ashurst

Mining in Australia

AN INTRODUCTION FOR INVESTORS

2016

Foreword

We are pleased to publish *Mining in Australia – An introduction for investors.*

In Australia, the mining sector is governed by a sophisticated and complex framework of laws and regulations, which oversee investment and mining operations. Despite its complexity, this framework has supported the development of a large proportion of the world's premier resource projects.

The sector has been the largest contributor to the nation's economy over the last 50 years, and has experienced a substantial period of growth, including in some States, a "boom". However, over the last few years, the softening in commodity pricing has caused a slowdown in the development of new projects, and in some cases, projects have been shelved.

So while new projects are not emerging at the rate previously experienced, significant opportunities remain for investors to participate in both existing and new projects across a range of commodities.

Australia continues to produce large amounts of iron ore, coal and bauxite from a number of world-class operations. The gold sector is benefiting from falling costs and a weaker Australian dollar, while interest is growing in specialty metals including lithium due to the anticipated increase in production of rechargeable lithium-ion batteries.

We also anticipate many companies will continue to divest non-core assets in the year ahead, which will likely present numerous opportunities to secure quality assets.

With these opportunities in mind, the purpose of this guide is to assist you, as a prospective investor, to gain a better understanding of Australia's legal and regulatory mining framework, as well as practical aspects of Australia's diverse mining sector.

Ashurst is proud that our expertise in the sector has consistently seen our Energy and Resources practice recognised as one of the best in the region, and that we remain a valued partner and trusted advisor to leading companies worldwide.

Our team comprises specialists who can support all aspects of a project's lifecycle, including infrastructure, engineering and construction, native title, project finance and industrial relations, as well as corporate, mergers and acquisitions, litigation and dispute resolution, taxation and property.

Beyond Australia, we also have offices in Singapore, Hong Kong, Beijing, Shanghai , Tokyo and Papua New Guinea, and an associated office in Jakarta. This supports our work with inbound investment from Asian markets, as well as the many projects we advise upon across the region.

We wish you every success for your business ventures in Australia, and would value the opportunity to work with you to achieve your goals.

Lorenzo Pacitti
Global Co-Head of Mining

This publication is not intended to be a comprehensive review of all developments in the law and practice, or to cover all aspects of those referred to. Readers should take legal advice before applying the information contained in this publication to specific issues or transactions. For more information please contact us at aus.marketing@ashurst.com.

Ashurst Australia (ABN 75 304 286 095) is a general partnership constituted under the laws of the Australian Capital Territory and is part of the Ashurst Group. Further details about Ashurst can be found at www.ashurst.com.

No part of this publication may be reproduced by any process without prior written permission from Ashurst. Enquiries may be emailed to aus.marketing@ashurst.com.

© Ashurst 2016

Contents

Introduction	5
Contents	3
Chapter 1 – Australia's lawmakers	6
Chapter 2 – Mining tenements	8
Chapter 3 – Holding mining interests in Australia	12
Chapter 4 – Royalties and taxes	16
Chapter 5 – Financing	22
Chapter 6 – Land access	26
Chapter 7 – Access to infrastructure	28
Chapter 8 – Native title and cultural heritage	30
Chapter 9 – Environmental law	34
Chapter 10 – Foreign investment approval framework	38
Chapter 11 – Structuring considerations	42
Chapter 12 – Bribery and corruption	50
Chapter 13 – Industrial relations, employment, and work health and safety	54
Appendix A	58
Your key contacts	60

Introduction

Mining in Australia offers a diverse range of opportunities for overseas investors.

This guide highlights some of the key legal issues associated with a mining project of which investors should be aware. These issues often become apparent when an investor conducts due diligence with a view to acquiring mining assets and interests, or seeks to raise funds for mining projects in debt or capital markets.

The guide describes:

- laws made in relation to mining by Australian Governments and the right to mine;
- the different regulatory approvals required for mining projects, including mining tenements, land access rights and environmental approvals;
- the different activities investors in mining may undertake, such as exploration or production or building mining infrastructure;
- ways to structure interests in mining interests;
- taxation implications of an investment in mining activities;
- land access issues including possible compensation payments to private owners, and dealing with laws that protect the interests of Indigenous Australians;
- environmental law considerations;
- workplace health and safety issues relating to mining;
- competition issues and access to major infrastructure services; and
- regulation of foreign investment in Australia's mining sector.

Australia's lawmakers

STATE AND FEDERAL GOVERNMENTS

Since federation in 1901, Australia has had a federal system of Government. Under this system, powers are distributed between a national Government (the Commonwealth) and the six States – New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia. The three Territories – the Australian Capital Territory, the Northern Territory and Norfolk Island – have self-government arrangements.

The Australian Constitution defines the boundaries of law making powers between the Commonwealth, the States and Territories. State Parliaments are subject to the Commonwealth Constitution, as well as their State Constitutions. A Commonwealth law typically overrides any inconsistent State law.

In practice, the two levels of Government cooperate in many areas where States and Territories are formally responsible, including, laws and regulations which are relevant to mining projects.

The third tier, Local Government, has restricted powers. Land use and development falls within its control, although on major development projects Federal, State and Territory Governments may also have authority.

MINING LAWS

Mining regulation in Australia is primarily State and Territory based. The starting point is that most minerals are owned by the State or Territory in which the minerals are located (there are some areas where private landowners hold title to certain minerals). State and Territory Governments also have certain taxation powers, for example, to collect resource royalties and stamp duty.

Mining proponents within Australia should also be aware of the interaction between State and Territory legislation and Commonwealth legislation affecting their projects. For example, even if mining exploration and production operations are conducted within the State's boundaries under State mining legislation, there is a significant overlap of Commonwealth laws which may potentially be relevant. Significantly, the Commonwealth has certain powers in relation to native title, employment, the environment, access to infrastructure, taxation and foreign ownership.

The remainder of this Guide describes the State and Commonwealth laws governing the mining industry in Australia and the interaction between those laws.

2

Mining tenements

The system of granting mining tenements aims to ensure that:

- land is utilised for the purpose for which it is most valuable;
- persons who hold mineral rights develop them and employ labour; and
- minerals are only available on lease or *profit a prendre* conditions.

In some States, the Government can also grant mining tenements to explore for and mine privately owned minerals if this is not being done by the owner of those minerals.

TENEMENTS

The details of legislative licensing regimes vary between jurisdictions, but all have common features. All of the regimes comprise at least two stages – exploration and production. Certain regimes also facilitate the conversion of exploration tenements to an "intermediate" tenement (or to a retention status) to facilitate the "retention" of an area after a discovery is made but when commercial production is not feasible at that time.

The mining tenement granted by the relevant Government typically gives the holder the exclusive right to explore for minerals in, or extract minerals from, the area specified in the tenement, in accordance with its conditions. The tenement overlays the underlying land title and generally allows the tenement holder to enter the land for prescribed exploration and mining purposes, subject to the payment of compensation to the landholder. Royalties are payable to the relevant Government in relation to minerals extracted and sold pursuant to that tenement.

Other tenements may also be required and may be granted to permit construction of infrastructure ancillary to a mine, such as roads, bores, pipelines and power lines. They may be granted over ground that is subject to an existing interest, such as a mining lease. Similarly, third party interests may be granted over land that is subject to an existing miscellaneous licence.

Typically, legislation in each State and Territory sets out:

- the types of tenements that may be granted;
- the processes to be followed in relation to the grant of tenements (including dealing with priority issues, for example where competing applications are lodged); and
- the revocation and surrender of tenements.

The relevant law also sets out the requirements that apply if a tenement is transferred or otherwise dealt with (such as the need to notify the relevant Minister or even obtain consent). However, these provisions rarely, if ever, apply where there is a change in the shareholding or control of the entity that holds the tenement (although this may be an issue to be considered when the tenement is due for renewal).

TYPES OF TENEMENTS

The main types of mining tenements granted by each State and Territory are summarised below. Mining tenements are regulated by each State and Territory under separate legislative regimes and the rights and obligations of tenement holders vary accordingly.

The general characteristics of each of the main types of tenements are set out in the table below.

	EXPLORATION LICENCE	MINING LEASE	RETENTION LICENCE[1]
Purpose	Exploration for mineral sources, drilling for core samples	Development and production of minerals from lease area	Title over mineral discovery where mining is impracticable
Coverage	Designated contiguous area; limited extraction rights	Designated area taken out of the exploration licence	Area sufficient to cover identified mineral resource, plus additional land for future mining operations
Period	Usually granted for five years (may be renewed) often subject to surrender of a portion of the area during each year of the term of the tenement	As specified in the relevant State or Territory law (for example, the period approved by the Minister in Qld, and 21 years in WA) (may be renewed)	Usually granted for five years (may be renewed)
Rights	Land entry Drilling surveys and recovery on an appraisal basis Usually confer a priority right to apply for a mining lease over minerals discovered within exploration area	Land entry Mining operations to develop and extract minerals from mining lease area Operation of production facility (usually subject to obtaining additional licences) Disposal of minerals recovered subject to royalty payment	Exploration and recovery on an appraisal basis Protects interests of the licence holders where production is likely to become commercially viable
Obligations	Rent Expenditure commitments Reporting obligations Security deposit Restrictions on amounts of minerals that can be extracted	Rent and royalties To develop and commercialise discovery Reporting obligations Security deposit	Rent Licensee may be required to carry out works program to establish nature/extent of resource and/or commercial feasibility Security deposit

1 In Western Australia, Retention Licences are no longer granted in respect of Exploration Licences applied for after 10 February 2006. Instead, a holder of an Exploration Licence can apply for the tenement to have "retention status".

TENEMENTS AND CONDITIONS

Tenements may be granted subject to conditions, mainly to regulate the manner in which activities may be conducted. Exploration licences will typically have "minimum expenditure" conditions, as well as time limits on exploration, while mining leases will require a certain level of expenditure. There will also be reporting obligations, which may exist under legislation and/or conditions attaching to the tenement. These obligations require the tenement holder to provide regular reports to the relevant Government department.

Tenement holders are usually required to submit a development plan to the relevant Government department to obtain approval to develop a mine. Tenement holders are also often required to lodge security deposits when licences are granted to ensure the performance of environmental and rehabilitation obligations.

Annual rental payments are generally required under each tenement based on area, and royalties must be paid based on the amount of the mineral extracted under a mining lease.

If a tenement holder does not comply with the conditions of a licence or an obligation set out in legislation, including the rental or royalty obligations, various compliance or enforcement tools (depending on the State or Territory legislation) may be used. These include cancellation of the licence or imposition of a penalty on the holder of a tenement. Most jurisdictions also provide for third parties to seek forfeiture (and be rewarded with the tenement) or fines depending on the level of under expenditure or non-compliance. Forfeiture is the ultimate sanction and a pillar of the "use it or lose it" system in Australia.

REGISTERS AND INTEREST IN TENEMENTS

The laws of each State and Territory appoint an administering department and Minister to maintain registers of mining titles and interests. Some information from these registers is available to the public. The information publicly available varies considerably between the jurisdictions.

The entry of a tenement or interest in a tenement on a register is not conclusive proof of title to that interest or tenement, but failure to enter a dealing on the register may make a transfer of an interest or tenement "of no force".

There is no system of indefeasible title (ie guaranteed title) by registration (unlike Australia's "Torrens" system of real property). If there is a flaw in the process for application to grant a mining tenement, a court may rule the tenement invalid, regardless of the registration of the tenement. In most jurisdictions, a mining tenement does not give the holder an interest in the underlying land.

Verifying good title to a tenement generally requires a "chain of title" examination of the successive dealings of that tenement from the date it was granted.

In addition to this shortcoming, various jurisdictions only permit the registration of some (but not all) dealings with respect to a tenement. The limit on the types of dealings that can be registered means that a search of the tenement register may not provide a "complete record" of all interests affecting the relevant mining tenement, as there may be various unregistered interests which are not recorded (such as the interests granted under a "farm-in arrangement").

Holding mining interests in Australia

3

In Australia, Governments or their agencies rarely participate directly in mining ventures. Private enterprise conducts the exploration and production operations. Entities gain the right to undertake exploration and production activities through mining tenements granted by the relevant authority under statutory regimes. Foreign entities most commonly hold interests in mining tenements in Australia by way of a company structure or investment in a joint venture.

JOINT VENTURES

It is common in Australia to conduct mining activities as part of a joint venture. Different arrangements may be required for ventures formed for various mining related activities (ie exploration, production and the operation of an infrastructure facility).

The joint venture agreement states the scope, purpose and duration of the joint venture, identifies the assets committed to it, describes and quantifies the interests of the participants and provides for the operation, management and control of the venture. The agreement also covers the making of "called sums", the holding and expenditure of funds, the apportionment of liability, the consequences of default, the use and disposal of the output of the venture and the assignment of interests and withdrawal from the venture.

There are two types of joint venture commonly used in Australia – incorporated and unincorporated joint ventures. Each structure has different legal and taxation implications that need to be carefully considered and assessed having regard to the commercial objectives of the parties.

The sections below provide a high level summary of the general characteristics of (and differences between) incorporated and unincorporated joint ventures.

