and social movements, to make coal and other fossil fuels uninsurable. In December 2019, IOF reported that at least 35 insurers with assets of more than \$10 billion have adopted some form of coal divestment policy in a growing trend of the insurance market's response to the management of environmental sustainability.

Those insurance companies have ceased or limited their support for new coal projects and existing coal operations. The strategy also involves companies whose revenue is tied to coal mining, including suppliers and contractors to coal mines. Some examples include:

- Liberty Mutual, one of the world's top six coal insurers, announced it would phase out coverage and investments for existing coal mines that exceed specific thresholds by 2023; and
- AXIS Capital have not provided new insurance or facultative reinsurance since 1 January 2020 for new thermal coal plants and companies that generate 30% of revenue from thermal coal mining, or produce 30% of their power from coal from 1 January 2020.

Most significantly, Lloyd's of London (Lloyd's), the regulator for approximately 100 syndicate members that underwrite insurance globally, recently announced its 'exit strategy' from the coal industry. Lloyd's outlined an environmental, social and governance (ESG) strategy focused on building a sustainable future in its ESG Report 2020 (Report) released in December 2020. In that Report Lloyd's outlined that its managing agents will be asked:

- not to provide new insurance cover for thermal coal-fired power plants, thermal coal mines, oil sands or new energy exploration activities from 1 January 2022; and
- not to renew 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.

This 'signal' from Lloyds has already seen this year a greater unexpected rush by syndicates to leave the coal sector, so the expectation is the escape from coal by insurers will be faster.

Locally, all Australian insurers have announced a move away from the coal mining industry.

Next steps for the coal insurance industry

There are a very limited number of insurers willing to insure and invest in coal and those still participating are imposing onerous conditions, including significantly higher deductibles.

The situation has become critical for stakeholders who must start looking at viable alternatives to the typical insurance offering. That involves reengineering insurance programs to combat the limitations imposed by the market. Businesses will also be forced to adopt more stringent strategies for the management and allocation of risk in their contracts, particularly in the potential absence of previously available insurance cover. Despite the exit from the coal space by insurers, the coal sector will be a key part of Australia's resource sector for some time. The development of these viable alternatives for insurance is therefore in all stakeholders interests. ■



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THE CRITICAL IMPORTANCE OF CRITICAL MINERALS

Each year the Annual Survey of Mining Companies (conducted by the Canadian based Fraser Institute) identifies the top ranked jurisdictions in the world for mining investment based on factors such as the relevant Government policies ability to provide a stable regulatory environment and geological attractiveness for minerals and metals. In the latest results from the Annual Survey of Mining Companies (2020), Australia continued its history of strong performance with Western Australia being ranked 4th in the world while South Australia was 7th, Queensland 16th, the Northern Territory 19th, New South Wales 27th, Victoria 56th and Tasmania 63rd.

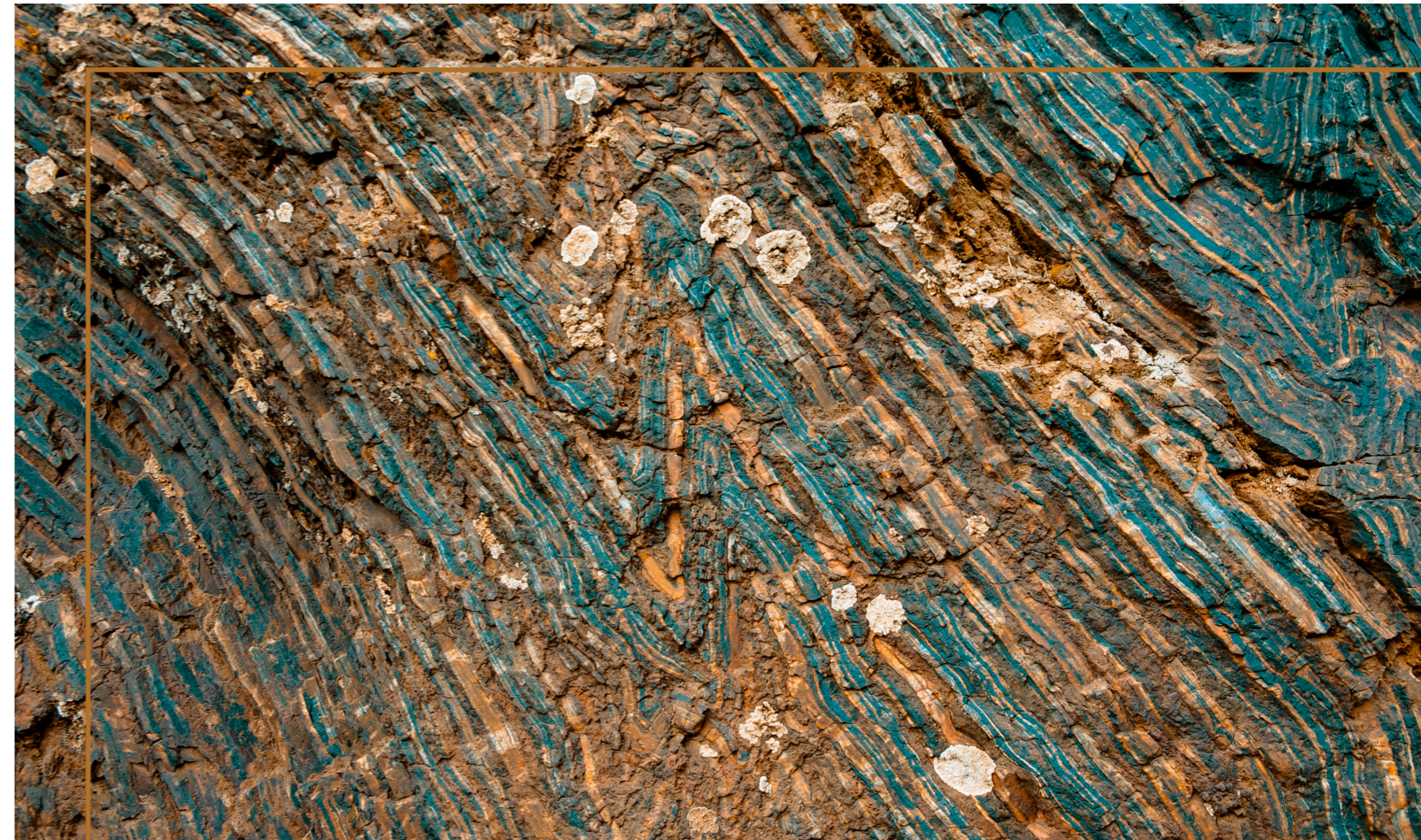
'Critical minerals' are described differently across jurisdictions, but are generally understood to refer to mineral and metal elements which are critical to the development of future technologies. Examples of these technologies include batteries for energy storage, renewable energy equipment, low-emission power sources, defence equipment and weapons, electric vehicles, consumer devices, products for the medical sector and for scientific research.

As Federal and State Governments, private companies and international economies move toward reducing carbon emissions and investing in new energy generation and storage technologies, it is expected that demand for critical minerals will increase to exceed existing global production, resulting in supply shortages. Consequently, Governments and industries across the world are seeking to drive investment in critical minerals exploration and secure predictable alternate supply chains in safe and stable jurisdictions like Australia.

A national approach

The following is a snapshot of some of the industry initiatives undertaken in Australia in 2020.

- In January 2020, Australia launched its centralised Critical Minerals Facilitation Office (CMFO) with ambition to drive a whole-of-sector and national approach to unlock Australia's critical minerals potential. The CMFO is a step towards implementing the Australian Critical Minerals Strategy, which aims to promote investment in Australia's critical minerals sector by providing incentives for innovation to lower costs, increase competitiveness, develop Australia's downstream processing capabilities and to connect critical minerals projects with key infrastructure development, all in an effort to make Australia a world leader in the exploration, extraction, production and processing of critical minerals.
- Also in 2020 Australia became a founding partner of the international Energy Resource Governance Initiative (ERGI) along with Botswana, Canada, Peru and the United States. The ERGI seeks to promote and share diversified, sustainable and ethical resource supply chains to meet growing global demand for energy resources and, in particular, critical minerals. As a practical means of disseminating best practices, ERGI developed a toolkit which provides practical guidance on resource management, project development, production and stewardship. Cooperation between the United States and Australian Governments over the past 18 months has fostered ideal conditions to position Australian minerals as part of the solution to the world's supply chain needs, including by fostering investment in new projects to meet the world's processing requirements.
- In October 2020, a prospectus of critical mineral projects in Australia was distributed by the Federal Government as a strategy to attract investment in the sector by showcasing over 200 investment projects nationwide. The investment projects identified in that prospectus included processing plants for the development of critical minerals including rare earths.
- In addition to these Federal initiatives, there has been ongoing development of initiatives in Queensland, such as: the junior exploration scheme; the Strategic Blueprint for Queensland's North West Minerals Province, which accounts for 75% of Queensland's base metal and minerals; and Queensland's Unite and Recover Economic Recovery Plan (Recovery Plan), which has continued to headline development initiatives and investment in the past year.
- The Queensland minerals sector was bolstered with investment and new initiatives announced in 2020, including:
 - approximately \$500 million over five years to boost mineral freight exports on the Mount Isa Line through ongoing maintenance and track improvements, discounted freight charges and support for a new container terminal at the port of Townsville;
 - finalising arrangements with industry for creation of a \$100 million Resources Community Infrastructure Fund (RCIF), delivered over three years towards projects to improve economic and social infrastructure across Queensland's resources communities including the North West Minerals Province. The RCIF will supplement existing planned State community infrastructure, in addition to



the investment by resource companies and is aimed at supporting resource communities to assist their recovery from the COVID-19 pandemic;

- as part of Queensland's Recovery Plan:
 - an additional \$10 million funding to upscale the Collaborative Exploration Initiative and support exploration activity for new economy minerals for emerging technologies and products;
 - a commitment to deliver Queensland's Resources Industry Development Plan which will focus on setting targets for industry growth, encouraging exploration through future rounds of the existing Collaborative Exploration Initiative, and exploring opportunities to continue advanced processing of resources in Queensland; and
 - \$14.8 million to continue investigating the feasibility of the CopperString 2.0 project, a 1,100 kilometre high-voltage transmission line to connect the North West Minerals Province with the national energy market which will deliver lower energy costs for the industry.

Key takeaways

We anticipate that the industry initiatives and funding announced by the Federal and State Governments in 2020 will have a positive impact on the Fraser Institute international rankings for investment attractiveness in survey results for the coming years. Critical minerals are an essential 'enabler' for the transition to a clean energy future and Australia is well positioned to benefit from the increase in demand that this transfer is expected to generate.

However, the sector does face some challenges. Like most of the resource sector in Australia, the critical minerals industry needs access to capital, and historically that capital has been secured from foreign investment. Recent decisions by FIRB makes it clear that foreign investment in critical minerals is a sensitive issue. In 2020, two proposed investments by Chinese companies in Australia's critical minerals sector were unofficially blocked, causing the applicants to withdraw their FIRB applications. Extensive FIRB reforms introduced earlier this year have also identified critical minerals as a national security issue, ensuring stricter oversight of foreign investment going forward. The concern for industry is that the imposition of tougher restrictions on foreign investment into critical minerals will reduce access to capital even to the point that the stated objectives of the Government of driving investment in critical minerals will be adversely affected in a material way. ■



GAS SECTOR UPDATE

Australian Gas Sector Developments

Federal and State Governments alike have clearly identified the oil and gas industry as a critical enabler of Australia's economy post COVID-19. This is positive news for stakeholders in the space. However, the growth and development of the oil and gas industry faces certain hurdles.