An **incorporated joint venture** is operated by a special purpose company in which the joint venturers are shareholders. The joint venture has its own separate legal personality. A shareholders agreement between the parties is entered into and, at the same time, the special purpose company is formed to own and control the venture, with an agreed number of directors appointed by each party.

An **unincorporated joint venture** involves parties agreeing to cooperate in relation to a commercial undertaking, with the parties holding their interests and entitlements in the venture separately rather than jointly. As there is no company structure, the contract (ie the joint venture agreement) between the parties will govern their relationship, the operation of the venture and their obligations to each other.

INCORPORATED VS. UNINCORPORATED JOINT VENTURES

The following table summarises the key features and differences in respect of incorporated and unincorporated joint ventures.

	INCORPORATED JOINT VENTURE	UNINCORPORATED JOINT VENTURE
Legal entity	Separate legal personality A manager (often a related entity of the majority shareholder) is commonly appointed by the joint venture company to conduct the day to day activities of the joint venture	No separate legal personality (contractual in nature) A manager (often a participant) is commonly appointed to act as agent for the participants to conduct the day to day activities of the joint venture
Liability	The liability of a participant as a shareholder is limited to the amount unpaid on its shares	Liability is usually expressed to be several not joint. The liability of a participant is generally limited to its participating interest in the joint venture
Ownership	Ownership of interest in the joint venture is held by way of shares in the joint venture company	The parties own an interest in the assets of the joint venture according to their participating interests
Income	Any profits of the joint venture company will be distributed by way of dividends Any losses of the joint venture company cannot be offset against a shareholder's own income	A party is entitled to its share of production in kind from joint venture activities and is then free to market and sell that product Any income or loss from such a sale flows directly to the participant and forms part of overall income and losses of that participant
Partnership risk	Avoids being categorised as a partnership by having a separate legal entity (in this case a company)	If taken to be a partnership, there may be undesirable tax consequences if there is a joint receipt of income (ie participants are taxed jointly on profit and cannot offset income against losses) or participants may be held to be jointly and severally liable
Transfer of ownership	Transfer of shares rarely requires notification to, or consent of, the relevant Minister Pre-emptive rights between shareholders are common The primary source of governance is a Shareholders Agreement entered into between the company and the joint venturers (shareholders). This document governs the rights and obligations as between the shareholders in much the same way as a joint venture agreement (in respect of an unincorporated joint venture).The joint venture company and board of directors will also need to comply with the *Corporations Act 2001* (Cth) provisions (ie reporting obligations, accounting and audit requirements, directors' duties etc) in addition to any contractual obligations	Transfer of interests in mining tenements is likely to require notification to, and the consent of, the relevant Minister Pre-emptive rights between participants under the joint venture are very common The primary source of governance is the contractual arrangements between participants (ie joint venture agreement or joint operating agreement) A management committee is a common feature of an unincorporated joint venture. The management committee functions in a manner similar to a company's board of directors, such that decisions are made by resolutions

FARM-IN AGREEMENTS

As mentioned above, the particular arrangements in respect of each joint venture will invariably differ depending on the terms of the relevant joint venture arrangements. However, a particular form of joint venture that is worth discussing in some further detail are those which involve a Farm-in/Farm-out arrangement.

Farm-in agreements are often used in conjunction with a joint venture structure to share the risk of the exploration and development stages of a tenement. In a typical farm-in agreement, the owner of a tenement would offer to sell part or all of its tenement to another entity in return for the farmee funding and/or completing "work" on the tenement. The farm-in agreement would generally specify the financial contribution to be made or work required to be carried out within a certain time frame in exchange for transfer of a proportionate interest. Following transfer, the parties may enter into a joint venture agreement to govern how they will work together to further develop the tenement and carry out mining operations.

COMPETITION

The competition law provisions of the *Competition and Consumer Act 2010* (Cth) (Competition and Consumer Act) should be considered before forming, or operating, a joint venture. Three of the provisions that commonly need to be considered are the prohibitions against cartel conduct, exclusionary provisions and anti-competitive arrangements.

If a joint venture is formed between competitors or potential competitors (which will generally be the case by virtue of their participation in the joint venture), care needs to be taken to avoid contravening the cartel conduct and exclusionary provision prohibitions in the Competition and Consumer Act. In Australia, making or giving effect to a "cartel provision" may attract both civil and criminal penalties, and making or giving effect to a exclusionary provision may attract civil penalties.

For example, a cartel provision may arise in a joint venture agreement which provides for the joint marketing of minerals produced by the joint venture which requires the joint venturers to reach agreement on the prices and other terms at which the joint venture sells the products, and the customers they will sell to. The joint venturers may also contractually limit their capacity to produce minerals outside of the joint venture and this may contravene the prohibition on cartel conduct, as well as the prohibition against exclusionary provisions.

The prohibition on cartel conduct is subject to an exception, and the prohibition against exclusionary provisions is subject to a defence, which aims to avoid punishing certain types of legitimate collaborative business activity (the Joint Venture Exceptions). However, the Joint Venture Exceptions have strict requirements, and do not apply to all types of joint venture activities.

Even where the Joint Venture Exceptions apply, the formation and operation of a joint venture is subject to other provisions of the Competition and Consumer Act, including the general prohibition against anti-competitive arrangements. These other provisions also apply to joint ventures between parties that are not competitors or potential competitors with each other.

It is therefore important to consider competition law issues carefully and upfront.

There are a range of ways to manage competition law risk. One option for dealing with these issues is to apply to the Australian Competition and Consumer Commission (ACCC) for an official authorisation for conduct that may breach the Competition and Consumer Act (including the prohibition against cartel arrangements). Such an authorisation provides immunity from prosecution if the ACCC is satisfied that the public benefits outweigh the anti-competitive detriment.

STATE AGREEMENTS

A feature of Australia's resources law is the use of agreements between Governments and project proponents which facilitate the implementation of large scale resource projects (State Agreements).

A State Agreement is an agreement between the relevant project proponent which specifies the rights, obligations, terms and conditions for the development of a specific project. This process may grant the project proponent certain "dispensations" from the law that would otherwise apply in respect of the project.

The terms of each State Agreement are drafted much like an ordinary contract, but are unique in the sense that they are ratified by an Act of Parliament. Depending on the language used in the ratifying act, the State Agreement can either have contractual force only or, force of law.

These agreements are particularly prevalent in Queensland, South Australia (where they are called indentures), and Western Australia (where there are around 64 State Agreements currently on the State's books).

Some of the key features commonly negotiated by a project proponent under a State Agreement include:

- **Proposal mechanisms:** a form "proposals" regime whereby the proponent is required to prepare detailed proposals for the establishment of the mining operations under the State Agreement;
- **Undertaking to grant tenure:** an obligation on the State to make tenure available for the project, upon approval of development proposals;
- **Infrastructure:** the right to construct critical infrastructure, such as ports and railways;
- **Superior tenure rights:** the grant of mining tenements on a "successive" renewal basis, over larger areas than otherwise would be possible; and
- **Concessions and protections:** concessional or fixed royalty rates, limited exemptions from duty liability, and specific protections against adverse State interference.

While a State Agreement may override certain laws under the State's mining legislation, the agreement will not typically grant the project proponent a dispensation from environmental protection laws or Aboriginal heritage processes. The State Agreement also cannot override a Commonwealth Act, so processes under the *Native Title Act 1993* (Cth) now apply.

Royalties and taxes

"In Australia, three levels of Government impose different taxes or duties."

4

The Commonwealth imposes income taxes, goods and services tax, customs and import duties, fuel tax and withholding taxes. State and Territory Governments impose stamp duties, land tax, payroll tax and resource royalties. Local Governments may impose land tax in the form of rates.

ROYALTIES

Each State and Territory currently imposes royalties relating to the extraction of minerals. The rates of royalty imposed differ between States and Territories and between different commodities. In most cases, royalties are calculated on a production basis.

Set out in Appendix A to this guide is a table which summarises the royalty regimes of each State and Territory for certain minerals.

INCOME TAX

Broadly, a non-resident company will only be subject to tax on income that is sourced in Australia, subject to the application of any applicable double tax agreement (DTA). The rate of tax is currently 30% for companies with an annual turnover of over $2 million. If a DTA applies to a non-resident company, the company will only be taxed on income attributable to any permanent establishment it has in Australia. Other Australian sourced income such as dividends, interest, royalties and payments for construction and related activities are subject to a withholding tax regime.

WITHHOLDING TAXES

Only certain forms of income derived by non-residents are subject to Australia's withholding tax regime.

The table below sets out the rates of relevant forms of withholding tax applied on a gross basis.

INCOME	WITHHOLDING TAX RATE
Dividends*	30%**
Interest+	10%**
Royalties	30%**
Construction or related activities***	5%

* No withholding tax is imposed on fully franked dividends. Broadly speaking, a fully franked dividend is a dividend paid out of profits on which the Australian company has paid underlying Australian corporate tax.

** The rate applied under Australian domestic law. The rate may be lower under an applicable DTA.

*** The ATO may grant an exemption or variation to the 5% foreign resident withholding tax in certain circumstances (such as where the non-resident does not have an Australian permanent establishment and is resident of a DTA country).

+ Exemptions can apply, for example, if the "public officer test" requirements have been met.

CAPITAL GAINS

Broadly speaking, a non-resident entity is only subject to capital gains tax (CGT) in respect of a gain derived from the disposal of:

- Australian real property (including mining and petroleum interests);
- shares in a "land rich" Australian company (ie more than 50% of the market value of the company's assets relate to Australian real property) and the interest held by the non-resident passes the "non-portfolio interest test" (ie if the interest is of 10% or more in the company). The 10% test is applied on an associate inclusive basis with a "look back" period of up to two years before the disposal; or
- assets used in carrying on business at, or through, an Australian permanent establishment.

From 1 July 2016, purchasers of such assets will be required to withhold and remit to the Australian Tax Office (ATO) 10% of the purchase price if the vendor is a non-resident or, in the case of real property, is unable to provide an ATO clearance certificate. The vendor will receive a tax credit in respect of the withheld amount, provided it has been remitted to the ATO.

GST

The Commonwealth Government imposes goods and services tax (GST) on supplies made by entities which are registered, or required to be registered, for GST. An entity is required to be registered for GST when its annual turnover from supplies connected with Australia (having regard to the previous 12 months and the following 12 months) exceeds $75,000. An entity can elect to register for GST if it is carrying on an enterprise.

GST is imposed at a general rate of 10%. Supplies can be subject to GST if they are connected with Australia and made in the course or furtherance of an enterprise. Some transactions are not subject to GST because they are GST-free (such as exports) or are input taxed (such as financial supplies and supplies of precious metals in some circumstances). Except to the extent an entity makes input taxed supplies, an entity which is registered, or required to be registered, can claim back as input tax credits any GST incurred on its costs and expenses, subject to holding a valid tax invoice.

Participants in a joint venture can notify the Commissioner of Taxation that it is a GST joint venture. Where a joint venture is a GST joint venture, the joint venture operator (either one of the joint venturers or another entity) has the responsibility, on behalf of all of the participants, to account for GST liabilities, input tax credit entitlements and adjustments relating to the operations of the joint venture. Supplies that are made by the joint venture operator to other participants are not subject to GST.

TRANSFER DUTY

All States and Territories impose transfer duty (previously referred to as stamp duty) on the transfer of interests in real property and goods transferred with real property.[1] Transfer duty can also apply to transfers of business assets (in Western Australia, Northern Territory, Queensland, and New South Wales until 30 June 2016), transfers of shares and units (in New South Wales until 30 June 2016) and the grant of mortgages over property to secure loans in New South Wales until 30 June 2016).

Transfer duty is applied at marginal rates according to the value of the assets being transferred. Different rates apply in each State and Territory and the rates also vary between different types of transactions. The table below sets out the types of duty and the relevant rates in each jurisdiction.[2]

STATE/ TERRITORY	DUTY ON TRANSFER OF INTERESTS IN LAND AND GOODS TRANSFERRED WITH LAND	DUTY ON TRANSFER OF NON-REAL PROPERTY SUCH AS GOODWILL AND INTELLECTUAL PROPERTY	DUTY ON TRANSFER OF SHARES/UNITS IN UNLISTED COMPANIES/TRUSTS	DUTY ON GRANT OF MORTGAGES
ACT	5.17%	Not imposed	Not imposed	Not imposed
NSW	5.5%[3]	5.5%	0.6%	0.4%
NT	5.45%	5.45%	Not imposed	Not imposed
QLD	5.75%	5.75%	Not imposed	Not imposed
SA	5.5%[4]	Not imposed	Not imposed	Not imposed
TAS	4.5%	Not imposed	Not imposed	Not imposed
VIC	5.5%[5]	Not imposed	Not imposed	Not imposed
WA	5.15%	5.15%	Not imposed	Not imposed

[1] Real property may include mining and exploration interests, depending on the jurisdiction.
[2] Rates listed are the top rates of duty in the scale.
[3] Premium property duty of 7% applies to the value of residential land over $3 million.
[4] Rates are being reduced with complete abolition from 1 July 2018 of duty on non-residential, non-primary production land.
[5] An additional 3% surcharge applies to foreign purchasers of residential property in Victoria, which is to be increased to 7% from 1 July 2016.

LAND RICH OR LANDHOLDER DUTY

All States and Territories impose stamp duty on the acquisition of interests in some companies and trusts that own Australian real property. This is known as "land rich" or "landholder" duty. The duty is generally imposed on the value of the land held by the relevant entity (or the value of land and goods in New South Wales, South Australia and Western Australia).

The table below sets out the relevant thresholds in each State and Territory for duty to apply.

STATE/ TERRITORY	LOCAL LAND HOLDINGS VALUE TEST THRESHOLD (AUD)	LAND RICH THRESHOLD TEST[6]	ACQUISITION THRESHOLD	RATE OF DUTY
ACT	N/A	N/A	50% or more if the landholder is a private company or unit trust	Standard transfer duty rate calculated on the proportion of all local landholdings represented by the acquisition
NSW	$2,000,000	N/A	50% or more if landholder is unlisted 90% or more if landholder is listed / widely held	Standard transfer duty rate calculated on the proportion of all local landholdings represented by the acquisition if landholder is unlisted 10% of the rate of transfer duty, calculated on the total value of local landholdings if the landholder is listed / widely held[7]
NT	$500,000	N/A	50% or more if landholder is unlisted 90% or more if landholder is listed	Standard transfer duty rate calculated on the proportion of all local landholdings represented by the acquisition
QLD[8]	$2,000,000	N/A	50% or more if landholder is unlisted 90% or more if landholder is listed / widely held	Standard transfer duty rate calculated on the proportion of all local landholdings represented by the acquisition if landholder is unlisted 10% of the rate of transfer duty, calculated on the total value of local landholdings if the landholder is listed / widely held[9]
SA[10]	$1,000,000	N/A	50% or more if landholder is unlisted 90% or more if landholder is listed	Standard transfer duty rate calculated on the proportion of all local landholdings represented by the acquisition if landholder is unlisted 10% of the rate of transfer duty, calculated on the total value of local landholdings if the landholder is listed / widely held
TAS	$500,000	60%	50% or more	Standard transfer duty rate calculated on the proportion of all local landholdings represented by the acquisition
VIC	$1,000,000	N/A	20% or more for private unit trusts 50% or more if landholder is an unlisted company 90% or more if landholder is listed / widely held	Standard transfer duty rate calculated on the proportion of all local landholdings represented by the acquisition 10% of the rate of transfer duty, calculated on the total value of local landholdings if the landholder is listed / widely held
WA	$2,000,000	N/A	50% or more if landholder is unlisted 90% or more if landholder is listed	Standard transfer duty rate calculated on the proportion of all local landholdings represented by the acquisition

[6] Total land-holdings of the corporation within and outside Australia as a percentage of all of its property excluding certain "liquid assets".
[7] If the landholder is a widely held trust, the duty payable is reduced by any duty paid in respect of the acquisition of the units, and any duty of a similar nature paid or payable in another Australian jurisdiction.
[8] Separate rules for unlisted trusts.
[9] In general, no further landholder duty will be charged if the interest in a listed or widely held is increased.
[10] Separate rules for trusts that are not registered managed investment schemes, approved deposit funds or pooled superannuation trusts apply until 30 June 2018. $1 million threshold to be removed from 1 July 2018.

SUMMARY OF TAXES

The table below summarises each of the taxes described above.

TAX	RATE	COMMENTS
Corporate tax	30%	Elective consolidation regime can apply to all 100% owned Australian subsidiaries
WITHHOLDING TAX		
Unfranked dividends	30%	DTA rate may be lower
Interest	10%	DTA rate may be lower and exemptions may apply
Royalties	30%	DTA rate may be lower
Construction or related activities	5%	Exemptions or variations may apply
GST	10%	Generally not payable on exports or input taxed supplies
STAMP DUTY		
Transfer of land or shares/units in a landholder company/trust	4.5% – 5.75%	All States/Territories
Transfer of certain non-real property assets	5.15% – 5.75%	NSW, QLD, NT, WA
Transfer of unlisted shares/units	0.6%	NSW
Mortgage duty	0.4%	NSW

5

Financing

There has been a long tradition in Australia of project financing the development of mine and mine related infrastructure.

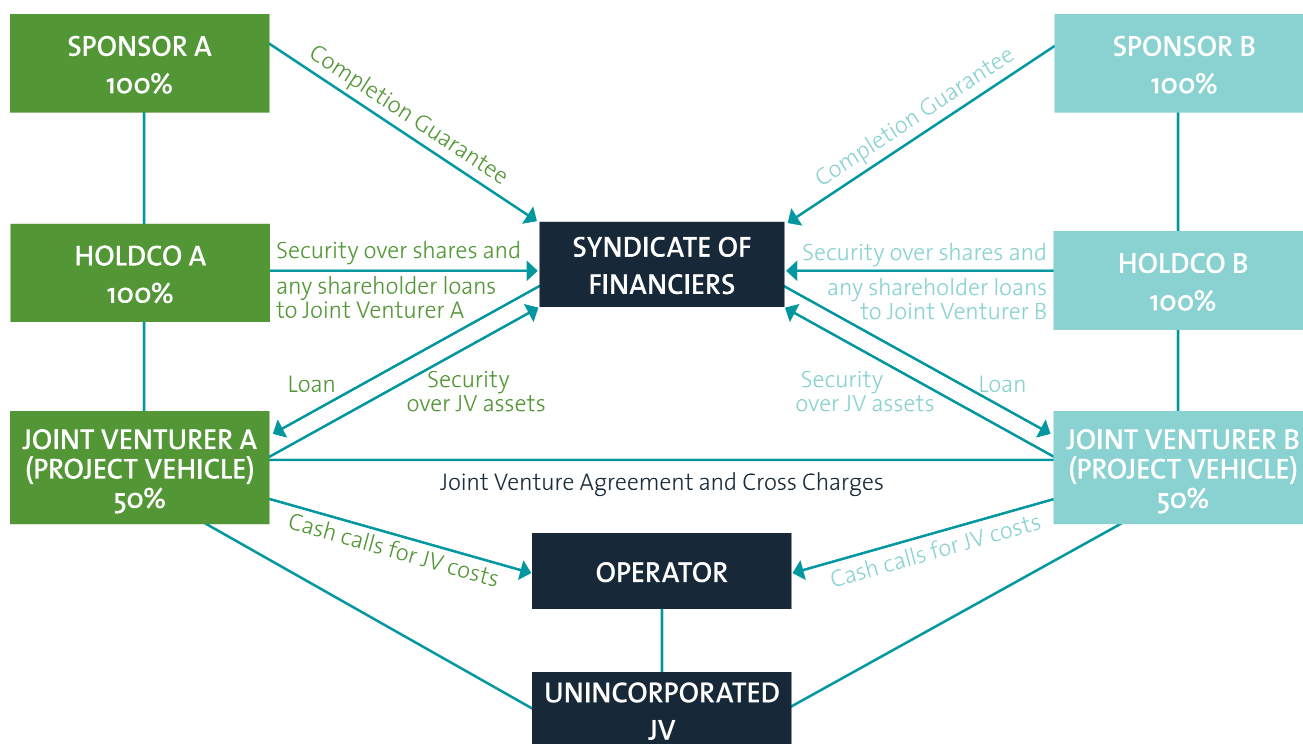
The project financing of a greenfield mine development shares many common characteristics with the project financing of other commodity based projects. Some of the important issues for the financing are as follows.

- the construction contracting strategy and interface risks between contract packages where no single contractor wraps the entire development;
- the offtake arrangements for the mine product including the term of any sales contracts and identity and creditworthiness of the offtaker and whether any hedging of the commodity price is required;
- the currency in which the funding is provided and whether it should be the same as the currency in which sales contracts are denominated (usually USD) notwithstanding that most development costs are likely to be in AUD;
- transportation of the mine product to market from the mine gate including access rights to rail and port infrastructure if that infrastructure is owned by third parties; and
- whether the mine owner has entered into take or pay agreements relating to access rights to rail and port infrastructure.

It is also relevant to note that there are no exchange control regulations in Australia and that interest withholding tax is payable by an Australian borrower to a foreign lender unless the borrowing falls within an exemption under the Australian tax legislation or is exempted under a relevant double tax treaty between Australia and the tax treaty relevant to the foreign lender. If withholding tax is payable, the Australian borrower is required to deduct the tax from the interest payment and remit it to the Australian Tax Office.

The unincorporated joint venture structure is a common ownership structure for Australian resources sector projects. This section describes the principal considerations when raising finance for a mining project where the participants are organised as an unincorporated joint venture.

The diagram below illustrates one possible structure for financing by a single lending group of the joint venturers in an unincorporated joint venture financing. An alternative structure (not shown) involves the joint venturers incorporating a borrowing vehicle owned by the joint venturers in their joint venture shares.



The above diagram assumes that a common lender group will finance each joint venturer. It is also possible for each joint venturer to be financed by separate lender groups or it may be that some, but not all, the joint venture participants will be financed.

JOINT AND SEVERAL LIABILITY WHERE FINANCING PROVIDED BY COMMON LENDER GROUP

Sponsors generally prefer several rather than joint liability so that each sponsor (under its completion guarantee) and its joint venture subsidiary is only responsible for a proportion of the project debt equal to its joint venture interest. A typical structure shown in the diagram on the previous page involves the same lenders making parallel loans to each joint venturer. In this structure, the financiers will prefer that an event of default by one sponsor group will (perhaps after some remedy period) also constitute a cross default in the other sponsor groups, thus allowing the financiers to enforce against the entire project. This can create separate issues which need to be resolved between the sponsors.

It will be important to properly understand the requirements for security over mining tenements in the relevant State or Territory where the mine is situated.

SEPARATE FINANCING VS. COLLECTIVE FINANCING

Because each joint venturer has its own separate interest in the joint venture property as well as its own related property (eg its interest in the joint venture agreement and the product of the mine), it is in theory possible for each joint venturer to raise finance separately on the basis of its participation in a mining project. Each joint venturer can grant a security interest over its joint venture interest and related assets to secure its own borrowings. While separate financing is an option, the optimal approach will vary from project to project, for instance, in a greenfield mine development all joint venturers may want to collectively borrow project debt.

Project financing of one (or less than all) joint venturers in an unincorporated joint venture raises a number of issues which do not arise in financing of an incorporated structure or financing of all joint venturers by a common group of project financiers. By way of example, insurances are always of importance to project financiers who generally require detailed insurance covenants in financing documents which are highly prescriptive of what the project insurances should cover, insured amounts, as well as standard endorsements on insurance policies (such as insurers waiving rights of set off or counterclaim against the financiers). These requirements may conflict with the views or preferences of the other joint venturers and may be difficult to resolve to the satisfaction of all parties. Furthermore, separate financings may also cause practical issues such as clear markets (eg if joint venturers are separately seeking to raise finance at the same time) and the potential for higher aggregate transaction costs across the project.

SECURITY

Financiers will require a comprehensive security package providing them with defensive protection (ensuring that no third party can get better security or priority than them) and offensive protection (ensuring that on enforcement they can sell the project vehicle or the project assets).

Security over project assets

Financiers will typically require a first ranking security interest over the joint venturer's interest in the joint venture (eg interest physical assets of the joint venture and its rights under sales contracts).

This will include mining tenements which are joint venture property, and are regulated under legislation of each State and Territory in Australia. Importantly, a mining tenement does not confer title to the subsurface minerals on a tenement holder – rather it confers a statutory right to extract the minerals. That right is proprietary in nature and is capable of being transferred or made the subject of a security interest.

As a result of legislative changes in recent years, security over a mining tenement is no longer required to be in a prescribed form or approved by the Minister. The relevant security agreement is attached to a prescribed registration form, and the registration is effective on, and from, the day the application is submitted to the Department of Natural Resources and Mines.

It will be important to properly understand the requirements for security over mining tenements in the relevant State or Territory where the mine is situated. The system for registering security interests over mining tenements is different to the system for registering security interests over personal property of the joint venture.

Share security

The holding company of the project vehicle would ordinarily grant in favour of its financiers a first ranking security interest over its shares in the project vehicle.

It is common for a sponsor to incorporate an intermediate holding company which owns the shares in the project vehicle for the unincorporated joint venture, so that the holding company will be able to provide security over the shares in the project vehicle in favour of its financiers. This means financiers can enforce by selling the shares in the ownership structure rather than by selling joint venture assets.

Cross security

Each joint venture participant (Grantor) will grant in favour of the other joint venturers a deed of cross security (JV Deed of Cross Security) over its interest in joint venture assets to secure the payment of amounts required to be contributed by the Grantor under the joint venture agreement. Under a priority agreement, the JV Deed of Cross Security will generally rank in priority (at least with respect to cash calls) over the security that the project financiers take over the Grantor's interest in joint venture assets.

Direct agreements

The financier may require a direct agreement with the joint venturer's contractor, offtaker and other material counterparties under which the counterparty is obliged to notify the financier of a default and allow the financier a cure period to rectify the default.

COMPLETION GUARANTEES

A completion guarantee from a creditworthy parent company is generally required for the project financing of a greenfield development. The guarantee is released upon satisfaction of operational and, often, economic completion tests.

6

Land access

"Companies looking to invest in Australia need to consider access and compensation issues."