Federal Government

The Australian Government's 2020-21 Budget reaffirmed the importance of increasing investment in the oil and gas industry – making energy affordable for manufacturers and supporting jobs as part of Australia's economic recovery from COVID-19.

Some of the specific steps for Australia's gas-led recovery identified in the Budget include:

- setting new gas supply targets with States and Territories and enforcing potential 'use it or lose it' requirements;
- unlocking five key gas basins beginning with the Beetaloo Basin in the Northern Territory and the North Bowen and Galilee Basins in Queensland;

- avoiding supply shortfalls in the gas market by entering into new agreements with the three east coast LNG exporters that will also strengthen price commitments; and
- exploring options for a prospective gas reservation scheme to ensure Australian gas users get the energy they need at a reasonable price.

The Federal Government also confirmed that it will support the gas transport network, including through the development of a National Gas Infrastructure Plan which will identify priority pipelines and other critical infrastructure where the Federal Government will step in if the private sector does not invest. It also intends to reform pipeline regulations to promote clarity and build a secondary pipeline capacity to promote competition.



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Queensland

With the North Bowen and Galilee Basins being identified as areas for investment by the Federal Government, Queensland is poised to play a vital role in Australia's post COVID-19 economic recovery.

The oil and gas industry has long been a focus of the Queensland Government. In response to supply shortages and high gas prices, commencing March 2018 the Queensland Government released land for gas development subject to an Australian market supply condition (**Supply Condition**). The Supply Condition requires that:

- the holder of the tenure must supply gas produced under the tenure to the Australian market; and
- any contract or other arrangements for the supply of the gas must include a condition that the gas must not be further supplied other than to the Australian market.

Market research indicates that stakeholders broadly accept the Supply Condition and purchasers are experiencing improvements in gas supply to the east coast gas market.

The Queensland Government has also recently implemented a new volume-based petroleum royalty regime. The regime has been implemented in response to producers' concerns about the complicated and burdensome nature of the previous royalty regime. The volume-based model links the royalty payable to the volume of petroleum produced, an average sales price and a 'sliding scale' percentage multiplier based on the class of petroleum produced. Producers have welcomed the change on the basis that it provides greater certainty than the previous regime which relied on a complicated net-back process.

Building on these pre-and-post COVID-19 developments, it is clear that the Queensland Government considers the industry a vital part of the State's energy and resources future. In its 2020-21 Budget, the Queensland Government committed funds to a concept study for a new 500 kilometre gas pipeline to connect gas reserves in the Bowen Basin to the east coast domestic market and overseas customers. If progressed, the pipeline could create more than 1,000 construction jobs and open up gas production in the Bowen Basin, bringing even more jobs to the region.



New South Wales

Consistent with the position of the Australian Government and alongside Queensland, the New South Wales Government has stated that it will prioritise gas as a post COVID-19 economic recovery tool.

The most prominent gas project in New South Wales, Santos' Narrabri Gas Project, received Federal Government approval in November 2020 following receipt of State approval earlier that year. In granting the approval, the New South Wales Independent Planning Commission (**Commission**) found that opening up the gas supply would enable lower emissions power generation when compared to coal plants. The Commission also found that construction of the gas field would be consistent with Australia's commitment to international climate treaties and New South Wales' deal with the Federal Government to deliver 70 petajoules of new gas supply in return for \$3 billion in infrastructure funding. Commencement of the Narrabri Gas Project will be dependent on the outcome of the Land and Environment Court appeal initiated by local farmers on climate change grounds.

The New South Wales Government also plans to investigate the designation of the Narrabri area as a 'Special Activation Precinct' to facilitate the delivery of streamlined planning approvals and the delivery of enabling infrastructure to the area. This is intended to support strategic business clustering for energy-intensive industries and other manufacturing sectors close to commercial quantities of affordable gas.

The Mullaley Gas and Pipeline Accord has since lodged judicial review proceedings in the New South Wales Land and Environment Court against Santos, alleging the Commission incorrectly ruled that gas is a low emission energy source that will deliver environmental benefits compared to coal fired power and that it failed to consider the environmental impacts of a pipeline, which will be built by a third party to supply gas from Narrabri to its customers. The matter will progress through the courts this year.

While attention in the gas sector is often focused on Queensland, New South Wales and Victoria, States like Western Australian and South Australia continue to be hubs for investment. The South Australian oil and gas sector has seen an increase in exploration and production particularly in the Cooper and Otway basins.

All the while Western Australia's development, production and export of conventional gas and LNG remains strong. 2020 saw the long fabled trans-Australia gas pipeline discussed. This \$5 billion dollar West to East pipeline has often been discussed as a solution to East Coast gas prices, but the logistical, regulatory and long-term financial viability of the project continues to impact any serious discussion.

Outlook

The future development of the oil and gas industry has its obstacles (as evidenced by the recent appeal lodged against the Narrabri Gas Project). However, with active Federal and State support, we expect the industry to be the recipient of renewed investment and growth in the post-COVID-19 era. ■



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MINE SITE ADOPTION OF RENEWABLE INITIATIVES

The global focus on renewable energy projects has continued to gain momentum over the last 12 months and so, too, has the uptake of renewable energy initiatives by the mining sector.

The investment landscape is changing

The case for mining companies to invest in renewable energy remains compelling. Governments around the world are enacting legislation designed to bring their economies in line with the goals of the Paris Agreement (which targets net-zero emissions by 2050), meaning companies across all industries will have to adapt to these new rules and regulations if they wish to remain compliant in their areas of operation. In addition to regulatory drivers, technological advances are continuing to reduce the cost of developing renewable energy projects and stakeholder requirements are driving an increasing corporate appetite to 'go green'.

These factors are contributing to an acceleration of investment in renewable energy projects.

Microgrids

There is increasing appetite by miners to implement renewable energy supply solutions for their operations.

In mid-2020, EDL Energy completed the delivery of a 56 MW 'hybrid' microgrid project at South African mining company Gold Fields' Agnew Gold Mine in Western Australia. The microgrid is comprised of five wind turbines capable of delivering 18 MW of power, a 10,000-panel solar farm contributing 4 MW, a 13 MW/4 MWh battery energy storage system and a 16 MW gas engine power station. The Australian Renewable Energy Agency (ARENA) supported the project with a capital contribution of \$13.5 million and the renewables component of the project is expected to provide up to 70% of the mine's energy requirements. The project is recognised as Australia's largest renewables microgrid and the first in-country to utilise wind generation at scale on a mine site.

Hot on the heels of the Agnew project, a number of other mine microgrids have been developed or are in the pipeline. These include recent announcements

by copper miner, Oz Minerals, to progress to the next stage of studies to power its proposed West Musgrave Project with a hybrid fossil fuel-solar-wind-battery solution, potentially making it one of the largest fully off-grid, renewable powered mines in the world.

Pumped hydro

In January 2021, Centennial Coal received funding from ARENA to perform a series of technical studies and trials for the potential deployment of a 600 MW pumped hydro energy storage (PHES) system using underground coal mining voids.

ARENA considers the Centennial Pumped Hydro Energy Storage Project to be an affirmation of the utility of large-scale PHES to 'firm-up' intermittent renewable generation and to address grid security and reliability issues, which have accompanied the accelerating rollout of renewables onto the distribution network. AEMO's Integrated System Plan 2020 indicates the NEM will require 6-19 GW of storage by 2035.

Furthermore, when compared to traditional PHES, the development of PHES on former mine sites has the potential to result in significant cost reductions driven by the lower cost of civil construction works (due to the pre-existing lower reservoir and existing underground shafts), as well as typically being co-located with existing transmission infrastructure.

A number of other PHES developments on former mine sites have been proposed or are already in the development stage. In this regard, Genex Power has recently started preliminary work on the 250 MW PHES component of its Renewable Energy Hub at Kidston, in North Queensland.



Our recent article [From mine site to pumped hydro: commercial considerations for mine owners and project proponents*](#) explores the benefits and unique challenges that former mine sites encounter with PHES projects.

Related to these developments, Hydro Tasmania, Macquarie Group and Shell have just struck an innovative deal under which Hydro Tasmania sells the rights to power stored in its PHES system during the highest-priced parts of the day. The first-of-its-kind deal heralds the development of a new financial product, which is expected to be popular with electricity retailers seeking to hedge against escalating price risk. This is anticipated to spur the development of PHES projects, including on mine sites.

* <http://bit.ly/2Oxo00o>

Malabar's Solar Project

Our client, Malabar Resources, obtained planning approval in September 2020 from the New South Wales Government for the development of a 25 MW solar farm on rehabilitated mine land. The solar farm will be constructed on open cut mine voids that have been backfilled after the completion of mining activities.

The solar farm is well positioned in close proximity to existing infrastructure and will connect to the network via either an existing substation located on the Maxwell Infrastructure site, or via the construction of a new transmission.

With an annual energy generation of 60 GWh, the Maxwell Solar Farm will have the capacity to power about 10,000 New South Wales homes – nearly all the homes in the surrounding towns of Muswellbrook and Singleton. ■



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The Energy Sector



CHANGING AUSTRALIAN ENERGY POLICY

Energy has been a fraught policy area across all levels of Government in Australia since 2007, when then Prime Minister Kevin Rudd referred to climate change as a moral imperative. There have been multiple attempts to address energy policy on a national scale, all of which have failed to provide what investors and market participants are crying out for: certainty.

Although the Federal Government has suggested 2050 to be the target for a zero carbon society, the policy detail behind that suggestion is yet to be published. Consequently, this policy void has been filled by various State Governments, with most setting net-zero emission targets by 2050. Although lacking national coordination, as control of energy policy in Australia rests with the States and Territories and not with the Federal Government, these policy announcements have given clear indications to the market that renewable energy is a key component of the broader energy framework in Australia.

The State-level focus on renewable energy has been spurred on by the global pandemic, with several States putting renewable energy development, decarbonisation, green hydrogen, and other low

emission technologies front and centre in their recovery plans. Reinforcing the difficulty this area of policy faces in Australia, however, the Federal Government has also placed a greater focus on the need for transitional energy sources such as gas, pumped hydro, hydrogen developments and biofuels to facilitate the advent of a zero carbon economy by 2050.

Current Commonwealth Government Energy Policy

In May 2020, the Federal Government released the long awaited Technology Investment Roadmap (**Roadmap**) as its centrepiece in renewable energy and climate change policy. The Roadmap is intended to identify areas of innovation that can help address the duelling challenges of high power prices, grid stability, regional unemployment and climate change through investment in emerging low emissions technologies.

Subsequently, in September 2020, Energy Minister Angus Taylor released the Federal Government's first Low Emissions Technology Statement (as required by the Roadmap). This statement set out the identified areas of priority, which will be the blueprint to which \$18 billion worth of Federal investment will be applied. The five technologies identified as a priority were:

1. hydrogen;
2. carbon capture and storage;
3. soil carbon;
4. energy storage options; and
5. 'low-carbon' steel and aluminium production.

The Federal Government will utilise the Australian Renewable Energy Agency, the Clean Energy Finance Corporation (**CEFC**) and the Clean Energy Regulator to support these priority areas.

Technologies such as solar, wind and indeed coal were not included in the priority list as they were identified as 'mature technologies', and not requiring government assistance.

The Roadmap is not a market mechanism, as advocated for by a number of interest groups, and will not see, at least initially, any direct impact on emissions, power prices or grid stability. But this Government support of emerging technologies could see new industries grow and thrive in the future.

In September 2020, Prime Minister Scott Morrison announced that Australia would have a gas-lead recovery from the COVID-19 induced economic downturn. This would involve the Federal Government supporting increased infrastructure, unlocking new basins and reducing regulation. To this end, the Prime Minister also announced that to support growth in Australia's manufacturing sector, the Federal Government-owned Snowy Hydro company would build a gas generator in the Hunter Valley if the electricity sector failed to meet the energy shortfall left by the scheduled closure of the coal-fired Liddell power plant in New South Wales.