The primary issues that exploration and mining companies face in relation to land access include:

- obtaining access to land controlled by the Commonwealth, or the relevant State or Territory Government (known as Crown Land);
- compensating private land holders; and
- native title and cultural heritage (discussed in more detail in Chapter 8).

PRIVATE LAND ACCESS

There are some limits on the access that a mining tenement application can obtain over private land without the agreement of the relevant land owner. These circumstances tend to be very limited and in most circumstances subsurface rights can still be obtained without the agreement of the private land owner (including by seeking orders from the applicable State or Territory court). The mining legislation of each State and Territory prescribes these limits.

An important issue concerning access to private land is the payment of appropriate compensation to landholders. Arrangements for determining compensation payable to private landholders are described in the mining legislation of each State and Territory. In all jurisdictions, a mining tenement applicant will need to enter into compensation arrangements with underlying landholders like pastoral lessees and if those arrangements cannot be agreed, compensation will be determined by a court process. Compensation is generally payable for land surface damage, restrictions on right of way, damage to improvements and reasonable expenses to control damage.

In Victoria, Western Australia, South Australia and New South Wales, compensation is also payable for loss of use of land, loss of earnings and social disruption.

Most State and Territory legislation prohibits access to private land in residential areas or near to key industrial infrastructure such as power stations. This is not usually a major concern as most mining projects are in remote locations.

CROWN LAND ACCESS

Access to Crown Land such as State forests, roads, land reserved for Indigenous Australians and other reserves for exploration and mining activities is generally restricted and varies according to the land category and the State or Territory in which the activity is carried out. Often approval from the relevant Minister is required to conduct exploration or mining activities on Crown Land.

Access to infrastructure

7

"A company investing in significant infrastructure should consider the potential for third parties to utilise an access regime to gain access to the infrastructure."

In Australia, many publicly and privately owned infrastructure facilities are subject to access regulation. There are both Commonwealth and State statutory access regimes, as well as frameworks for infrastructure owners to submit voluntary access undertakings. Access regulation is particularly common in relation to gas pipelines, electricity networks, railways and ports.

WHAT DOES ACCESS REGULATION MEAN FOR INVESTORS IN AUSTRALIA?

Access regulation can have significant consequences for investors in Australia. There is an opportunity for private investors to build, own and operate their own infrastructure in Australia such as ports, railways or mineral processing facilities. However, a company investing in significant infrastructure should consider the potential for third parties to utilise an access regime to gain access to services provided by the infrastructure. Governments may also seek to impose access obligations as a condition for approving a mining or infrastructure project.

Providing access to third parties under an access regime may significantly affect the commercial returns to a facility owner, the financial stability of proposed infrastructure as well as limiting the owner's operational control and flexibility in its use of the infrastructure. Third party access may also impose regulatory and compliance costs, including involvement in expensive disputes.

Conversely, an investor interested in using another company's infrastructure facility may have the option of negotiating access under an existing access regime, or applying to have the infrastructure facility subjected to an access regime, if that other company is not prepared to reach a reasonable commercial agreement.

PART IIIA OF THE COMPETITION AND CONSUMER ACT

Part IIIA of the *Competition and Consumer Act 2010* (Cth) (Competition and Consumer Act) establishes a general national regime for access regulation that can be applied to nationally significant infrastructure.

Under Part IIIA of the Competition and Consumer Act a party may apply to the National Competition Council to have access to a service provided by an infrastructure facility "declared". Declaration confers a legally enforceable right on third parties to negotiate with an infrastructure owner for use of that service. Part IIIA sets out a process under which the National Competition Council reviews the application for declaration and makes a recommendation to the relevant Minister. The Minister then decides whether or not to grant declaration of access to that service.

In making the decision, the Minister must be satisfied that:

- access would promote a material increase in competition in a relevant market;
- it would be uneconomical to develop another facility to provide the same service;
- the facility is of national significance;
- use of the facility is not already subject to an effective access regime; and
- access would not be contrary to the public interest.

If a service is declared and an access dispute arises, the Australian Competition and Consumer Commission (Australia's competition law regulator) (ACCC) can arbitrate the terms and conditions of access, including price. A similar framework currently applies to gas pipelines under the National Gas Law, but the ACCC has recently recommended very substantial changes to that framework.

STATE AND TERRITORY REGIMES

The States and Territories also administer their own access regimes for some infrastructure. For example, some Australian railways and some ports are already regulated under State access regimes. While those regimes seek to achieve the same objective as the Part IIIA access regime, the way each regime works can vary considerably (extending, for example, to infrastructure that is not nationally significant, and requiring infrastructure owners to published regulated prices).

A State or Territory access regime may be "certified" as an effective regime. Access to infrastructure services which are subject to an effective access regime cannot be declared under the Part IIIA access regime.

VOLUNTARY ACCESS UNDERTAKING

Under the Competition and Consumer Act, an infrastructure owner may seek approval from the ACCC for an access undertaking which is offered on a voluntary basis by the infrastructure owner. This access undertaking is intended to provide a framework for negotiation of the terms and conditions upon which the owner will provide access to third parties (but can be more onerous that the Part IIIA access regime – for example, including economic regulation of pricing outside access arbitrations). If the ACCC approves the voluntary access undertaking, access to the infrastructure cannot be declared under Part IIIA of the Competition and Consumer Act. Once approved, the undertaking is binding on the owner and enforceable by the ACCC.

Native title and cultural heritage

8

"A licence holder's relations with Indigenous Australians can be a key determinant of the successful implementation of a mining project in Australia."

Australian law recognises and protects the traditional connection to land of Aboriginal people and Torres Strait Islanders (Indigenous Australians).

A licence holder's relationship with Indigenous Australians can be a key determinant of the successful implementation of a mining project in Australia.

From a legal perspective, the issues requiring consideration include:

- whether the project affects land where native title does or may exist, in which case the relevant procedural process in the Native Title Act 1993 (Cth) (Native Title Act) will need to be followed;
- the potential for the project to affect places or objects within the landscape which are of cultural significance to Indigenous Australians; and
- whether the land proposed to be used for a project is reserved under State or Territory based land legislation introduced for the benefit of Indigenous Australians.

Of increasing relevance from a policy perspective is the development of international laws and standards in relation to the rights of indigenous people. An emerging theme in negotiating with Indigenous Australians is the development of international standards on "free prior and informed consent" or "FPIC". While strictly separate to the legislative framework set out in the Native Title Act and Australian cultural heritage legislation, proponents also need to have regard to the broader policy framework when considering how to approach indigenous land access issues and matters that may affect their "social licence to operate".

NATIVE TITLE OVERVIEW

Native title is the set of rights and interests of Indigenous Australians over land and waters arising from their traditional laws and customs. These rights are recognised by Australia's common law and differ between native title groups.

The Native Title Act is Commonwealth legislation which establishes the system through which native title is integrated into the Australian legal system. It applies in each State and Territory. The Native Title Act has four objectives which are reflected in its operation:

- **Protection of native title:** to provide for the recognition and protection of native title;
- **Validation of prior invalid tenures:** to provide for, or allow, the validation of historic actions which may have been invalidated because of the existence of native title;
- **Validity of future acts:** to establish ways in which future dealings affecting native title may proceed, and to set standards for those dealings; and
- **Native title claims resolution process:** to establish a mechanism for determining claims to native title.

WHERE DOES NATIVE TITLE EXIST?

In general, native title does not exist over, or has been extinguished by, freehold title. It can exist in relation to Crown Land and much of Australia is comprised of Crown Land. For example, in Western Australia more than 90% of the State is Crown Land.

EXTINGUISHMENT OF NATIVE TITLE BY THE GRANT OF CERTAIN TENURES AND CONSTRUCTION OF PUBLIC WORKS

The Native Title Act confirms that the grant of certain classes of land tenure, including freehold and leases conferring exclusive possession, as well as the construction of public works, have extinguished native title. In those cases, subject to very limited exceptions, native title no longer exists.

It is usual to review the area of a proposed project development footprint to assess whether native title to the relevant land parcels continues or has been extinguished. If extinguished, there is no need to consider the requirements of the Native Title Act any further, although serious regard will still need to be had to matters involving stakeholder management, international laws and standards, cultural heritage, and the importance a company places on its "social licence to operate".

NATIVE TITLE CLAIMS

Since the introduction of the Native Title Act, Indigenous Australians have made several hundred claims seeking recognition of their native title through the processes set out in the Native Title Act itself. Many claims have been determined by the Federal Court in favour of native title claimants, and there are large areas of land in Australia where native title has been formally determined to exist. For mining proponents, in legal and practical terms, there is not a great difference between determined native title holders and registered claimants. Both enjoy the same procedural rights under the Native Title Act in respect of the grant of mining tenements.

FUTURE LAND USE

The Native Title Act protects native title from invalid interference by setting out a regime that governs all "acts" that occur on Australian land and waters after 1 January 1994 to the extent they "affect" the underlying native title rights and interests. These acts are called "future acts". A future act (such as the grant of tenures and mining licences) will be valid if it is done in accordance with the relevant procedural requirements of the Native Title Act. If the relevant procedural requirements are not satisfied, the future act cannot be done and, if done (ie if mining tenure is granted by the State regardless) the future act will be invalid.

The procedural requirements associated with the particular classes of future acts vary. Generally, the greater the impact on native title rights, the more onerous the procedural requirements.

In most cases, the creation of a right to mine will attract the "right to negotiate" – the most significant of the procedural requirements set out in the Native Title Act. This requires a minimum of six months good faith negotiation as to the terms on which the proposed acts can occur, between the tenure applicant and the determined native title holders or registered claimants. Such agreements commonly involve the payment of money, promises in relation to employment and/or training opportunities to native title group members and protection for areas of cultural heritage significance, and are common law contracts. Agreements may also take the form of, and be registered with the National Native Title Tribunal as, an "indigenous land use agreement" – a type of agreement that – when registered – binds all affected Indigenous Australians and provides greater certainty for project proponents that common law contracts alone.

If no agreement is reached, the National Native Title Tribunal can determine whether the grant can proceed, which requires an analysis of whether the parties actually negotiated in good faith for the required period. If that can be demonstrated, then the future act can be done (that is, the tenure can be granted by the relevant State or Territory government department).

None of the procedural requirements set out in the Native Title act confer a right of veto to native title claimants and holders as to whether a project can proceed. However, the processes can nonetheless be time consuming and can give rise to expensive delays if not managed carefully.

ABORIGINAL CULTURAL HERITAGE OVERVIEW

Areas and objects of archaeological importance or cultural heritage significance to Indigenous Australians are protected from harm under Commonwealth, State and Territory laws. Indigenous cultural heritage is protected irrespective of whether the heritage is listed on a formal government register or is otherwise already identified and located.

The States and Territories each have their own Aboriginal cultural heritage protection laws, which vary considerably across the jurisdictions. Queensland, Victoria and New South Wales, in particular, impose significant approval obligations, significant monetary penalties and in some cases criminal custodial sentences if unauthorised harm to Indigenous cultural heritage occurs. Proponents may also be ordered to stop work if protected heritage is at risk of harm. In practice, regardless of the specifics of the regulatory regime, cultural heritage protection requirements are often time consuming and onerous approvals to obtain which can cause considerable delay to a project.

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (Commonwealth Heritage Act) also operates to protect areas or objects of particular heritage significance at imminent risk of harm. In those circumstances, under the Commonwealth Heritage Act, the Minister can require the works to stop.

The laws regarding heritage protection in Australia have become considerably stricter in the past decade. The penalties, statutory obligations and risk of being ordered to stop work after construction has commenced mean that it is important to assess and address cultural heritage risk early in any major project.

Obtaining an approval to conduct a project that will impact Aboriginal cultural heritage will require the proponent to consult with Indigenous Australians with traditional connection to the land in question. Indeed, to ensure statutory compliance, most proponents consult with Indigenous Australians in any event to undertake surveys and assist them to determine whether their project may impact on heritage sites or how they can be avoided. Proponents will usually be dealing with the same Indigenous Australian group in connection with both native title and cultural heritage approvals, and native title claim and determination boundaries are the most commonly used method of identifying which Indigenous Australian's the proponent should consult with from a heritage perspective.

STATE AND TERRITORY LAND RIGHTS SCHEMES OVERVIEW

Many States and the Commonwealth in the Northern Territory established schemes allowing the transfer of freehold interests in certain lands to Indigenous Australian groups with connection to those lands. Reserves created for the benefit of Indigenous Australians also exist in many States. There are, as a result, large areas of land held as freehold by Indigenous Australians for the benefit of their communities.

The use of this land for mining and infrastructure projects will require the consent of the relevant community and is tightly regulated. As a result, the agreements that need to be negotiated in respect of these lands can be more difficult to negotiate and more favourable to Indigenous Australians than native title agreements. It is also possible for native title to exist over these areas.

9

Environmental law

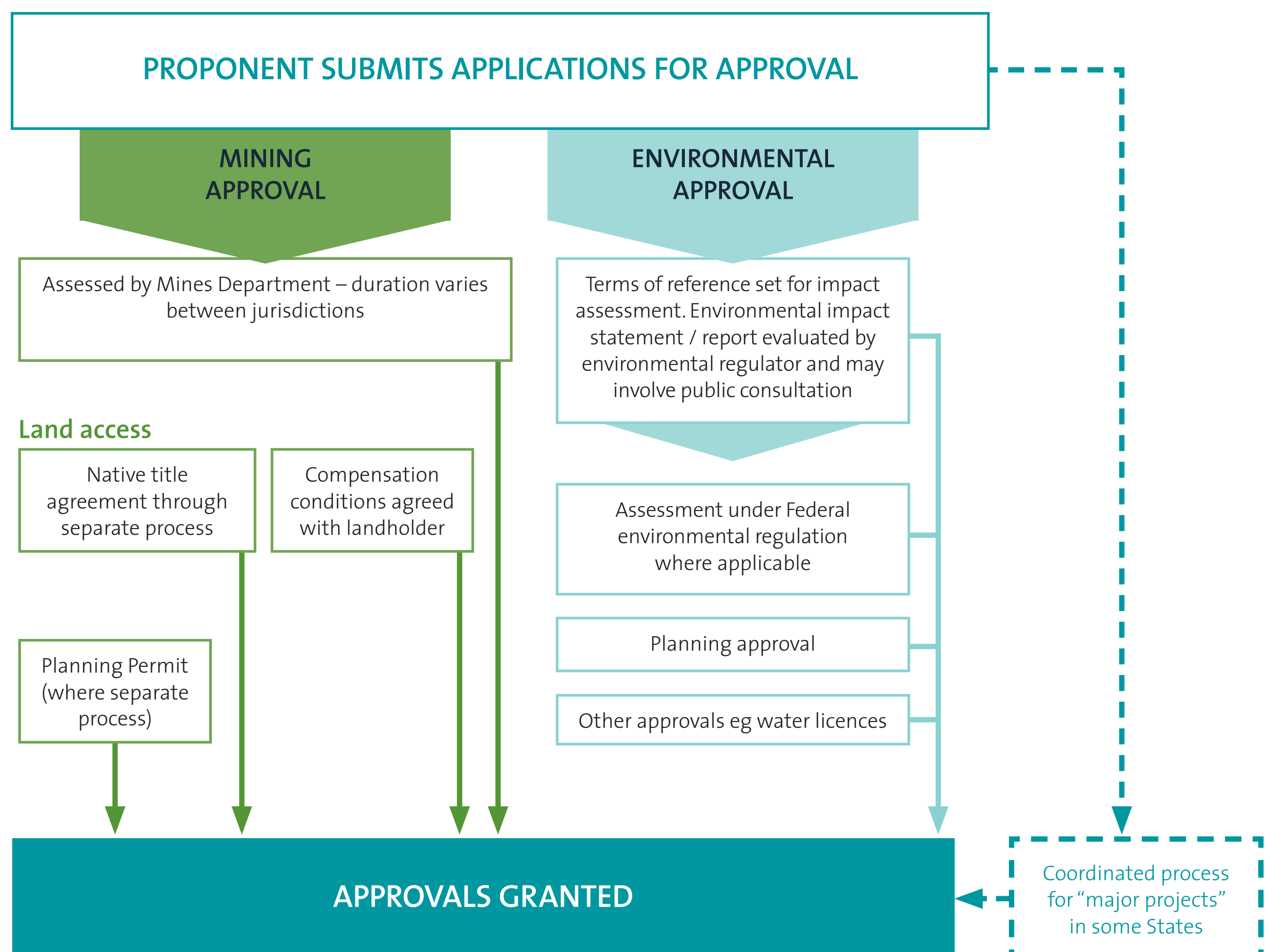
"Unfortunately, the proliferation of so-called 'green tape' in all Australian jurisdictions has created a situation where mining companies ignore its effect on process risk, cost and delay to their peril."

OVERVIEW

A key issue for the mining industry in Australia is to minimise potentially negative environmental impacts. Regulatory environmental approvals must be obtained before the commencement of exploration or production stages and the mining company must adhere to the terms and conditions of those approvals as well as to the requirements of general environmental regulations throughout the mining life cycle.

The diagram below indicates the typical interaction between mining, environmental and related approvals in Australia.

GENERAL PROCESS FOR MINING PROJECT APPROVALS IN AUSTRALIAN JURISDICTIONS



ENVIRONMENTAL APPROVALS

Environmental approvals are only granted following detailed assessment of impacts and, in Australia, these processes are largely governed by State and Territory legislation administered by the relevant environmental regulator in each jurisdiction.

The key matters to be addressed in the impact assessment are:

- managing air, water, land and noise impacts;
- protection of flora, fauna and habitat; and
- recognising and preventing impacts to objects or sites significant to Indigenous communities.

The assessment work can take considerable time and resources with the environmental impact statements produced for large projects typically running to thousands of pages. Frequently the assessment is also open to public consultation and appeals (including by third parties in some jurisdictions).

A determination about the proposed project is then made by the relevant environmental regulator with approval being given by the relevant State or Territory Minister, usually subject to conditions designed to minimise the environmental impact. The mining company (and in some cases its executive officers) will be liable for any non-compliance.

In some States and Territories there are absolute prohibitions on conducting mining activities in areas designated as having particular environmental or agricultural value or areas close to regional urban populations.

PLANNING APPROVALS

Like all development activities, mining projects involve the construction of buildings, roads and other infrastructure which may require Local Government or State Government planning approval. In some jurisdictions, planning approval is integrated into the project approvals process or may be subsumed by the mining and environmental approvals processes.

Planning approvals are controlled by State and Territory planning legislation and standards. Local Governments may have a key role under this legislation in formulating and administering planning schemes. Assessments for issuing permits under planning schemes need to take account of the potential for a mine or mineral processing project to affect future uses of the area.

GOVERNMENT FACILITATION OF APPROVALS PROCESSES

In some States the approval processes for major mining projects receive special assistance from a centralised government coordinating authority which facilitates the planning and coordination of Government agencies involved in the approvals processes and may also assist in securing access to land and infrastructure needed for the project.

Beyond facilitation, some States and Territories commit to seeking the passage of project-specific legislation to ratify agreements between the Government and the proponents of the mining project (ie State Agreements). Each agreement specifies the rights, obligations, terms and conditions for development of the project and establishes processes for ongoing relations between the Government and the proponent. State Agreements are discussed in more detail in Chapter 3 on “Holding mining interests in Australia”.

FEDERAL GOVERNMENT ENVIRONMENTAL REGULATION

While land management and mining is not generally a responsibility of the Federal Australian Government, the exploration and mining approval framework is affected by certain Commonwealth laws, including the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act).

The EPBC Act is concerned with the protection of specified matters of national environmental significance. It sets out the circumstances in which a mining project may need to be referred to the Federal Government and the requirements for having the impacts on those specified matters assessed, evaluated and approved (with conditions).

Large resources projects are frequently referred under this regime either to afford certainty or because they are plainly going to affect one or more matters of national environmental significance.

In some cases the Federal Government has delegated supervision of the environmental impact assessment part of the process to State and Territory Governments although EPBC Act approvals must nevertheless still be made by the Federal Environment Minister.

This means that in some cases the EPBC Act assessment process can be combined with the relevant State or Territory assessment process thereby avoiding some duplication and potentially reducing time taken for approval.

10

Foreign investment approval framework

WHO NEEDS TO APPLY?

Investments by foreign persons in Australia are regulated under the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (FATA). Foreign persons include Australian subsidiaries of foreign companies.

A foreign person acquiring an interest in "Australian land" (regardless of its value) or 20% or more (or 40% or more in aggregate with other foreign persons) in an Australian entity or business with a value over certain specified monetary thresholds (currently A$252 million, unless a Free Trade Agreement applies – see below) must notify the Foreign Investment Review Board (FIRB) of its proposed acquisition.

A foreign government (including any state-owned enterprise or sovereign wealth fund) and its related entities must notify FIRB before acquiring an interest in "Australian land", acquiring a "direct interest" in an Australian entity or business (regardless of its value) or before beginning a new business. A "direct interest" is defined as an interest of at least 10% in the entity or business (or at least 5% if the investor has entered into a legal arrangement with the entity or business) or generally one which puts the investor in a position to influence or participate in the policy or central management and control of the entity or business.

Once notified, FIRB will consider and advise the Commonwealth Treasurer of the proposed investment, with the Treasurer being able to object to the investment if it is not considered to be in Australia's national interest.

MINING, PRODUCTION AND EXPLORATION TENEMENTS AND PERMITS

Following recent amendments to FATA, mining and production tenements are specifically included in the definition of "Australian land", making it clear that FIRB approval is required for acquisitions of interests in this tenure.

These recent changes to FATA, together with FIRB's new Guidance Note on Foreign Investment in Mining, also clarify the position on exploration tenure. Generally, acquisitions of interests in exploration tenements and permits are not notifiable under FATA and therefore do not require FIRB approval. However, exploration tenements or permits or other tenure relating to prospecting for minerals may fall within the general lease or licence provisions of FATA. An acquisition of an interest in an exploration tenement or permit or similar tenure will therefore require FIRB approval if it has a term reasonably likely to exceed five years (including any extension or renewal) or confers on the holder a right to occupy the underlying land.

WHAT SHOULD BE INCLUDED IN THE NOTIFICATION?

The FIRB website contains a checklist setting out what needs to be included in any foreign investment application for a business acquisition. FIRB applications should be made through the online system on the FIRB website.

At a minimum, the application will need to include information about:

- the relevant parties;
- the investment (including its nature, commercial rationale, the method of acquisition, its value and the timetable); and
- the investor's immediate and future intentions with respect to the investment.

As the Government considers each application against national interest considerations, the application should also indicate how the proposal will impact:

- national security;
- competition;
- other Australian Government policies (including tax and environmental matters); and
- the economy and community,

and include information about the character of the investor.

WITHIN WHAT PERIOD WILL THE TREASURER RESPOND?

The Treasurer has 30 days from receipt of the application to make a decision, unless an interim order is made to extend this period up to a further 90 days or the applicant requests that the 30 day period be extended. An applicant will be informed of the Treasurer's decision within 10 days of it being made. The Treasurer can make an order prohibiting the acquisition if satisfied that it would be contrary to the national interest or can apply conditions to ensure that the acquisition is not implemented in a manner contrary to the national interest. Often these conditions are the subject of negotiation.

FEES PAYABLE

FATA and its associated legislation now prescribe that a non-refundable upfront fee must be paid before a foreign investment application will be assessed by FIRB. The fee will generally depend on the consideration payable for the proposed acquisition but minimum fees apply. In a mining context, the following fees are payable:

- $25,000 for a proposed acquisition of an interest in a mining or production tenement by a foreign person that is not a foreign government investor;
- $10,000 for a proposed acquisition of an interest in a mining or production tenement by a foreign government investor; and
- $25,000 for a proposed acquisition of an interest in an Australian entity or business by a foreign person where the consideration payable for the acquisition is $1 billion or less or $100,000 if the consideration payable for the acquisition is more than $1 billion.

ADDITIONAL AGREEMENTS APPLICABLE TO CERTAIN INVESTORS

A Free Trade Agreement (FTA) is an international treaty which removes barriers to trade with the intention of facilitating stronger trade and commercial ties and, as a result, increased economic integration between participating countries.

For investments in Australian mining projects, the primary benefit to foreign investors of certain participating countries is a significant increase in the usual investment value thresholds above which an investor must notify the Commonwealth Treasurer (through FIRB) of the proposed investment.

For example, non-government investors from Chile, Japan, Korea, China, New Zealand and the United States may make investments of up to A$1,094 million in "non-sensitive" sector investments without prior notification to the Treasurer, which is significantly higher than the A$252 million threshold for other foreign investors. These monetary thresholds are current as at 1 January 2016 and are subject to annual indexation.

Australia currently has:

- 10 FTAs in force;
- one FTA that has been signed, but is not yet in force; and
- eight additional FTAs under negotiation,

details of which are set out in the table below.

AUSTRALIA'S FTAS

FTAS IN FORCE	CONCLUDED FTAS	FTAS UNDER NEGOTIATION
• ASEAN-Australia-New Zealand FTA • Australia-Chile FTA • Australia-New Zealand Closer Economic Relations • Australia-United States FTA • Japan-Australia Economic Partnership Agreement • Korea-Australia FTA • Malaysia-Australia FTA • Singapore-Australia FTA • Thailand-Australia FTA • China-Australia FTA	• Trans-Pacific Partnership Agreement (expected to come into force mid 2016)	• Australia-Gulf Cooperation Council (GCC) FTA • Australia-India Comprehensive Economic Cooperation Agreement • Environmental Goods Agreement • Indonesia-Australia Comprehensive Economic Partnership Agreement • Pacific Agreement on Closer Economic Relations (PACER) Plus • Regional Comprehensive Economic Partnership • Trade in Services Agreement • Australia – European Union Free Trade Agreement

11

Structuring considerations

When it comes to investing in mining companies at the parent company level, there are a number of threshold structuring considerations that an acquirer needs to bear in mind. This Chapter deals primarily with the restrictions that apply to obtaining control of a mining company that is registered under the Corporations Act 2001 (Cth) (Corporations Act) and is admitted to the official list of the Australian Securities Exchange (ASX), and how to navigate those legal restrictions to execute a successful transaction. This Chapter does not cover issues relating to foreign investment approvals. For information on foreign investment approvals please see Chapter 10.