This proposed intervention by the Federal Government was met with criticism on a number of fronts, first and foremost by the Australian Energy Market Operator (**AEMO**), which asserted that there would be no interim reliability shortfall after the closure of the Liddell power station, given the number of planned energy projects in the pipeline. Other stakeholders have also warned that Government-backed infrastructure in the gas sector could result in stranded assets due to the move away from fossil fuels towards renewables, and that the Government should leave these decisions to the market.

Therefore, while the Federal Government's approach in specific areas for development, primarily technology and gas has been welcomed in some quarters, it does not offer the immediate certainty that is required for renewable energy investors to make informed investment decisions today.

Another priority set by the Federal Government was recently announced by the Energy Security Board, the Federal body dedicated to devising interim measures to stabilising the NEM's grid and reliability of supply. The Board has recently announced that it will be issuing principles of reform for the NEM which will be its last act. This is likely to have profoundly positive consequences for future projects.

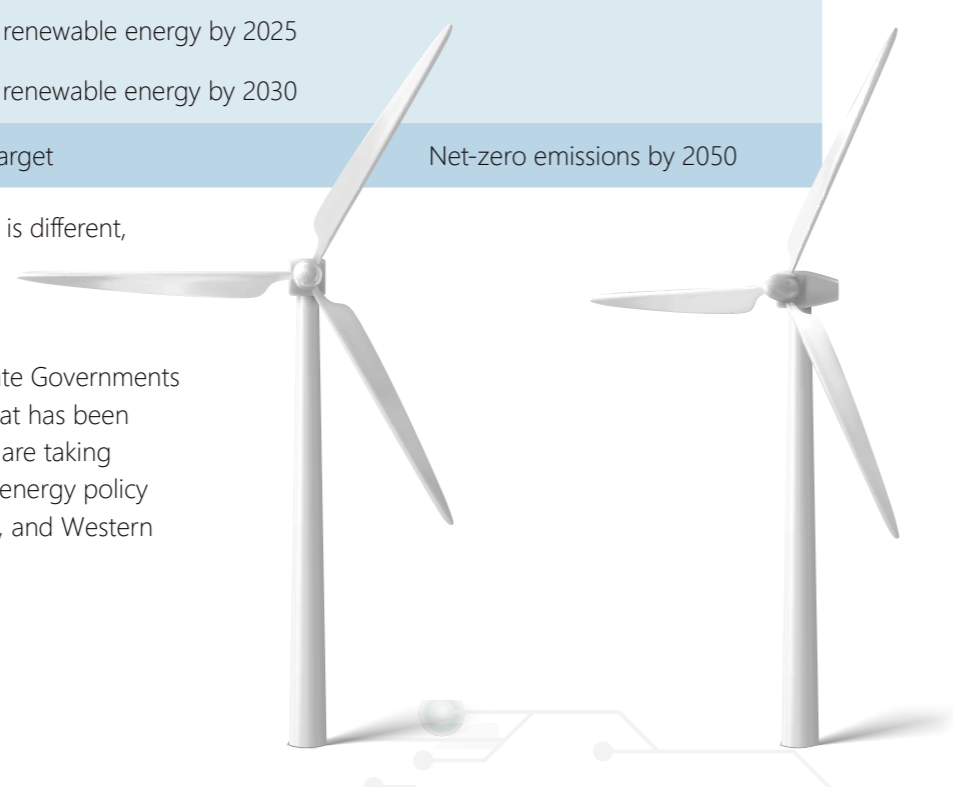


Key State Government Energy Policy

For better or for worse, the responsibility for spurring the development of renewable energy projects has fallen to the States. With the exception of Tasmania, all other States and Territories have committed to renewable energy targets, including net-zero emissions by 2050 (mirroring similar commitments by some of the largest economies in the world and trading partners of Australia, including South Korea, Japan and China).

State or territory	Renewable energy commitment	Carbon commitment
New South Wales	NSW has achieved its 2020 target and not announced a new renewable energy commitment target	35% reduction in greenhouse gas emissions on 2005 levels by 2030 Net-zero emissions by 2050
Northern Territory	50% renewable energy by 2030	Net-zero emissions by 2050
South Australia	100% net renewable energy production by 2030	Net-zero emissions by 2050
Tasmania	100% renewable energy by 2022 200% renewable energy by 2040 (export orientated)	Commitment to establish a net-zero emissions target by 2050
Queensland	50% renewable energy by 2030	Net-zero emissions by 2050
Victoria	25% renewable energy by 2020 40% renewable energy by 2025 50% renewable energy by 2030	Net-zero emissions by 2050
Western Australia	No target	Net-zero emissions by 2050

The path being used by each State is different, and driven by their existing key industries and resources (including suitable development zones). But for renewable energy investors, State Governments are providing a level of certainty that has been lacking to date. Three states which are taking three very different approaches to energy policy are Queensland, New South Wales, and Western Australia.



Queensland

Queensland's renewable energy policy is being led by State-owned generator CleanCo. Established in 2018, CleanCo inherited existing State-owned low-carbon energy assets, including Barron Gorge Hydro Power Station, Swanbank E Power Station, Kareeya and Koombooloomba Hydro Power Stations and Wivenhoe Pumped Storage Hydro Power Station. At the time of its inception, CleanCo had a mandate to facilitate the development of 1,000 MW of renewable energy, reduce power prices and support regional job creation.

CleanCo has since been involved in a number of new renewable energy projects, including developing the 102 MW Karara Wind Farm and enter into offtake arrangements with MacIntyre Wind Farm and Western Downs Green Power Hub, which has seen CleanCo achieve some early 'wins' in its aim to support renewable energy developments and place downward pressure on power prices. The State-owned generators' mission is likely to be further assisted by the newly elected Labor Government reviewing its other energy and climate change policies.

The year 2020 also saw a number of announcements by the Queensland State Government in support of green hydrogen development, including the provision of a \$25 million funding package to a new partnership between CS Energy and Japanese corporation IHI Corporation which has launched a feasibility study into establishing a renewable hydrogen plant next to CS Energy's coal power station at Kogan Creek. With the State now having a dedicated minister for hydrogen development, it is likely this will be an area of significant policy focus for Queensland.

New South Wales

The New South Wales Government also announced a plan to establish five new Renewable Energy Zones (**REZ**) in the Central West Orana, New England, South-West, Hunter-Central Coast and Illawarra regions. As part of these initiatives, the State has already promised \$40.6 million and \$78.9 million respectively for the planning, coordination, transmission and storage needed to support the Central West Orana and New England regions.

Parts of the Electricity Infrastructure Investment Act 2020 (NSW (**Renewables Act**)) commenced on 9 December 2020 which provide for the establishment of a NSW Renewable Energy Sector Board, identification of renewable energy zones and process for the planning and prioritisation of network infrastructure projects. The remainder of the Renewables Act will come into force by 1 July 2021 and will see the adoption of NSW Energy Security Targets.

In January 2020, the New South Wales and Federal Governments signed a \$2 billion 'landmark' deal, requiring both Governments to invest in clean technology and energy efficiency (and these are not the same). Under the agreement:

- New South Wales will provide an additional 70 petajoules of gas for the east coast market each year;
- the Federal Government will fund New South Wales emission reduction initiatives and underwrite the delivery of new interconnectors and renewable energy projects; New South Wales will receive \$960 million in Federal funding to upgrade the energy grid and invest in emissions reductions initiatives; and
- barriers to coal supply at the Mount Piper Power Station will be removed.

Western Australia

In April 2020, the Western Australian State Government released the Distributed Energy Resource (DER) Roadmap, a five-year plan to, not only support renewable energy, but also address increasing grid stability issues, a consequence of the widespread uptake of rooftop solar across the Western Australian grid.

The DER Roadmap is intended to assist with integration of distributed energy resources, such as including solar panels and smaller scale battery storage. The focus on grid stability is a key issue for Western Australia due to the State not being a member of the National Electricity Market (NEM). Unlike other members of the NEM, Western Australia cannot rely on other states such as Queensland, which has a relatively young coal generator fleet, to provide grid stabilisation services.



Like Queensland, Western Australia has its focus firmly set on being Australia's hydrogen powerhouse. The Western Australia Renewable Hydrogen Roadmap, released in November 2020, identifies 26 initiatives (focussed on the production and export of green hydrogen) the State Government is supporting through the issue of grants. As the primary exporter of Australia's iron ore, the State Government sees Western Australia already positioned to put itself at the forefront of green steel production and supply.



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What's next for Australia's energy policy?

With the growing international commitment to net-zero emissions, it is unlikely the Australian Federal Government can continue indefinitely with its current 'micro' approach and there are increasing signs from within the Government that some type of 'micro' target will be set.

With as many as nine different approaches to energy policy across Australia, the private sector will need to shoulder a significant part of the burden in 'leading' Australia's energy transition. The recent wave of announcements of proposed battery storage developments, in conjunction with renewable energy generation projects, suggests the private sector is willing to take on this role, at least for now.

Regardless, unless underlying issues such as grid connection delays, curtailment risk and the overall complexity of Australia's electricity regulation are addressed, this proactive private sector push will continue to be unnecessarily challenged in a way which would impose limitations on achieving an optimal outcome.

Despite the challenges, the market consensus seems to be that renewable energy is viable as a cost effective energy source. Combining that consensus with the rapidly reducing price of battery storage technology, another of the chief criticisms of renewable energy – intermittency – is becoming less relevant, making the sector ripe for continued investment. ■

INDUSTRY ACTIVITY: A SNAPSHOT OF WHAT'S BEEN AND WHAT'S COMING

As a result of COVID-19 induced state border closures, lockdowns, international travel bans and supply chain interruptions, renewable energy projects suffered delays and setbacks. However, these issues do not seem to have dampened the enthusiasm for new developments, with new projects – in particular, battery projects, continuing to be announced as Australia moves into its post-COVID-19 recovery phase. We have also observed a significant uptick in secondary sale processors in respect of developed assets.

Project delays

Greenfield developments continue to experience grid connection delays placing pressure on project schedules and, in turn, construction and development arrangements. The ageing nature of the grid, as well as the sheer number of projects seeking connection, has AEMO facing a backlog of connection requests. The latest connection figures released by AEMO, demonstrate that many projects which have been in train for several years are only now being connected.

This situation is not helped by outdated rules which were not designed to accommodate a large number of dispersed generators. For example, where a solar farm developer is towards the end of their modelling phase, and a new solar farm is announced in the vicinity, the modelling of the developer will become outdated, taking them back to square one. Although the regulator is aware of these issues, there are few concrete steps being taken to address them and this issue continues to cause delays in development and is further impacting Australia as a destination for investment in renewable projects.

Secondary M&A market

2021 has seen a number of large-scale renewable energy projects and portfolios come to the market: Fotowatio Renewable Ventures announced a partial sell down of its 500 MW Australian solar portfolio; New Energy Solar announced it is exiting the market by placing its 165 MW portfolio up for sale; and BlackRock announced its 90% interest in the 60 MW Hayman Solar Farm; and a 180 MW Daydream Solar Far is currently for sale – just to name a few.

There appear to be a number of different drivers for these sales, among which is developers' pre-scheduled strategy to exit the Australian renewables market. In any case, these sale processes offer an opportunity for infrastructure investment funds, superannuation funds and pension funds to pick up long-term, income generating assets which align with demand from some consumers for investments in renewable and green energy.

Battery project announcements

The fourth quarter of 2020, and first quarter of 2021, saw a raft of announcements regarding large scale battery projects. In January 2021, renewable energy company Neoen announced plans to build the 'Great Western Battery', a project made up of 500 MW of generation with up to 500 MWh battery capacity. Origin Energy also announced in January 2021 that it plans to construct a 700 MWh capacity battery at its coal-fired power plant in Eraring.

The rapidly dropping price of battery storage and State and Federal Government focus on grid stability and energy storage have seen these projects become more appealing. Although these projects are all in the early planning stages, their development is a positive sign for an ever growing industry.

Power purchase agreements

Last year also saw a continued uptake of green Power Purchase Agreements (PPAs) entered into by large corporates seeking to reduce their energy costs and increase their consumption of renewable energy to address shareholder concerns. BHP recently announced a PPA with Risen Energy. The deal involves the supply by Risen Energy's 132 MW Meridian Solar Farm in Western Australia of enough electricity to power half of BHP's Nickel West Kwinana refinery. This 10 year PPA is an example of an increasing push by the mining sector to adopt energy solutions that meet a variety of stakeholder requirements. Other entities like Shell, Macquarie University, various Local Governments and Government entities (like CSIRO) enter into PPAs with renewable energy generators in 2020.

The renewable energy sector in Australia is a dynamic and diverse one that is continuing to grow and attract significant amounts of investment. Australia's position as a leader in battling the COVID-19 pandemic has made this even more apparent. With significant amounts of capital in circulation as a result of central banks' COVID-19 response, it is likely the Australian renewable energy sector will continue to attract investment. ■



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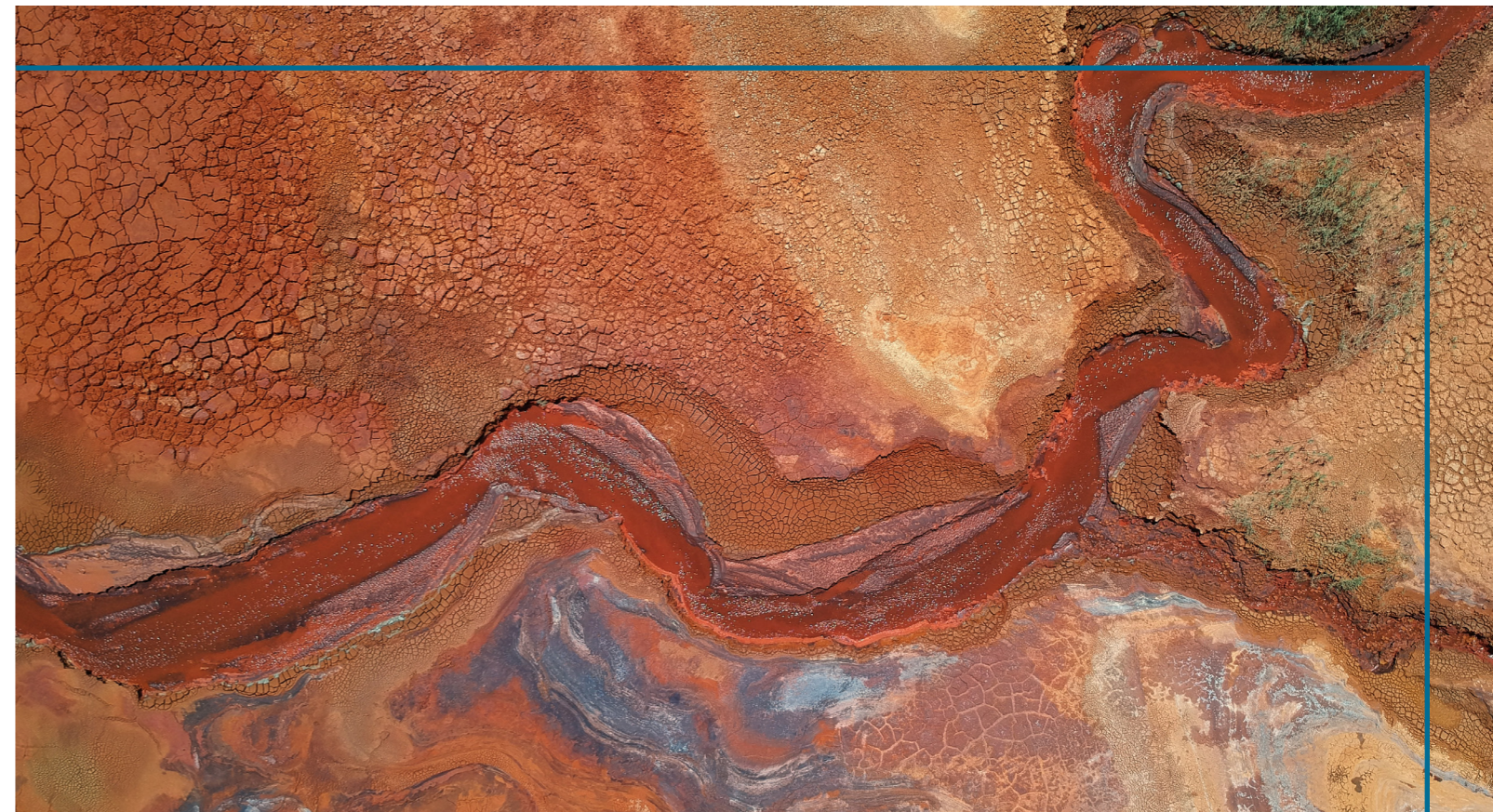
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CLIMATE CHANGE REPORTING

Investors and regulators are showing increasing interest in understanding how companies are addressing climate risk. Whilst Australian legislation does not expressly require companies to report on climate risk, regulatory guidance and legal opinion shows that directors of Australian companies do have obligations to consider and disclose climate-related financial risks. The ASX Corporate Governance Council, ASIC, APRA, AASB and AuSB have each issued guidance on the importance of considering climate risks and, in some cases, disclosing climate risks in financial reporting. Barristers Noel Hutley SC and Sebastian Hartford Davison also published a legal opinion in 2016 advising that directors have a duty to manage and consider climate risk under section 180(1) of the Corporations Act 2001 (Cth), and that directors of listed companies must disclose material climate-related risks in the companies annual reports.

ASIC's view

ASIC has released revised versions of Regulatory Guides 247 and 228 requiring directors of listed companies to consider, manage and disclose all climate risks (outlined below) in their annual reports. In addition to this, ASIC has indicated that, in some cases, climate change risk and opportunity will be relevant to disclose for companies seeking to raise funds under a prospectus. ASIC has been surveying climate change-related disclosure practices by selected ASX 300 companies since 2019 to ensure compliance with the new reporting requirements. The Regulator plans to adopt a consultative approach moving forward and will continue monitoring the adoption of climate reporting. Enforcement action may be taken where serious disclosure failures exist.



Expectations

The framework published by the Task Force on Climate-related Financial Disclosures (TCFD) is recommended by regulators, including ASIC and the ASX Corporate Governance Council, as the standard companies should use for considering and disclosing material climate risks. The main climate-related risks that the TCFD recommends companies consider are physical risks (including acute and chronic risk) associated with disruption to business activities from climate change and transition risks (including policy and legal, technology, market and reputation risk) associated with the transition to a lower-carbon economy. Some examples of these risks include:

- acute risk – hurricanes, fire or floods disrupting production and manufacturing;
- chronic risk – changing rain patterns or rising temperatures impacting production;
- policy and legal risk – government policy changes to efficiency standards or resource use (particularly in relation to the approval of new coal mines);
- technology risk – increased research and development costs to fund technology and innovation aimed at improving product energy efficiency to satisfy consumer preferences;
- market risk – reduced consumer demand for products that are not low carbon or energy efficient; and
- reputation risk – investors withdrawing from companies that are not responding to climate change.

In addition to the voluntary TCFD framework, the National Greenhouse and Energy Reporting Schemes (NGERS) requires certain entities to report annually on Scope 1 and Scope 2 greenhouse gas emissions. Scope 1 emissions directly result from facility activity, Scope 2 emissions are indirectly released from energy commodity consumption and Scope 3 emissions are other indirect emissions. While the NGERS does not require reporting of Scope 3 emissions, we note that some entities have continued doing this on a voluntary basis (e.g. Origin Energy).

Shareholder activism and climate change litigation

Climate change activist groups, such as Market Forces, have begun buying shares in prominent resource companies in order to table special resolutions for climate-related purposes. For example, Market Forces has consistently made applications for special resolutions with Santos to the effect that the company should end its oil and gas operations. While many of these applications have been rejected by Santos, a number of the similar styled resolution applications have been made to other public companies and have been tabled for mention at their annual meetings.

Climate change litigation

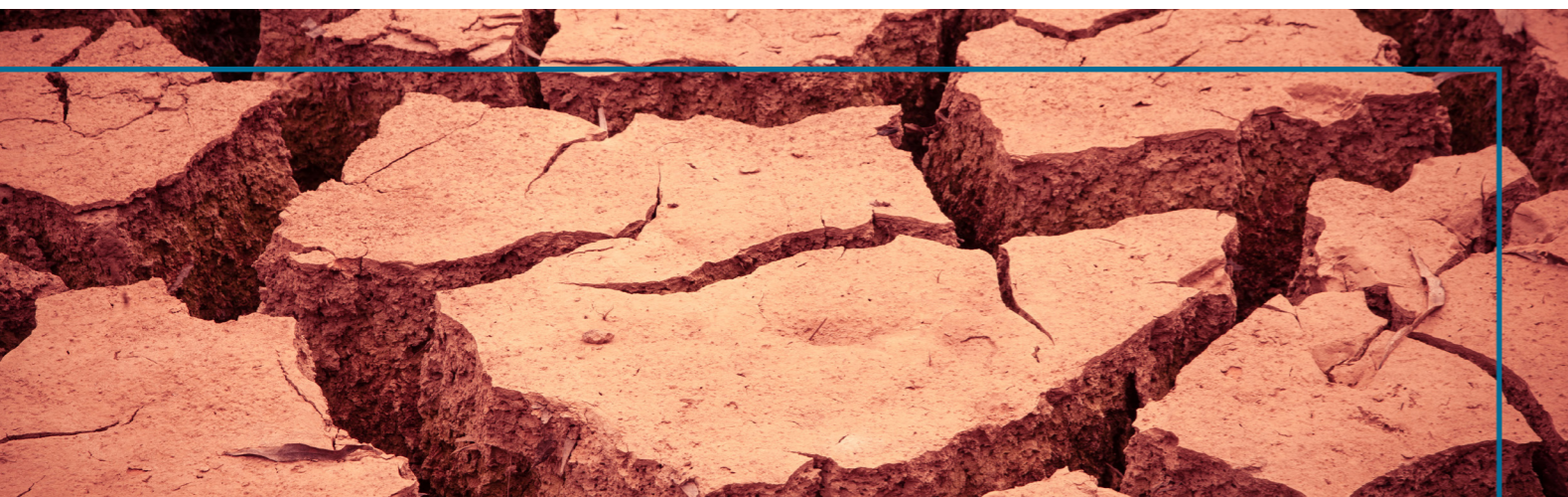
The last decade has seen increasing challenges to projects and planning decisions, focussing on greenhouse gas impacts and the resultant effect on climate change, at both a State and Federal level. Most recently, challenges have included:

- Federal Court proceedings brought by the member of a superannuation fund against the fund, who alleged he was not properly informed about the financial risk to his superannuation as a result of climate change, in breach of the *Corporations Act 2001*. That proceeding was settled, with part of the settlement that the fund would be carbon neutral by 2050;
- a challenge brought by a group of bush fire survivors against the New South Wales Environmental Protection Agency (EPA), alleging the EPA has failed to comply with its obligations under the *Protection of the Environment Administration Act 1991* (NSW) with respect to climate change; and
- objections made against the development of a coal project in the Galilee Basin which are being heard in the Queensland Land Court, including objections alleging the proposed approval of the project would infringe human rights by its contribution to climate change.