THE BASIC PROHIBITION

Takeovers of Australian companies are governed by Chapter 6 of the Corporations Act. The purpose of Chapter 6 is to ensure that the acquisition of direct and indirect interests in listed companies and companies with more than 50 members (these are called Widely Held Entities) takes place in an efficient, competitive and informed market.

In particular, the laws prohibit the acquisition of an interest which results in any person's "voting power" in a Widely Held Entity increasing to more than 20% (or any person's voting power increasing from a starting point that is above 20% and below 90%). This is known as the "20% rule".

A person's voting power is determined by calculating the number of shares in which that person and its "associates" have a "relevant interest".

EXCEPTIONS

There are a number of key exceptions to the 20% rule, including for:

- acquisitions under a formal takeover bid in which all target shareholders can participate;
- acquisitions pursuant to a scheme of arrangement;
- acquisitions that are approved by a majority of the shareholders who are not parties to the transaction;
- acquisitions that result in the acquirer's voting power increasing by no more than 3% every 6 months (this is the "3% creep rule");
- acquisitions under certain rights issues and underwriting arrangements; and
- "downstream" acquisitions of shares in Australian companies that result from "upstream" acquisitions in companies listed on ASX or on certain foreign stock exchanges approved by ASIC.

ACQUISITION STRUCTURES FOR A CHANGE OF CONTROL

The two most common structures for effecting a change of control at the parent company level are the takeover bid and the scheme of arrangement.

WHAT IS A TAKEOVER BID?

A takeover bid involves an acquirer making an offer to all target shareholders to acquire their shares on the same terms. The offer must be included in a bidder's statement prepared in accordance with the Corporations Act. A takeover bid allows an acquirer to contact target shareholders directly, with or without the support of the target board. Unlike a scheme of arrangement, there is no "minimum acceptance" threshold for a takeover bid to be successful. A bidder may decide to set a minimum acceptance condition to its takeover bid as part of the broader suite of bid conditions that would typically accompany its offer. Typically, a bidder sets a minimum acceptance condition of 50% (so that it can achieve a majority or controlling interest through the bid) or 90% (so that it is in a position to compulsorily acquire the remaining shares). It is ultimately for the bidder to determine whether to propose a minimum acceptance condition at all and, if so, at what level of take up.

WHAT IS A SCHEME OF ARRANGEMENT?

Rather than the acquirer making takeover offers directly to target shareholders, the target company agrees to propose a scheme of arrangement for approval by its members. If a scheme of arrangement is approved and ultimately implemented, all the target's shares are either transferred to the acquirer or cancelled in return for the offer consideration (either scrip and/or cash).

Unlike a takeover bid, a scheme of arrangement must be approved by the Court. The Corporations Act also requires that the disclosure document prepared for target shareholders, called the scheme booklet, is reviewed by the corporate regulator, the Australian Securities and Investment Commission (ASIC), before it is sent to shareholders. The Court will have regard to any objections raised by ASIC about the nature or adequacy of the disclosure in the scheme booklet, or the scheme of arrangement more broadly, before sanctioning the convening of the scheme meeting of target shareholders and approving the scheme of arrangement.

As mentioned, a scheme of arrangement must be approved by the requisite majorities of target shareholders at a scheme meeting, as well as the Court. The scheme resolution must be approved by a majority in number of non-associated shareholders present and voting (either in person or by proxy) and holding at least 75% of the votes cast on the resolution. As such, a scheme of arrangement can be blocked by a shareholder holding 25% of the target's shares; however, voter turnout numbers at scheme meetings means that it is usually possible to block a scheme with less than 25%.

WHAT APPROACH SHOULD AN ACQUIRER ADOPT?

The decision as to which acquisition structure to adopt will depend on the particular circumstances.

Market statistics relating to change of control transactions in the mining sector show that, since 2014, there have been 11 successful schemes of arrangement and an equal number of successful takeover bids. However, since 2014, no scheme of arrangement announced in the mining sector has been unsuccessful, whereas there have been as many (ultimately) unsuccessful takeover bids announced as successful bids.

Some things to consider in deciding which structure to adopt include the following.

- **A scheme of arrangement delivers greater certainty of outcome:** Schemes of arrangement are often viewed as the preferable structure to use in a friendly context (ie where the transaction is sanctioned by the target board) and where the acquirer and target want greater certainty about the outcome.
- **A scheme of arrangement allows greater flexibility:** Takeovers must follow a more prescribed set of rules, which can limit an acquirer's flexibility to respond to developments in the bid. In particular, novel consideration structures are generally more successful if applied in a scheme of arrangement structure, with the sanction of ASIC and the Court. And sometimes a scheme is the only way to achieve a novel structuring outcome.
- **Takeovers are more popular in a competitive or dynamic setting:** Where there is already a proposal on the table (whether a scheme of arrangement or a takeover), or an acquirer considers that there is a high prospect of a competing proposal emerging, a takeover bid structure may be preferable because it allows the acquirer to go straight to the target shareholders (without the knowledge or support of the target board), and allows an acquirer to respond quickly to the changing dynamics of a live takeover bid without having to re-engage with ASIC, the Court and shareholders in general meeting.

VOTING POWER, RELEVANT INTERESTS AND ASSOCIATES

The 20% rule has a broad reach because the underlying concepts of "voting power", "relevant interest" and "associate" are cast very widely.

A person's voting power in a company is equal to the aggregate relevant interests of that person and their associates in the voting shares of the company.

Essentially, two or more persons are associates if: one controls the other or they are under common control; there is an agreement, arrangement or understanding between them for controlling or influencing the composition of the target's board or the conduct of the target's affairs; or they are acting or proposing to act in concert in relation to the target's affairs.

A person has a relevant interest in a share if they are the registered holder of the share or have the power (direct or indirect, formal or informal and whether or not enforceable) to control the disposal (of the share) or to control the exercise of the right to vote (attaching to the share). By way of example, a person can have a relevant interest in a share as a result of an agreement to purchase the share (even a conditional agreement) or a call option to acquire the share.

An acquirer will also obtain a relevant interest in target's shares where a shareholder provides an irrevocable undertaking to, in the case of a takeover bid, accept the bid and, in the case of a scheme of arrangement, vote in favour of the transaction. This is sometimes called a "shareholder commitment". As a result, an acquirer is broadly prohibited from obtaining irrevocable undertakings or shareholder commitments in respect of more than 20% of the target's issued shares.

REGULATORY BODIES

Regulated transactions in the mining space may involve interactions with the following regulatory bodies:

ASIC

ASIC is broadly responsible for ensuring that the provisions of the Corporations Act are upheld, including in the context of a regulated change of control transaction, as well as overall market supervision and compliance. ASIC has broad powers not only to enforce the Corporations Act, but also to modify provisions of the takeover laws and grant exemptions from strict compliance with them in the appropriate circumstances. Modifications and exemptions are widely used by acquirers in both the takeover and scheme of arrangement contexts. A detailed understanding of ASIC policy is a great help in navigating the application of the Corporations Act provisions and obtaining appropriate modifications and exemptions.

TAKEOVERS PANEL

The Takeovers Panel (Panel) is a peer review body that regulates corporate control transactions in relation to Widely Held Entities by providing a forum for airing and quickly resolving disputes. The Panel determines cases on the papers, and typically the Panel's decision will be handed down within a couple of weeks of the initial application having been made.

The Panel comprises members from Australia's legal, financial and general business communities, appointed on a part-time basis, with specific Panel members appointed to each case as appropriate. Ashurst's Sarah Dulhunty, Garry Besson and Bill Koeck are currently members of the Panel.

The Panel is established by statute and has broad powers. It can make declarations of "unacceptable circumstances" (even in circumstances where there has been strict compliance with the law) and wide-ranging consequential orders. The Panel exercises its powers in accordance with the key policy objectives of Australia's takeovers laws, which include ensuring that:

- the control transaction takes place in an efficient, competitive and informed marked; and
- all target shareholders have a reasonable and equal opportunity to participate in any benefits accruing to shareholders under the transaction.

COURTS

Given the role that the Panel plays, the courts are not typically the first avenue of redress in the context of a dispute between parties involved in a change of control transaction. Indeed, under Chapter 6 of the Corporations Act, only ASIC and certain other authorities can commence court proceedings concerning a takeover or proposed takeover before the end of the bid period; put another way the parties must go to the Panel first. The Panel may refer a question of law to the Court for determination although this does not happen very often.

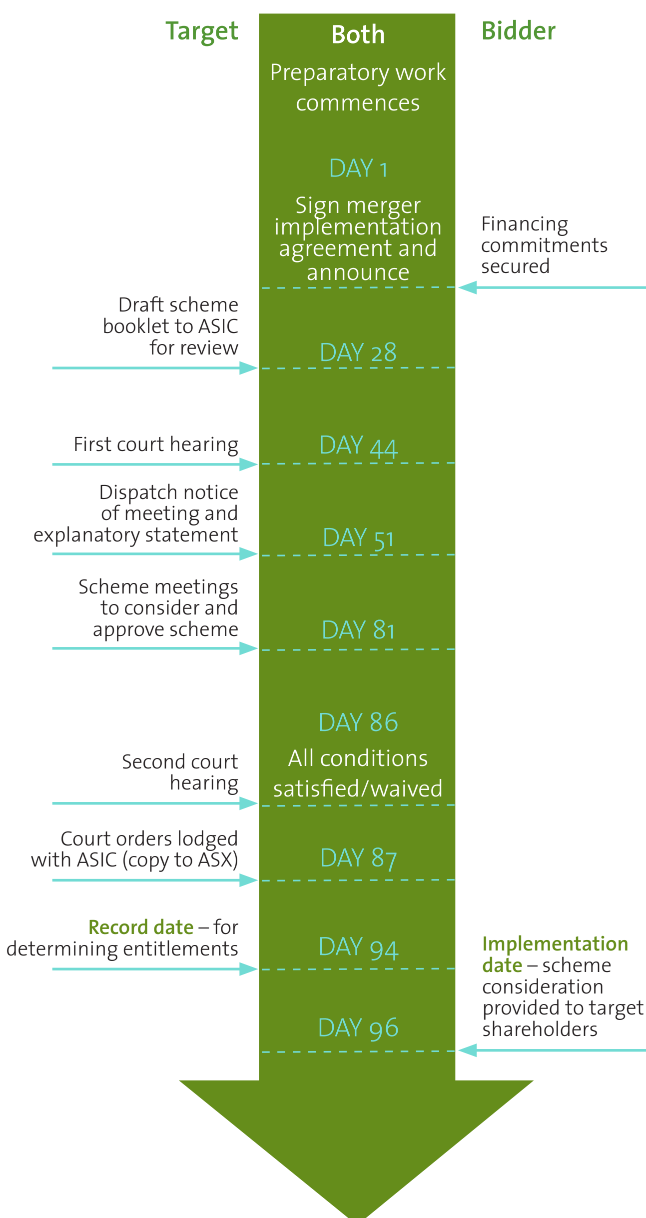
The Court, of course, plays a more significant role in relation to schemes of arrangement because of the requirement to hold two court hearings; the first to approve the dispatch of the scheme booklet to target shareholders and to convene the scheme meeting of shareholders, and the second to approve the scheme of arrangement itself.

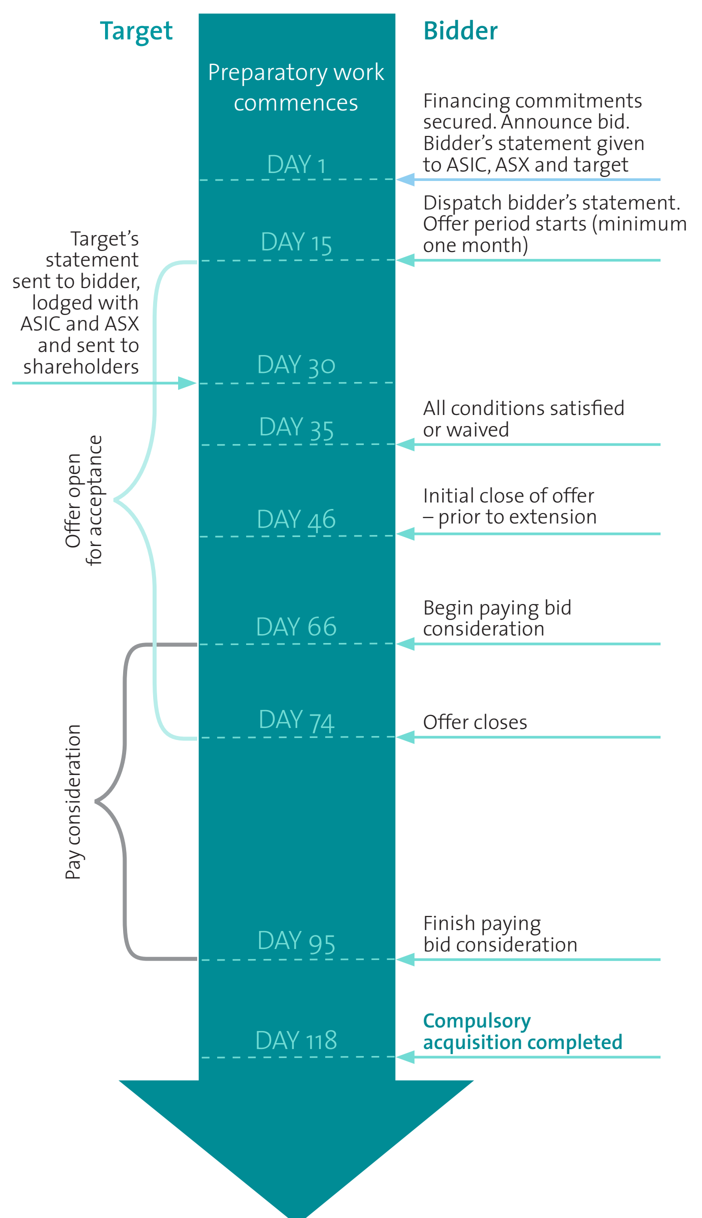
SECURITIES MARKETS

Listed mining companies and their acquirers also need to comply with the ASX Listing Rules (in Australia) and equivalent, applicable rules for companies also listed on a foreign exchange. ASX has primary responsibility for ensuring that companies listed on its exchange comply with the ASX Listing Rules, on a day to day basis but also in conducting any corporate actions such as change of control transactions.