It is expected that these types of challenges will continue in the coming years as we strive towards achieving a sensible balance between economic and social needs on the one hand and managing the impact on climate on the other.

What's next?

The number of Australian companies reporting on climate risk is increasing. A study by KPMG indicates that the percentage of ASX 100 companies that follow the recommendations of the TCFD increased from 16 percent in 2017 to 58 percent in 2020. Given the increasingly strict regulatory requirements, it is likely that climate risk reporting will soon become common practice. ■



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TECHNOLOGY GENERATING THE RENEWABLE ENERGY SECTOR'S GROWTH

New applications of existing technology, together with new developments in science and engineering, is driving transformation in renewable energy as well as in technology itself.

As the internet of things (IoT) expands from personal devices and homes to whole industries and cities, the interconnection and automation of renewable asset controllers has significantly enhanced operational capability and efficiencies, but has equally created more centralised vulnerabilities. Stability and resilience are core qualitative measures of a renewable energy source. Key to this is the ability to more immediately detect interference and disruptions, and more quickly resume stable operations. Achieving this within the energy infrastructure is requiring a combination of technologies that have traditionally been applied to large scale computing networks: real-time monitoring software, secure communication networks, real-time collection and analysis of data, and bespoke computing code automating the correction or adjustment of operational settings based on that analysis.

True to form, developments in the legal landscape continue to lag behind technological advancement, as the rollout of new renewable technology raises new issues for industry, investors and governments that have not previously been contemplated.

Automation, big data, analytics and cyber security lead the way

The adoption of newer technology and re imagined applications of existing technology are accelerating efficiencies and expanding the possibilities across the entire renewables supply chain, driving innovation in both the production and consumption of alternative renewable sources of energy. At the heart of it, this transformation is being led by automation, big data, analytics and cyber security.

The use of artificial intelligence (AI), robotics and drones has also dramatically changed the nature of inspection and maintenance of renewable assets, such as wind turbines and large solar arrays. The reduction in effort and time required has moved the task from a weeks-long activity to mere hours. The use of robotics, automation and analytics solutions, such as asset tracking and predictive maintenance, also helps to track supply chain disruptions, better manage supplies, and assist with warehousing decisions and contingencies. The ease of inspection and the digitisation of supply chains has meant that issues can be detected sooner through automated alerts and enabling repairs to be administered more readily by supply and repair partners.

As the traditional energy grid transitions to an interconnected renewable energy infrastructure, the impending threat that looms large is the cybersecurity risk at the core of every 'smart' asset.

As seen in Utah in March 2019, a denial-of-service attack disrupted a wind and solar generation provider by disconnecting it from the Central US Power Grid. An unpatched vulnerability of the system's firewall allowed hackers to reach the core and crash the system. Although there was the potential to exfiltrate intellectual property and other proprietary information, the sole motive appeared to be to create a power blackout – often the focus of nation state cyber warfare. The potential for damage was not unlike the 2015 Russian cyber attack on three energy distribution companies in Ukraine, where the combination of malware, remote

disabling of assets, deletion of files and denial-of-service attacks left almost a quarter of a million people without power or any information updates from the energy companies for up to 6 hours.

The ability to bring down critical control systems and impact power generation highlights how generic vulnerabilities in software and firmware can impact core utilities and infrastructure, with the potential to leave whole cities without power. As energy providers adopt a more interconnected infrastructure, an increasingly 'online' system also makes vulnerable the traditional cyber targets of intellectual property, proprietary data and personal information. As digitisation moves through the supply chain, 'security by design' should be central to the energy sector's risk management strategy for all system networks, infrastructure and energy assets.

Complementing new science and engineering

New science and engineering has created new opportunities to apply these technologies and to enhance the existing capability of energy assets.

For example, this has led to the advent of smart meters that monitor and collect data in realtime on the individual power consumption of appliances, allowing consumers to gain insight into and adjust how they use power. Similar benefits are being realised from developments in smart solar systems. Combined with other innovations, such as the potential developments in renewable energy battery storage, big data analytics and IoT interconnection, the long-term opportunity is for a realtime, data-driven energy system for consumers.

Analytics solutions, used in surveying and mapping technology and more sophisticated weather forecasting and tracking, have also directed the deployment of renewable assets and the application of renewable energy generation in ways previously unconsidered. Based on more sophisticated data analysis, the installation of solar arrays and wind turbines in marine environments and the implementation of solar projects in space and on roadways have enabled existing renewable technologies to be more fully utilised.

Dynamic transformation

The advent of green technologies and the integration of existing technology in renewable energy infrastructure and production is driving the same transformational force across technology in return.

Globally, 940 million people still lack access to electricity. Communities around the world are investing in renewable forms of energy that bypass traditional energy suppliers. To support this, greater reach of the internet, more resilient networks and systems, connections that remain stable and secure in the event of a natural disaster, real-time analytics, big data capability and the use of AI to continuously adapt and improve operations are in increasing demand.

As energy networks expand and evolve globally, the volume of data required to be processed and the complexity and capability of the systems required to monitor, support and optimise these networks is increasing exponentially. As a result, large players in the energy sector, including ExxonMobil and the US Department of Energy, are driving investment and development in quantum computing. With its ability to execute multiple computations simultaneously, quantum computing promises to enable large scale energy grid and asset optimisation, and significantly more reliable communication and security that current computing technology is not capable of. Investment in quantum computing is estimated to reach USD\$1.9 billion in 2023, increasing to USD\$8 billion by 2027.



Managing risks

The implementation of renewable energy projects requires detailed consideration of issues akin to those in technology transformation projects, such as the underlying infrastructure compatibility and existing system capability. Legal disputes have already arisen where projects stalled or could not proceed due to incompatibility or functional capability hurdles, which, despite being foreseeable, were not contemplated by either party and not catered for in contractual arrangements. Specific consideration needs to be given to contractual relief and remedies based on the specific project – for example, a liquidated damages regime for failure to achieve performance guarantees due to issues with existing infrastructure or systems, or specifying clear conditions precedent and allocating responsibility and liability for ensuring underlying preconditions are met.

Construction and defect disputes remain prevalent as new construction techniques and engineering solutions evolve. For example, with the installation of floating wind farms out at sea, and other wind farms being developed further and further away from the coast, the most common problems encountered involve cabling and foundations. Currently, the standard position is that the transmission asset does not fall within the scope of work of the developer, so careful consideration needs to be given to the allocation of risk for latent defects and damage to connecting assets.

Just like other industries, the energy sector supply chain was significantly disrupted due to COVID-19. Wind projects, and solar projects in particular, experienced a slowdown due to over 70% of global photovoltaic modules being manufactured in China. Traditional supplier risks must now contemplate new scenarios in the wording of and in the allocation of liability in force majeure clauses and delay clauses, and suppliers must ensure these risks have been flowed down through the supply chain.



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Climate targets and cyber defence as legal drivers

With renewed global vigour for the Paris Agreement and jurisdictions around the world setting aggressive climate targets, there is the potential for societal and global pressure to drive more active Government involvement. With islands like Pulau targeting transition to 70% renewable energy by 2050 and China pledging carbon neutrality before 2060, environmental targets will add regulatory pressure across the energy supply chain. For example, several city and provincial Governments have already enacted regulations mandating a certain amount of roof space and other parts of buildings to be utilised for solar power installations.

As cybersecurity becomes a greater focus for national defence, specific security standards and regulations like those that already exist in the US and the EU may be enacted around the world. ASIC has long taken the position that responsibility for a company's cyber resilience falls within a director's duty of care and diligence. While privacy protection has already been filtering into the boardroom agenda of all Australian entities caught by the *Privacy Act 1988* (Cth), particularly following the introduction of Australia's notifiable data breach scheme in 2017, it would be unsurprising for Australia to adopt minimum security standards for its critical systems, infrastructure and utilities as part of its defence strategy. Going forward, energy companies should proactively take an enterprise wide security approach that goes beyond merely meeting privacy compliance requirements. Such strategies should also contemplate appropriate cyber protection for all aspects of the organisation that may be brought 'online' through an interconnected network, including its intellectual property, proprietary data, critical systems, energy assets, as well as ensuring appropriate security levels throughout the supply chain. ■

HYDROGEN – 2020 SNAPSHOT

Hydrogen is building momentum towards becoming an economically viable energy source that has the potential to become Australia's next major energy export. However, challenges remain for critical processes to reach commercial scale.

This article provides a snapshot of the key developments in the hydrogen sector in 2020 and our predictions for 2021.

Hydrogen in 2020

2020 was a bumper year for the hydrogen industry, with a number of major feasibility and demonstration projects announced alongside increased Government interest and investment.

Government investment

The release of the National Hydrogen Strategy in late 2019 and the Technology Investment Roadmap Discussion Paper in May 2020 paved the way for Commonwealth and State Government investment in the hydrogen industry (see our insight on this, [here*](#)). For instance:

- in January 2020, Australia and Japan signed a joint statement of cooperation on hydrogen and fuel cells;
- on 15 April 2020, the ARENA announced the opening of its \$70 million Renewable Hydrogen Deployment Funding Round to progress the development of renewable hydrogen in Australia;
- in April 2020, Australia became a member of the US Centre for Hydrogen Safety not-for-profit global organisation which promotes hydrogen safety and best practices worldwide;
- in May 2020, the Commonwealth Government announced that it will change the investment mandate of the CEFC to direct up to \$300 million towards a new 'Advancing Hydrogen Fund', which aims to support a clean, innovative, safe and competitive hydrogen industry in Australia;

- on 11 September 2020, Australia and Germany signed an agreement for a joint feasibility study to investigate the development of 'green' hydrogen production from renewable energy; and
- in December 2020, the Queensland Government announced that it will commit a further \$10 million over the next four years to develop the renewable hydrogen industry in Queensland.



* <https://bit.ly/3rmHzaK>

Private investment

In parallel with increased government investment, 2020 saw a flurry of announcements of hydrogen feasibility and demonstration projects, including:

- Hazer Group's 'The Hazer Process: Commercial Demonstration Plant' project in Munster, Western Australia, which has a project value of approximately \$22.57 million (including \$9.41 million in funding from ARENA);
- Horizon Power's 'Horizon Power Denham Hydrogen Demonstration' project in Denham, Western Australia, which has a project value of approximately \$8.9 million (including \$2.57 million in funding from ARENA);
- Stanwell Corporation Limited's 'Stanwell Hydrogen Electrolysis Deployment Feasibility Study' in Rockhampton, Queensland, which has a project value of approximately \$4.99 million (including \$1.25 million in funding from ARENA);
- BP Australia Pty Ltd's 'Project GERI Feasibility Study' in Geraldton, Western Australia, which has a project value of approximately \$4.42 million (including \$1.7 million in funding from ARENA);
- Yara Pilbara Fertilisers Pty Ltd's 'Yara Pilbara Renewable Ammonia Feasibility Study' in Murujuga, Western Australia, which has a project value of approximately \$3.69 million (including \$995,000 in funding from ARENA); and
- APT Facility Management Pty Ltd's 'APA Renewable Methane Demonstration Project' in Roma, Queensland, which has a project value of approximately \$2.26 million (including \$1.1 million in funding from ARENA).

Each of these projects demonstrates not only the interest the private sector has in hydrogen as a green fuel but the diverse sectors it applies to, just part of the reason so many countries are putting their emission reductions hopes in hydrogen's hands.

2021 outlook

Based on the commitment of Commonwealth and State Governments to hydrogen last year, 2021 will continue to present opportunities for growth in the sector. (For instance, ARENA has now shortlisted seven applicants for its \$70 million hydrogen funding round (the total grant requested across all seven applicants is over \$200 million with a combined total project value of approximately \$500 million)).

It is clear that the government's commitment to hydrogen is underpinned by a desire to create a green hydrogen export industry in Australia (targeting countries throughout East Asia) that is on a similar scale to the LNG sector. However, large-scale transportation of hydrogen still remains an issue to be resolved in order for this vision to become a reality the costs to safely transport hydrogen are significant.

However, further public investment and Government-led initiatives are going to be required before industry participants will be in a position to demonstrate the commercial viability of hydrogen energy as an industry. ■



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Strati Pantges
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The Regulatory Landscape



EPBC REVIEW AND ONGOING POTENTIAL REFORM

The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) is Australia's primary Federal environmental law. As for many, 2020 was not easy for the EPBC Act or those responsible for its administration, witnessing long-standing community and industry discontent with its operation on numerous fronts.

Much of the recent scrutiny of the EPBC Act and its implementation arose from an independent review (**Samuel Review**) first announced on 29 October 2019. The administration of the EPBC Act was also subject to a somewhat scathing performance audit by the Australian National Audit Office (**ANAO**). The Federal Government reacted by introducing the *Environment Protection and Biodiversity Conservation Amendment (Streamlining Environmental Approvals) Bill 2020* (Cth) (**Streamlining Bill**) in the second half of 2020, prior to the Samuel Review concluding.



Brief overview of the EPBC Act

The EPBC Act came into force in July 2000. Its primary function is to protect matters of national environmental significance (**MNES**), including certain species of plants and animals and a range of features protected under international treaties. Arguably the most controversial MNES is the 'water trigger', which was introduced in 2012 and targeted only coal and coal seam gas activities, with limited protections offered to existing and approved projects.

The EPBC Act requires the proponent of an 'action' (broadly defined) that has the potential to significantly impact MNES to refer the action to the responsible Minister. The Minister determines whether the action is a 'controlled action' and, if so, whether assessment and approval is required.

Two notable features of the project assessment and approvals regime under the EPBC Act that are distinct from many of the State-level (and largely overlapping) legislative frameworks are:

- while some steps within the assessment and decision-making process have specific timeframes included, there is a catch-all provision which prevents anything done out of time from being invalidated on that basis; and
- only judicial review is available in respect of decisions made under the EPBC Act, with no appeals based on merit provided for.

The Samuel Review interim report and ANAO audit

The Samuel Review, led by Professor Graeme Samuel AC, was announced on 29 October 2019. It is a requirement under the EPBC Act for an independent review into the Act to be conducted at least every 10 years. The Samuel Review is the second such review conducted.

In July 2019, the ANAO was also requested to carry out its performance audit, in part to inform the Samuel Report. Released in June 2020, the ANAO audit report ultimately found, among other things, that the:

- *'administration of referrals, assessments and approvals of controlled actions under the EPBC Act is not effective'; and*
- *'regulatory approach is not proportionate to environmental risk'.*

Unsurprisingly, the nature and extent of the ANAO's findings attracted some attention. Shortly afterwards, in August 2020, the Interim Report of the Samuel Review was released (**Interim Report**). With echoes of the ANAO findings, the Interim Report determined that the EPBC Act is:

- *'ineffective. [as] it does not enable the Commonwealth to play its role in protecting and conserving environmental matters that are important for the nation. It is not fit to address current or future environmental challenges'; and*
- *'duplicative, inefficient and costly for the environment, business and the community'.*

The Interim Report also highlighted community distrust in the effectiveness of the EPBC Act in protecting the environment, as well as presenting the industry view that the proceedings under the Act are *'cumbersome, duplicative and slow'*.

A key recommendation of the Interim Report was to develop and implement National Environmental Standards (**NES**) to underpin the administration of the EPBC Act. The Interim Report envisages NES as legally binding, 'granular and measurable', and outcomes-focused rather than prescriptive.

The Interim Report also recommended greater devolution of decisions to State and Territory jurisdictions. One aspect of this would entail States and Territories having to demonstrate their assessment systems meet the NES.

Streamlining Bill

In what was seen by some as a knee-jerk reaction to the ANAO and Interim Report, the Federal Government introduced the Streamlining Bill in August 2020. The Bill proposes amendments to the EPBC Act, primarily the provisions about bilateral agreements, touted to adopt recommended reforms to work towards a single-touch more streamlined approach for environmental approvals.

Many observers noted that the Streamlining Bill does not contain provisions to enact the NES as proposed in the Interim Report. Moreover, it is largely comprised of provisions that were contained in a Bill that was originally proposed in 2014 as part of what was then called the 'One Stop Shop' proposal but which ultimately did not progress. The Streamlining Bill passed the House of Representatives on 3 September 2020 but is yet to pass the Senate.

Samuel Review final report

The Final Report of the Samuel Review was given to the Minister for the Environment on 30 October 2020, but was not publicly released until 28 January 2021 (**Final Report**).

The Final Report does not pull back from the recommendations set out in the Interim Report. In fact, many of these have been expanded. The Final Report appends a 'full suite' of recommended NES for adoption and also builds upon the proposed reform pathway outlined in the Interim Report, explicitly noting that all reforms should be in place within two years.

The Final Report also recommends the creation of a statutory position of Environment Assurance Commissioner: an independent role responsible for overseeing the EPBC Act and reporting on the performance of the Commonwealth, States and Territories, and other accredited parties, in implementing the NES.

The Final Report plainly recommends:

- immediate legislative reform to allow for NES (which the Streamlining Bill does not achieve in its current form); and
- more comprehensive legislative reform to be implemented by the end of 2021.



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Next steps and broader reform

It is expected the Streamlining Bill will next be discussed in the early parliamentary sittings of 2021. There has been nothing since the public release of the Final Report, to indicate that the Federal Government is backing away from the Streamlining Bill. However, even if the Streamlining Bill is passed in its current form in the coming weeks or months, there will remain a significant body of non legislative work required before any real reform can occur (e.g. drafting and/or adoption of NES and reviewing of bilateral agreements), as plainly anticipated by the Samuel Review.

Moreover, the timing and nature of the Government's response to criticisms of the EPBC Act and its administration as it has played out so far is unlikely to have more broadly increased confidence in the regime overall among any of the key stakeholders. Stakeholders will be watching to see what, if any, amendments to the Streamlining Bill are progressed and whether they align with the Final Report. ■

Trends in rehabilitation costings for Queensland, common sense prevails in Court appeal

Substantial changes to the law surrounding provision of financial security for rehabilitation liabilities of miners in Queensland came into effect in April 2019. This security is now known as the Estimate Rehabilitation Cost (**ERC**) for a site's environmental authority. At the same time, the Department of Environmental and Science (**DES**) released substantially overhauled statutory Guidelines about determining ERC, as well as an overhauled ERC Calculator. Industry generated calculators are no longer allowed, with discounts as a performance incentive also no longer being available. Third party quotes are also subjected to much greater scrutiny than was seen historically, leading to a number of contractors requiring payment to produce a compliant quote.

Use of the new Calculator has had varying impacts on the determined rehabilitation liability for mine sites throughout the State. While in general most ERC liabilities have increased, there is no clearly discernible or proportionate increase seen consistently across commodities types. The increase has been most sharply noticeable for many minerals operators though, as the Guideline and Calculator require all structures containing potentially acid forming material to be automatically treated as high risk, and apply the default high risk closure costings (particularly for capping) in the Calculator.

McCullough Robertson was able to successfully secure a Land Court victory for one of our minerals clients in February 2021, resulting in a reduction of the rehabilitation liability for its site. In the first published decision under the new ERC regime, the Land Court's reasons offer some clear guidance for DES, as well as hope for industry moving forward. In particular, the Court has confirmed that DES cannot 'slavishly' apply the Guideline and otherwise ignore the requirement that an ERC decision reflect the actual likely costs of rehabilitating a site and restoring the environment. Operators with a clear justification for calculating capping costs, in particular, based on a demonstrated rehabilitation methodology which does not reflect the default rates in the Calculator can now be more bullish in presenting their proposals to DES in an ERC application. ■



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INDIGENOUS ENGAGEMENT

Juukan Gorge

The destruction of 46,000 year old sacred Aboriginal caves at Juukan Gorge in May 2020 has had a material adverse impact on Rio Tinto's reputation and will have a lasting impact on their future operations and engagement with Aboriginal groups and Government.

Needless to say, the incident will also have a significant impact on the broader resources industry, which continues to see increased public scrutiny from politicians, activists and critical institutional investors and financiers, focused on ensuring that proponents fulfil their environmental, social and governance (ESG) promises to protect, preserve and prevent harm to Aboriginal cultural heritage.

Even with substantive legislative change yet to be seen, the media response and inquiry findings and recommendations demonstrate that it is now more important than ever for resource companies to preserve their social licence to operate by upholding their ESG promises.

There are some key learnings for industry to take away from the Juukan Gorge incident:

- **Complying with the law is not always enough** – consider the social and reputational impacts of significant decisions relating to Aboriginal cultural heritage and the views of the Aboriginal group concerned before they are carried out.
- **Engagement** – ensure a meaningful and fair process is undertaken in engaging with Aboriginal groups, and that the process is well documented during any agreement making process.
- **Relationships** – building and maintaining strong and meaningful relationships with Aboriginal stakeholders, founded in trust and mutual respect, can be critical to the success of a project.



- **Protect your social licence** – investors are signalling that financial performance does not outweigh a failure by a company to deliver on its promises. A social licence to operate holds huge commercial and social value, and should be protected by ensuring accountability for ESG policy.
- **Governance** – bad news of a reputational nature flows upward within an organisation. It is not enough for executives to claim they 'did not know'.



Process changes

On 3 February 2021, the Australian Parliament passed a raft of long awaited amendments to the *Native Title Act 1993* (Cth) and the *Corporations (Aboriginal and Torres Strait Islander) Act 2005* (Cth). The amendments will commence on a date to be fixed no later than August 2021.

Among a raft of changes, the amendments:

- validate Section 31 'right to negotiate' deeds that were at risk due to not being executed by all members of a registered native title claimant group (following the decision in *McGlade v Ors* [2017] FCAFC 10);
- introduce a new 8 month objection period for the creation of a right to mine for a mining infrastructure facility, which may ultimately impact project approval timelines; and
- involve process improvements such as majority decision making for registered native title claimants.

Timber Creek

On the back of the High Court's Timber Creek decision in March 2019, State and Territory Governments have continued to see more broad scale compensation applications made by determined native title holders. Governments are still considering their approaches to the unquantified liability, and it is yet to be seen whether a framework will be established to encourage negotiated settlements outside of Court. ■



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MANAGING A HEALTH CRISIS FROM AN EMPLOYER'S PERSPECTIVE

COVID-19 has been a steep learning curve for employers across all industries. The key focus of protecting the health and wellbeing of employees has remained paramount.

However, the changes to the way we work and the increased risks to work health and safety have impacted the operation of workplaces like never before.

The challenge for employers is to manage both the health and wellbeing of employees, while also managing the economic crisis faced by businesses.

Mandating vaccinations for employees

In January 2021, the Federal Government published its national rollout strategy to support early access to, and the delivery of, a COVID-19 vaccine. Prime Minister Scott Morrison announced that the Australian COVID-19 vaccination program was expected to commence from mid-to-late February 2021, with a focus on priority populations (as has been the case). This group includes aged and disability care residents and workers, frontline healthcare workers and quarantine and border workers.