TIMETABLING CONSIDERATIONS

Indicative timetables for an (off-market) takeover bid and a scheme of arrangement are set out below. These timetables are only an indication of how a transaction might unfold, and timeframes will vary depending on a number of factors, including target cooperation and timing for receipt of regulatory approvals.





ACQUIRING A STRATEGIC STAKE IN AN AUSTRALIAN MINING COMPANY

Rather than launching a takeover bid or entering into a scheme of arrangement, an investor may prefer to acquire a strategic stake in a mining company (that is, something less than a control position), either for investment purposes or as part of a pre-bid strategy. The 20% rule still applies to the acquisition of a strategic stake.

Some factors to consider in acquiring a strategic stake are as follows:

- **Strategic stakes of less than 5%:** While there is no obligation on the acquirer to publicly disclose its holding at this stage, a target company may issue "tracing notices" requiring a registered holder of shares, and any person who is disclosed in response to a notice (as having a relevant interest), to disclose anyone else who has a relevant interest in those shares. Some companies regularly issue these notices, particularly if they suspect someone is building a pre-bid stake.
- **Strategic stakes of 5% or greater – substantial shareholdings:** If the stake to be acquired is 5% or more of the target's total issued shares, the acquirer will be deemed to have a "substantial holding" in the target and be required to notify the company and ASX of its interests (in the prescribed form) within two business days after acquiring the stake. The notice (referred to as a "substantial holder notice") must include details about the interest (including consideration paid) and be accompanied by copies of all documents which give rise to the substantial holding.

  A substantial shareholder is also obliged to notify the company and ASX (in the prescribed form) if its interest increases or decreases by 1% or more, or if the person ceases to have a substantial holding. Again, these notifications must be given within two business days of the change.
- **Placements:** If the stake is to be acquired by way of a placement of shares by the target, Chapter 7 of the ASX Listing Rules will also need to be considered. Among other things, Chapter 7 broadly provides that, subject to certain exceptions, shareholder approval is required for placements of shares above 15% of the target's total issued capital.

Bribery and corruption

The Commonwealth, and all Australian States and Territories, have legislation criminalising bribery and corruption. Due to the potential breadth of the legislation, and its capacity to apply in connection with dealings with government or other public officials, organisations need to be conscious of anti-bribery legislation, have policies and procedures in place to comply with that legislation and take steps to ensure that compliance is embedded within the organisation's culture.

Generally speaking, bribery is the offer, payment or provision of a benefit to someone to influence the performance of a person's duty and/or to encourage misuse of his or her authority. Countries, including Australia, are now becoming more active in investigating suspected bribery both within and outside their borders and bringing enforcement action.

BRIBERY OF A FOREIGN PUBLIC OFFICIAL

In Australia, bribing a foreign public official is an offence under s 70.2 of the Schedule to the *Commonwealth Criminal Code Act 1995* (Cth). The offence applies where a person provides or offers a benefit which is not legitimately due with the intention of influencing a foreign public official in the exercise of the official's duties as a foreign public official to obtain or retain business or a business advantage that is not legitimately due. The offence applies to companies incorporated in Australia, persons resident in or citizens of Australia, and where the conduct that amounts to commission of the offence occurs wholly or partially in Australian territory.

A benefit includes any advantage and is not limited to money or other property. The benefit provided does not need to be given to a person directly – providing or offering a benefit to, for example, a family member or friend would suffice. As a result, organisations must take care in providing benefits such as gifts, corporate hospitality or making political or charitable donations (amongst other things).

The *Criminal Code* provides defences to bribery of a foreign public official where a foreign or local written law permitted the provision of the benefit or the benefit was a "facilitation payment". A benefit will be a facilitation payment where:

- the value of the benefit was of a minor nature;
- the payment was made for the sole or dominant purpose of expediting or securing the performance of a routine government action of a minor nature; and
- a record of the conduct was made as soon as practicable after it occurred.

DOMESTIC BRIBERY

The Commonwealth, States and Territories have each enacted legislation criminalising bribery at the domestic level. While each piece of legislation is different and needs to be specifically considered, there are a number of similar features between them.

All Australian jurisdictions have legislation criminalising bribery of domestic public officials. The question of which law applies largely depends on where in Australia the conduct constituting the alleged offence took place. Generally speaking, it is an offence to give or offer a bribe to a domestic public official, or for a domestic public official to solicit or receive a bribe.

Each State and Territory (but not the Commonwealth) also has legislation criminalising bribery of "agents", which extends bribery into the private sphere. In broad terms, it is an offence to corruptly give, or offer to give, an agent an inducement or reward for doing or not doing something in relation to affairs of the agent's principal. In most states the definition of "agent" includes employees and officers of a company and the definition of "principal" includes the company or employer.

For the domestic bribery offences above, it is generally a requirement that the benefit be given or accepted dishonestly or corruptly. In connection with the act of giving a bribe, courts have interpreted "dishonestly" or "corruptly" as meaning "with an intention to influence". Courts infer an intention to influence from all the circumstances in which the benefit is given eg the size of the benefit, the frequency of the benefits, the context and whether the benefit was recorded by either party and recorded accurately.

In many States, paying "secret commissions" for advice given to others about their business dealings is also an offence, even if the advisor is not an agent.

LIABILITY OF COMPANIES FOR ITS REPRESENTATIVES

Companies may be criminally liable for bribery committed by their employees, officers or agents. For bribery offences under the *Commonwealth Criminal Code* (which includes bribery of a foreign or Commonwealth public official), a company will be liable if:

- an employee, agent or officer is found to have engaged in the bribery;
- that person was acting within the actual or apparent scope of their authority; and
- the company expressly, tacitly or impliedly authorised or permitted the conduct.

The Territories adopt a similar approach to the Commonwealth model above. However, there are no equivalent provisions on corporate liability under the various State laws. This means that the position is governed by the common law, with the result that corporate liability is only likely to arise where a directing mind or will of the company – typically a director or senior manager – is involved in the bribery offence.

PENALTIES

The penalties for an individual or company found to have engaged in bribery can be significant. For example, bribery of foreign or domestic public officials under the Commonwealth *Criminal Code* attracts a penalty of up to 10 years imprisonment or a $1.7 million fine for individuals. For a company, the penalty can be up to $17 million or three times the value of the benefit to the company arising from the conduct or 10% of the annual turnover of the company.

CORPORATIONS ACT

The failure by director or officers of a company to take proper measures to prevent and detect bribery by employees or other officers may be a breach of their duties under the *Corporations Act 2001* (Cth). The corporate regulator ASIC is taking an increasing interest in directors' oversight of bribery and corruption risks and is starting to work with the Australian Federal Police (who have responsibility for enforcing the foreign anti-bribery laws) to investigate foreign bribery.

CONTRACTUAL CONSEQUENCES OF BRIBERY

Bribery may also have an effect on the enforceability of contracts. In particular, an innocent principal may have remedies at common law and in equity where a contract is induced by a bribe taken by the principal's agent. In these circumstances, the principal may be able to rescind the contract, to recover damages arising from entry to the contract or to recover the bribe as money had and received.

ANTI-CORRUPTION INVESTIGATIVE BODIES

The Commonwealth and States have each created their own statutory anti-corruption commissions. Broadly, the anti-corruption commissions are empowered to inquire into allegations of corruption involving or affecting public authorities and public officials.

The anti-corruption commissions have a range of powers to facilitate their investigations. For example, the West Australian Corruption and Crime Commission has the power to apply for search warrants, obtain documents and examine witnesses (amongst other things). Hearings and reports are generally public, in the interest of transparency and public education. Typically, the anti-corruption commissions do not have any prosecutorial powers themselves (the exception being the Queensland Corruption and Crime Commission in limited circumstances). Rather, investigation can lead to referral of the matter to the relevant Director of Public Prosecutions or other appropriate body for prosecution.

All this means that being caught up in an anti-corruption commission investigation imposes significant burdens on companies and individuals.

13

EMPLOYMENT AND INDUSTRIAL RELATIONS

Employment in Australia is contractual in its base, including for employees working under a modern award or collective industrial instrument. However, an employer in Australia must also navigate a layered safety net of minimum terms and conditions of employment.

LEGISLATIVE FRAMEWORK

Currently, the centrepiece of the Australian industrial relations legislative framework is the *Fair Work Act 2009* (Cth) (Fair Work Act). The Fair Work Act applies generally to corporate employers (foreign, trading or Australian constitutional corporations) and their employees.

SAFETY NET ENTITLEMENTS

The Fair Work Act governs a system of minimum terms and conditions of employment that cannot be undercut in an individual contract. These "safety net entitlements" can be found in:

- The National Employment Standards, setting a statutory minimum for leave entitlements, termination of employment, maximum hours of work and flexible working arrangements.
- Modern awards, prescribing the minimum terms and conditions relating to employers and employees in particular industries (eg mining, construction, and oil and gas) and occupations.
- Long service leave legislation, prescribing entitlements to leave for employees with long periods of service. A portable long service leave scheme applies to the black coal mining and construction industries.
- Superannuation legislation, prescribing superannuation contributions to be made by employers on behalf of employees to recognised superannuation funds. Some States and Territories have specific legislation dealing with superannuation contributions in the coal and oil shale mining industries.

ENTERPRISE AGREEMENTS

An employer and its employees may negotiate a collective enterprise agreement that sets out the minimum conditions of employment that will apply in a particular business. These agreements are underpinned by the safety net entitlements and must be approved by the Fair Work Commission.

Terms and conditions of employment which are equal to, or more generous than, the safety net entitlements and which are tailored to the needs of an enterprise may be bargained for, and contained in a collective enterprise agreement. There is a facility for multiple enterprise agreements (which are not common) and for a greenfields agreement where a new enterprise or project is being established.

An enterprise agreement other than a greenfields agreement must have the approval of a valid majority of employees employed in the enterprise who will be covered by the agreement.

As a general principle, industrial action (eg a strike or work ban) is only allowed during negotiations for a new enterprise agreement. The Fair Work Act puts a priority on collective enterprise bargaining in which unions have an entrenched and privileged role.

UNIONS

The Fair Work Act permits active participation by unions in employment matters. The level of unionisation varies from industry to industry, but is comparatively high in the mining, construction and resources industries.

Employees have a right under the Fair Work Act to choose to belong or not belong to a union or a particular union, or to involve a union in enterprise bargaining on their behalf.

The Fair Work Act provides that unions are the default representative for employees in enterprise bargaining. To put in place enterprise agreements for new projects (greenfields agreements), there is a requirement for agreement with unions.

Unions are entitled, through an officer or employee holding a relevant permit, to enter premises where their members or eligible members work in each of these situations:

- holding discussions with those employees the union is entitled to represent;
- investigating a suspected breach of industrial laws; and
- investigating a suspected breach of State or Territory work health and safety laws.

TRANSFER OF BUSINESS

Investment often implies the transfer of assets from one company to another, with or without transferring the employees of that business. The Fair Work Act generally requires that an enterprise agreement applying to the "transferring" employees transfers to bind the purchaser of the business.

UNFAIR DISMISSAL AND ADVERSE ACTION

Under the Fair Work Act, subject to various exceptions and eligibility rules, employees are able to claim reinstatement or compensation if they can prove that termination of their employment was harsh, unjust or unreasonable.

The Fair Work Act prohibits any "adverse action" by the employer that results in the dismissal, injury, prejudicial alteration of position or discrimination of an employee for a prohibited reason listed in the Fair Work Act.