Employers are now asking whether they can require employees to receive the vaccination. Employers who consider mandating COVID-19 vaccines should proceed with caution. While a vaccinated workforce could reduce and potentially eliminate the health and safety risks posed by the virus, employees and representative bodies may have legitimate objections to this.

The Australian Government has indicated there are complex legal issues that need to be considered in preparation for the vaccine rollout, and that it is the States and Territories, rather than the Federal Government, that are primarily responsible for workplace safety. It is also noted that preliminary discussions have begun with key stakeholders to consult about these issues.

Important considerations in determining whether employers can require employees to be vaccinated against COVID-19 include:

- an employer's obligations as a duty holder under State and Territory work health and safety laws to ensure, so far as is reasonably practicable, the health and safety of workers and others in its workplace;
- the right for employers to issue lawful and reasonable directions to its employees;
- an employee's obligation to comply with the lawful and reasonable directions; and
- the inherent requirements of an employee's position.

In what will be the first of many cases, the Fair Work Commission (**FWC**) has allowed an employee to pursue a claim that her employer unfairly dismissed her by placing her on indefinite unpaid leave for declining to receive an influenza vaccination. The case, *Maria Corazon Glover v Ozcare* [2021] FWC 231, involved an assistant who provided in-home care who had previously declined vaccinations on allergy grounds. In April 2020, Ozcare made vaccinations compulsory for all employees. Referring to the now-revoked Queensland Health directions that workers could not enter residential aged care facilities unless they had a vaccination, Ozcare said annual inoculations were now an inherent requirement of the assistant's role. The FWC will consider whether Ozcare's decision to make a vaccination an inherent requirement of the job is lawful and reasonable.



NEW INDUSTRIAL RELATIONS LAWS

On 9 December 2020, the Federal Government introduced the Fair Work Amendment (Supporting Australia's Job and Economic Recovery) Bill 2020 (**Bill**). Employer groups have welcomed the Bill's changes as the first step to getting industrial relations back on track. However, unions have criticised it as the 'worst attack on workers' rights since Work Choices'. Below we outline key changes proposed by the Bill.

Greenfields agreement

- The Bill will extend the nominal expiry date for major project greenfields agreements (that is, greenfields agreements for projects with a total capital expenditure of at least \$500 million) for up to eight years. For agreements that operate longer than four years, the agreement must include a term for annual pay rises. This is designed to prevent the need for mid-project bargaining and exposure to mid-project industrial action.

Bargaining

- The Bill includes a new requirement for the FWC to approve enterprise agreements within 21 working days, or publish the reasons that prevented it from doing so.
- The Bill will also simplify the prescriptive requirements for 'genuine agreement' with the FWC.
- Employers will have 28 days (up from 14 days) from the day the employer agrees to bargain or initiates bargaining, to give employees the notice of employee representational rights.
- The Bill will also restrict the intervention of non-bargaining representatives to contest approval applications. This proposed change is designed to reduce the prospect of the agreement approval stage being held up by unions which were not appointed bargaining representatives opposing the approval application. In particular, the coal mining sector has seen many occasions over the last five years where the Construction, Forestry, Maritime, Mining and Energy Union (**CFMMEU**) has opposed the approval of an

enterprise agreement when they were not appointed as a bargaining representative by any relevant employee.

- The Bill will permit franchisee employers to join enterprise agreements of their franchise network without requiring a vote of the entire workforce.
- The Bill will prevent an application being made to the FWC to terminate an enterprise agreement before 90 days has lapsed after the nominal expiry date.
- Most controversially, the Bill will give the FWC limited discretion to approve an enterprise agreement that fails the BOOT because of the impacts of COVID-19, and where it is not contrary to the public interest. The maximum nominal life of these agreements will be two years. The FWC will only have this COVID-19 related discretion for two years.
- Finally, the Bill will terminate all pre-Fair Work agreements from 1 July 2022 – so called 'zombie agreements' – made before the commencement of the Fair Work Act 2009 (Cth) (FW Act). This will have the significant effect of removing agreement coverage for many employees and returning their minimum terms and conditions to the modern awards, until such time as a new agreement is approved, which in some cases may result in a significant financial impact on businesses.

Casual employees

- If passed, the Bill will insert a definition of 'casual employee' into the FW Act, with the test hinging on whether the offer of employment makes a firm advance commitment to continuing and indefinite work according to an agreed pattern of work.
- The Bill also addresses the so called 'double dipping' for mischaracterised casual employees who are paid a loading but are later found to be entitled to amounts of paid leave and other employment entitlements not typically afforded to casuals.
- There will be a new requirement for an employer to offer a casual employee conversion to a permanent role, and a requirement on employers to provide a Casual Work Information Statement in addition to the Fair Work Information Statement when a casual employee commences employment.

Modern Awards

- The Bill proposes to provide scope for employers to enter into agreements for additional hours with part-time employees without the requirement to pay overtime. Overtime would still be payable if those additional hours are worked outside the spread of ordinary hours in the relevant award, or above the maximum ordinary hours for a full-time employee under the award. The intention is clearly to increase the attraction of part-time work as part of a person's ordinary hours, over casual employment. This proposed change will apply in relation to a number of identified modern awards, including the General Retail Industry, Fast Food Industry, Hospitality Industry (General) and Restaurant Industry Awards.
- There will be new rules to enable employers to give flexible work directions, as employers receiving the JobKeeper wage subsidy were able to do, which will sunset after two years. The employer must have a reasonable belief that the direction will assist with the revival of the enterprise in the wake of the COVID-19 problems in order for the direction to be valid.

Compliance and enforcement

- The Bill will introduce a range of new penalties and increase fines in some cases. Penalties for remuneration-based contraventions for large businesses will have an increased maximum fine for the multiple value of the benefit, as opposed to a fixed monetary amount. The Bill also introduces a new criminal offence for dishonestly engaging in an underpayment scheme.
- It is unlikely that the Bill will make its way through the Senate without amendments.



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STATUS OF INDUSTRIAL MANSLAUGHTER OFFENCES IN STATE AND TERRITORY WHS LAWS

In November 2020, Western Australia joined Queensland, Victoria, the Northern Territory and the Australia Capital Territory in implementing industrial manslaughter offences. These States and Territories have gradually introduced offences in WHS frameworks in response to legislative reviews and inquiries that have recognised the increasing community expectations with respect to work health and safety. While these five jurisdictions have introduced industrial

manslaughter offences, it is important to understand how the elements of the offences differ across the States and Territories (and this is discussed further below).

Amending legislation introducing an industrial manslaughter offence is also before the South Australian Parliament. Industrial manslaughter is not currently an offence in Tasmania or New South Wales.

South Australia

On 23 September 2020, the South Australian Work Health and Safety (Industrial Manslaughter) Amendment Bill 2020 (**SA Bill**) was introduced into the South Australian Legislative Council.

The SA Bill proposes to insert an industrial manslaughter offence for employers and officers in the *Work Health and Safety Act 2012* (SA).

Under this offence, an employer or officer would be found guilty of an offence if the employer breaches their duty of care, the employer or officer knew or was recklessly indifferent that the act or omission constituting the breach would create substantial risk of serious harm to a person, and the breach causes the death of a person.

The SA Bill prescribes up to 20 years imprisonment for officers or employers who are a natural person and a maximum \$13 million penalty in any other case.

The Greens have introduced this legislation three times before in line with the recommendation for an industrial manslaughter offence made by the South Australian Parliamentary Committee on Occupational Safety, Rehabilitation and Compensation. Debate on the SA Bill has been adjourned.

Western Australia

On 10 November 2020, the *Work Health and Safety Act 2020* (WA) (**WA Act**) received assent, making the state the eighth jurisdiction to adopt the proposed model WHS laws. The WA Act replaces existing legislation relating to work health and safety and adopts most provisions of the model laws, but it also contains some substantive variations from the model provisions.

The WA Act will not commence until proclamation. The WHS regulations have to be finalised before proclamation occurs, with Industrial Relations Minister Bill Johnston indicating this will occur within 12 months of the date of assent.

The WA Act will introduce two separate offences for manslaughter:

- A person or an officer would be found guilty of a crime if the person conducting the business or undertaking has a health and safety duty, they engage in conduct that causes death of an individual, knowing the conduct is likely to cause death or in disregard of that likelihood, and the conduct fails to comply with the duty. For this offence, the WA Act prescribes up to 20 years imprisonment and a maximum \$5 million fine for an individual, or a maximum \$10 million fine for a body corporate.
- A person or an officer will also commit an offence if the person conducting the business or undertaking has a health and safety duty, the person fails to comply with that duty and the failure causes the death of an individual. This carries a penalty of up to 10 years imprisonment and a \$2.5 million fine for an individual, or a \$5 million fine for a body corporate.



Queensland resources industry

On 1 July 2020, industrial manslaughter offences introduced by the *Mineral and Energy Resources and Other Legislation Amendment Act 2020* (Qld) (**MEROLA Act**) commenced under the:

- *Coal Mining Safety and Health Act 1999* (Qld) (**CMSH Act**);
- *Mining and Quarrying Safety and Health Act 1999* (Qld);
- *Explosives Act 1999* (Qld); and
- *Petroleum and Gas (Production and Safety) Act 2004* (Qld),

(collectively the **Resources Safety Acts**).

An offence occurs for an employer or senior officer where:

- a worker dies in the course of undertaking work or is injured and later dies;
- the employer or senior officer's conduct causes the death; and
- the employer or senior officer is negligent about causing the death.

The maximum penalty for an individual is 20 years imprisonment and for a body corporate is a fine of over \$13 million.

This creates significant potential liability for employers and senior officers in the Queensland resources sector. In light of these changes, employers should review existing work health and safety procedures to ensure compliance and, in the event of a fatality, ensure that legal advice is sought immediately after an incident so that any admissions by senior officers against their interest are avoided.

The MEROLA Act also amended the CMSH Act to require individuals appointed to statutory roles for coal mining operations – namely site senior executives, ventilation officers and underground or surface mine managers – to be employees of the coal mine operator. Previously, those individuals could be employees of a contractor or service provider to the coal mine operator.

Where those roles are currently filled by contractors, there is an 18 month period from 25 May 2020 to make the transition. Mining employers will need to consider making changes to current arrangements where statutory office holders in its Queensland operations are not currently employees of the coal mine operator. Based on the current agreed period, compliance with this requirement will need to be achieved by 25 November 2021.



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REVIEW OF QLD AND NSW MINING WORK HEALTH AND SAFETY LAWS

Queensland Resources Safety and Health Framework

On 1 July 2020, the revised regulatory framework for safety and health in the Queensland resources industry commenced. Importantly, the *Resources Safety and Health Queensland Act 2020* (Qld) amended operations covered by the Resources Safety Acts to:

- create a regulator for the State's safety-related regulatory functions, called Resources Safety and Health Queensland (**RSHQ**), which will administer the Resources Safety Acts;
- appoint a Commissioner for Resources Safety and Health, replacing the current Commissioner for Mine Safety and Health; and
- direct prosecutions in the resources sector to the independent Work Health and Safety Prosecutor, appointed under the *Work Health and Safety Act 2011* (Qld).

Employers in the resources sector need to be aware of the new regulatory bodies they will now be dealing with for the management of work health and safety issues and, in a worst-case scenario, prosecutions.

Queensland Coal Mining Board of Inquiry

On 30 November 2020, the Queensland Coal Mining Board of Inquiry (**Board of Inquiry**) published Part I of its report. Following this report, the Minister for Natural Resources, Mines and Energy, Anthony Lynham, tasked the Board of Inquiry with examining the serious accident at the Anglo American Grosvenor Mine and other high potential incidents involving methane exceedances, and making recommendations for improving work health and safety practices to mitigate against the risk of similar incidents in the future.

Part I outlines 82 findings and 25 substantive recommendations for the improvement of safety in Queensland coal mines. Significantly, the inquiry found that, while the operational practices and management systems at three of the examined mines and the corporate levels above them were generally adequate and effective to achieve compliance with safety laws and standards for methane exceedances, the potential consequence of the methane exceedances were not properly identified at any of the mines. The inquiry emphasised that these shortcomings are concerning given the prominent role of methane explosions in underground coal mine accidents and disasters. The Board of Inquiry recommends that mine operators and parent companies take steps to identify and action reportable methane exceedances by escalating such incidents and conducting more rigorous investigations.

The Board of Inquiry also examined the industrial manslaughter offence that commenced under the CMSH Act. The inquiry found that the definition of 'employer' in the relevant provisions fails to extend liability to the mine operator as it only attaches to an entity that employs or engages a coal mine worker under a contract for service. The Board of Inquiry recommends that RSHQ amend the CMSH Act to reflect Parliament's intention with regard to strengthening safety culture in mining, ensuring consistency in how deaths of workers are treated, and who should be liable to prosecution.

The Board of Inquiry will provide Part II of its report to the Minister by 31 May 2021. Part II will address labour hire and the roles of the Site Safety and Health Representatives and Industry Safety and Health Representatives.

Statutory Review of Work Health and Safety (Mines and Petroleum Sites) Legislation

On 10 November 2020, the NSW Deputy Premier tabled the independent report produced by Kym Bills (**NSW Review**) regarding the statutory review of the *Work Health and Safety (Mines and Petroleum Sites) Act 2013* (NSW) and *Work Health and Safety (Mines and Petroleum Sites) Regulation 2014* (NSW) (**WHS (MPS) laws**).

The NSW Review found the objectives of the WHS (MPS) laws remain valid and their terms are generally appropriate for securing those objectives. In particular, it determined that the WHS (MPS) laws assist in securing the objective of the WHS Act 'to provide for a balanced and nationally consistent framework to secure the health and safety of workers and workplace'.

Importantly, the NSW Review concluded that the framework of duties to protect workers – including safety management systems, principal hazard management plans, controls and principal control plans, and licensing, authorisations and statutory functions – remain appropriate and essential for these high-hazard industries.

The Review made a total of 40 recommendations regarding improvements to the operation of the WHS (MPS) laws. Of the 40 recommendations made, the Resources Regulator commenced implementation of 25 recommendations, including reviewing legislation and, in collaboration with other jurisdictions, reviewing existing guidance material and developing new guidance material.

The New South Wales Resources Regulator announced that further consultation with industry stakeholders is necessary for the other 15 recommendations. This consultation will occur in early 2021, and subject to its outcomes, the Resources Regulator will progress amendments of the WHS (MPS) laws.

What's next?

It is difficult to see any changes to industrial relations at the Federal level passing without significant debate and probable amendments in the Senate. However, the Morrison Government's is unlikely to want industrial relations policy unresolved before the next election so deals with the cross bench in the Senate should be expected.

At a State level, the pattern of increasing regulation in the safety space continues with a high likelihood of further legislative amendments once various inquiries and reports are finalised. Suffice to say that 2021 will require resources industry participants to maintain vigilance in an evolving regulatory landscape. ■



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HUMAN RIGHTS AND RESOURCES – THE QUEENSLAND HUMAN RIGHTS ACT IMPACT ON PROJECT DEVELOPMENT

Legislating human rights in Queensland

On 1 January 2020, Queensland's Human Rights Act 2019 (**HR Act**) commenced, having been assented to on 7 March 2019. The main objects of the HR Act are to protect and promote human rights, help build a culture in the Queensland public sector that respects and promotes human rights, and to increase a dialogue about the nature, meaning and scope of human rights.

The HR Act protects 23 fundamental human rights, including recognition and equality before the law, the right to life, property rights, privacy, protection of children, and cultural rights, including specifically cultural rights of Aboriginal and Torres Strait Islander peoples.

The HR Act requires public entities to act compatibly with those rights, such that:

- Parliament must consider human rights when proposing and scrutinising new laws;
- courts and tribunals, so far as is possible to do so, must interpret legislation in a way that is compatible with human rights; and
- public entities – such as state government departments, local councils, state schools, and non-government organisations and businesses performing a public function must act and make decisions compatible with human rights.

Compatibility with human rights means that a decision or provision either does not limit a human right, or to the extent that it does, it is only to the extent that it is reasonable and justifiable to do so.

Importantly, the HR Act does not confer a standalone cause of action for individuals concerned that a decision or act by a public entity is incompatible with a recognised human right. Rather, an applicant must piggyback any human rights challenge under the HR Act to a separate cause of action under a separate statute. In this regard, the HR Act is intended to supplement existing legislation in Queensland.

The impact on resources and renewables sector

Section 58 of the HR Act makes it unlawful for a public entity to act or make a decision in a way that is not compatible with a human right relevant to the decision.

While the HR Act is directed to the conduct of public entities, there is no doubt that it is in the interests of individuals and companies in the resources and renewables sector to assist public entities to comply with the HR Act, thereby ensuring acts done or decisions made – upon which industry operators rely – are robust and resistant to challenge.

As resources and renewable projects are heavily regulated and monitored by State government departments exercising obligations under a range of legislation, including the *Mineral Resources Act 1989* (Qld) (**MR Act**) and the *Environmental Protection Act 1993* (Qld) (**EP Act**), businesses should facilitate compliance with the HR Act by those departments by considering the regulated human rights, particularly in their environmental assessment documentation, and how certain decisions or acts will comply with the HR Act.

The convergence of human rights and environmental and climate change litigation

May 2020 saw the first legal challenge in respect of the approval of a project involving the HR Act.

Waratah Coal's Galilee Coal Project in Central Queensland is a proposed open and underground thermal coal mine, together with attendant infrastructure and railways for the transport of the mined coal. Objections were lodged against the grant of the mining lease and environmental authority for the project, including on the ground that to grant the applications would not be compatible with recognised human rights under the HR Act and, therefore, unlawful under section 58(1) HR Act.

There is no question that the Minister and the Chief Executive of the statutory party are each subject to section 58 of the HR Act when they make their final decision on the relevant applications. In doing so, they must not act or make a decision that is not compatible with human rights, and in making their decision, they must properly consider relevant human rights.

Waratah Coal made an early challenge to the HR Act objections on the basis that the Land Court did not have jurisdiction to consider them. In rejecting that challenge, the President of the Land Court determined that in fulfilling its function under the MR Act and the EP Act, in deciding what recommendations to make on the applications, the Land Court itself was also subject to the substantive and procedural requirements imposed on it as a public entity.

Although still at an early stage, the challenge to the Galilee Coal Project utilising the HR Act raises important matters of policy, weight and law, bearing on potentially competing rights and interests, including the public interest. An issue which will confront the objectors will be establishing a causative link between the Galilee Coal Project and human rights, as opposed to climate change generally and human rights. This will no doubt be the subject of expert evidence in the proceeding.

This case echoes other examples of the intersection of human rights in environmental litigation internationally. For example, in 2019 the Dutch Supreme Court upheld an earlier ruling that the Dutch government had a positive obligation to adequately reduce greenhouse gas emissions, reflecting a duty of care to protect citizens from climate related harm. In February 2020, the United Kingdom's Court of Appeal found that the planned expansion of Heathrow Airport was unlawful in its then proposed form, as the Secretary of State for Transport had failed to take into account its own firm policy commitments on climate change under the Paris Agreement in publishing the Airports National Policy Standard.

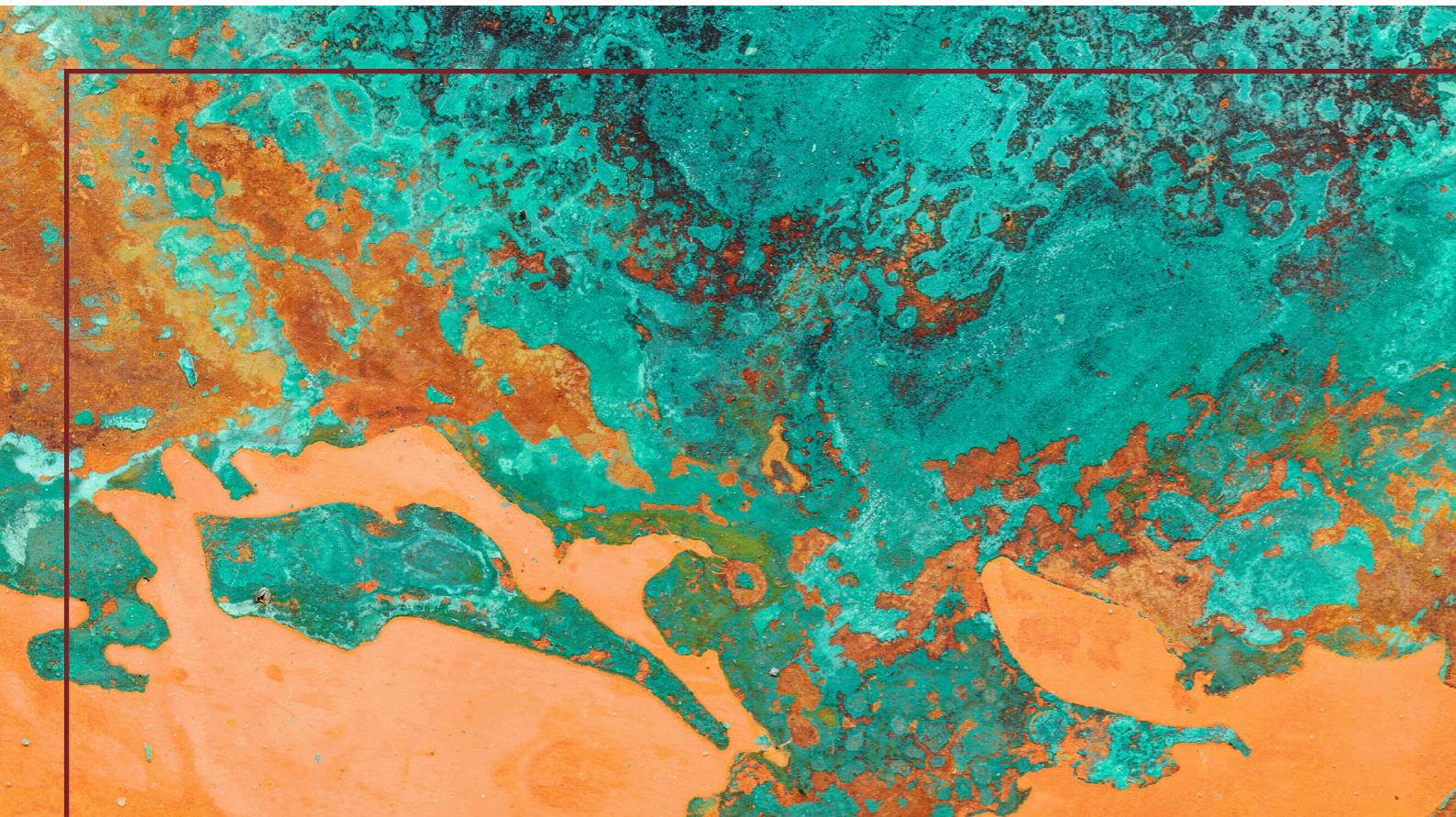
With the commencement of Queensland's HR Act, it is clear that there will be an increase in litigation in Queensland, involving both government and project proponents, focussing on actions to reduce the risks and impacts of climate change through the lens of human rights. For this reason, it is important for these rights to be adequately considered and dealt with by public entities in the decision-making process, and proponents should be prepared to assist Government departments in this regard. ■



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