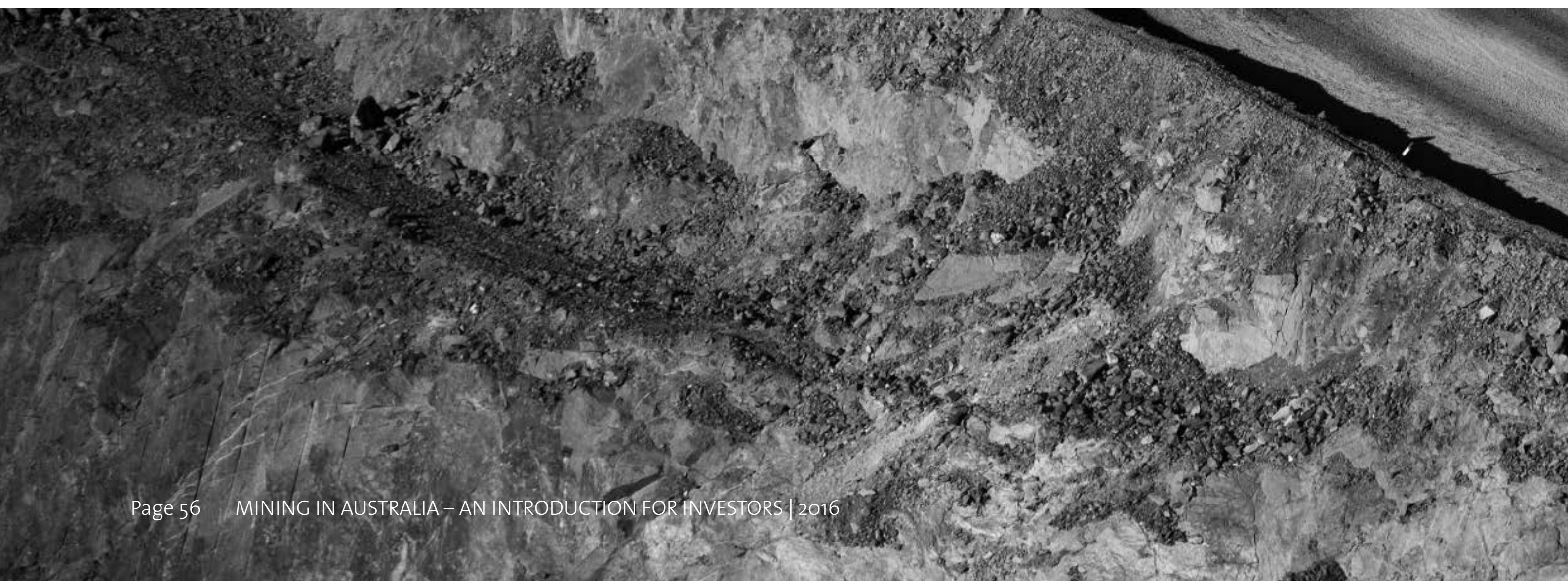
DISCRIMINATION

Unlawful discrimination in employment and employment related activities is regulated by Federal, State and Territory anti-discrimination legislation.

The laws have wide coverage prohibiting discrimination on a number of grounds listed in the legislation (eg age, sex, pregnancy, carer's responsibilities, race, disability). Unlawful discrimination can also occur in the context of non-employment relationships and in broader business activities, including the provision of goods and services to customers.

LIMITS ON CERTAIN SENIOR MANAGEMENT EMPLOYMENT TERMINATION BENEFITS

The termination benefits of senior management personnel are generally limited to the amount of salary received in the previous 12 months, unless shareholder approval has been obtained.



WORK HEALTH AND SAFETY

The States and Territories each have in place work health and safety (WHS) legislation that applies generally (with some exceptions) throughout the State or Territory.

WHS LEGISLATION

Harmonised WHS laws operate in all jurisdictions in Australia except Victoria and Western Australia.

Some States and Territories have specific laws that regulate WHS in the mining industry, and for oil and gas facilities located onshore and in coastal waters. Work health and safety on offshore oil and gas facilities located in Commonwealth waters operates under a national statutory framework, separate to the State and Territory WHS laws.

LIABILITY

Under the WHS laws, the primary duty of care is imposed on a person who conducts a business or undertaking. This person must ensure, so far as is reasonably practicable, the health and safety of workers. A worker includes direct employees and also other workers such as contractor personnel.

The WHS laws also impose obligations on those who manage or control workplaces and on those who design, manufacture, import and supply plant, substances or structures for use at work. Duties also apply to those who install, construct or commission plant or structures for use at work.

Officers of corporations have duties to exercise due diligence to ensure that the relevant business or undertaking complies with the WHS laws. Workers also have duties to take reasonable care for their own health and safety and to ensure their acts or omissions do not adversely affect the health or safety of other persons.

SAFETY MANAGEMENT SYSTEM

Persons who conduct a business or undertaking generally comply with the WHS duty of care by developing and implementing a safe system of work that has various components. These components include a risk management system and management structure which identifies the positions having responsibility for applying the risk management system.

COMPULSORY WORKERS' COMPENSATION

The States and Territories each have legislation in place that regulates workers' compensation in the event of a workplace injury or illness. An employee does not need to prove a fault by the employer to be entitled to workers' compensation. The employer is required to obtain appropriate insurance against the risks of workers' compensation claims.

Appendix A

STATE AND TERRITORY ROYALTY REGIMES FOR CERTAIN MINERALS

<table>
<tr><th>MINERAL</th><th>RATE AND BASIS OF CALCULATION</th></tr>
<tr><td colspan="2">QUEENSLAND</td></tr>
<tr><td>Coal</td><td>7% of the value of the coal up to $100 per tonne, 12.5% of the value between $100 per tonne and $150 per tonne and 15% of the value thereafter</td></tr>
<tr><td>Cobalt</td><td>Variable rate of 2.5% – 5% (varying in 0.02% increments) depending on average metal prices
Discount of 20% if processed in Qld and metal content is at least 50%
No royalties payable on first $100,000 of combined value of minerals sold, disposed of or used in a year</td></tr>
<tr><td>Copper</td><td>Variable rate of 2.5% – 5% (varying in 0.02% increments) depending on average metal prices
Discount of 20% if processed in Qld and metal content is at least 95%
No royalties payable on first $100,000 of combined value of minerals sold, disposed of or used in a year</td></tr>
<tr><td>Gold</td><td>Variable rate of 2.5% – 5% (varying in 0.02% increments) depending on average metal prices
No royalties payable on first $100,000 of combined value of minerals sold, disposed of or used in a year</td></tr>
<tr><td>Iron ore</td><td>$1.25 per tonne, if average price is up to $100 per tonne. If average price is greater than $100 per tonne, the royalty rate is increased by the extent of the price over $100 per tonne divided by the average price, multiplied by 1.25
Discount of 20% if processed in Qld and metal content is at least 95%</td></tr>
<tr><td colspan="2">NEW SOUTH WALES</td></tr>
<tr><td>Coal</td><td>Depends on type of mining:
• open cut mining: 8.2% of value of mineral
• underground mining: 7.2% of value of mineral
• deep underground mining: 6.2% of value of mineral</td></tr>
<tr><td>Cobalt</td><td rowspan="4">4% ex-mine value (value less allowable deductions)</td></tr>
<tr><td>Copper</td></tr>
<tr><td>Gold</td></tr>
<tr><td>Iron ore</td></tr>
<tr><td colspan="2">NORTHERN TERRITORY</td></tr>
<tr><td>Coal</td><td rowspan="5">20% of net sales value of mineral
If the net sales value is $50,000 or less – no royalty is payable
If the net sales value is more than $50,000, the royalty payable is reduced by $10,000</td></tr>
<tr><td>Cobalt</td></tr>
<tr><td>Copper</td></tr>
<tr><td>Gold</td></tr>
<tr><td>Iron ore</td></tr>
<tr><td colspan="2">TASMANIA</td></tr>
<tr><td>Coal</td><td rowspan="5">Variable rate of 1.9% – 5.35% based on net sales value of mineral
A rebate of up to 20% is available for a production of a metal within the State</td></tr>
<tr><td>Cobalt</td></tr>
<tr><td>Copper</td></tr>
<tr><td>Gold</td></tr>
<tr><td>Iron ore</td></tr>
</table>

<table>
<tr><th>MINERAL</th><th colspan="2">RATE AND BASIS OF CALCULATION</th></tr>
<tr><td colspan="3">SOUTH AUSTRALIA</td></tr>
<tr><td>Coal</td><td>5% of value of mineral</td><td rowspan="5">2% of value of mineral for new mines for first five years if application approved by Minister</td></tr>
<tr><td>Cobalt</td><td>3.5% of value of mineral</td></tr>
<tr><td>Copper</td><td>5% of value of mineral</td></tr>
<tr><td>Gold</td><td>3.5% of value of mineral</td></tr>
<tr><td>Iron ore</td><td>5% of value of mineral</td></tr>
<tr><td colspan="3">VICTORIA</td></tr>
<tr><td>Coal</td><td colspan="2">Depends on type of coal:
• brown coal: $0.076 per gigajoule unit of brown coal produced, adjusted in accordance with the CPI. From 1 January 2017, $0.228 per gigajoule unit
• other than brown coal: 2.75% of value of mineral</td></tr>
<tr><td>Cobalt</td><td colspan="2">2.75% of value of mineral</td></tr>
<tr><td>Copper</td><td colspan="2">2.75% of value of mineral</td></tr>
<tr><td>Gold</td><td colspan="2">No royalty payable</td></tr>
<tr><td>Iron ore</td><td colspan="2">2.75% of value of mineral</td></tr>
<tr><td colspan="3">WESTERN AUSTRALIA</td></tr>
<tr><td>Coal</td><td colspan="2">Depends on import/export status:
• if exported: 7.5% of value of mineral
• if not exported: A$1 per tonne (adjusted each year at 30 June in accordance with comparative price increases)</td></tr>
<tr><td>Cobalt</td><td colspan="2">Depends on form of metal:
• if sold as concentrate: 5% of value of mineral
• if sold in metallic form: 2.5% of value of mineral
• if sold as nickel by-product: royalty rate is calculated by multiplying the gross cobalt metal price per tonne by the number of units per 100 of cobalt metal in the nickel by-product sold, multiplied by 2.5%</td></tr>
<tr><td>Copper</td><td colspan="2">Depends on form of metal:
• if sold as concentrate: 5% of value of mineral
• if sold in metallic form: 2.5% of value of mineral
• if sold as nickel by-product: royalty rate is calculated by multiplying the gross copper metal price per tonne by the number of units per 100 of copper metal in the nickel by-product sold, multiplied by 2.5%</td></tr>
<tr><td>Gold</td><td colspan="2">Royalty not payable on first 2500 ounces of production during a financial year
2.5% of value of mineral thereafter</td></tr>
<tr><td>Iron ore</td><td colspan="2">Depends on type of ore:
• beneficiated ore: 5% of value of mineral
• all other iron ore: 7.5% of value of mineral</td></tr>
</table>

Your key contacts

PERTH

Lorenzo Pacitti
T +61 8 9366 8166
lorenzo.pacitti@ashurst.com

Adam Conway
T +61 8 9366 8775
adam.conway@ashurst.com

Gaelan Cooney
T +61 8 9366 8023
gaelan.cooney@ashurst.com

Roger Davies
T +61 8 9366 8022
roger.davies@ashurst.com

Geoff Gishubl
T +61 8 9366 8140
geoff.gishubl@ashurst.com

Stuart James
T +61 8 9366 8175
stuart.james@ashurst.com

Antonella Pacitti
T +61 8 9366 8773
antonella.pacitti@ashurst.com

Lucas Wilk
T +61 8 9366 8756
lucas.wilk@ashurst.com

BRISBANE

Caroline Ammundsen
T +61 7 3259 7098
caroline.ammundsen@ashurst.com

John Briggs
T +61 7 3259 7102
john.briggs@ashurst.com

Simon Brown
T +61 7 3259 7153
simon.brown@ashurst.com

Jeremy Chenoweth
T +61 7 3259 7028
jeremy.chenoweth@ashurst.com

Mark Disney
+61 7 3259 7399
mark.disney@ashurst.com

Tony Denholder
T +61 7 3259 7026
tony.denholder@ashurst.com

James Hall
T +61 7 3259 7088
james.hall@ashurst.com

Paul Newman
T +61 7 3259 7061
paul.newman@ashurst.com

Gavin Scott
T +61 7 3259 7231
gavin.scott@ashurst.com

Ben Warne
T +61 7 3259 7471
ben.warne@ashurst.com

SYDNEY

Phil Breden
T +61 2 9258 5823
phil.breden@ashurst.com

Mark Brennan
T +61 2 9258 6072
mark.brennan@ashurst.com

Michael Harrison
T +61 2 9258 6837
michael.harrison@ashurst.com

David Mason
T +61 7 3259 6104
david.mason@ashurst.com

Jamie Ng
T +61 2 9258 6753
jamie.ng@ashurst.com

Bill Reid
T +61 2 9258 5785
bill.reid@ashurst.com

Murray Wheater
T +61 2 9258 6744
murray.wheater@ashurst.com

Shawn Wytenburg
T +61 2 9258 6046
shawn.wytenburg@ashurst.com

MELBOURNE

Simon Fraser
T +61 3 9679 3303
simon.fraser@ashurst.com

Tanya Denning
T +61 3 9679 3364
tanya.denning@ashurst.com

BEIJING

Patrick Phua
T +86 10 5936 2888
patrick.phua@ashurst.com

SHANGHAI

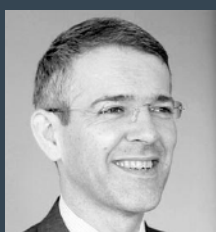
Michael Sheng
T +86 21 6263 1818
michael.sheng@ashurst.com

SINGAPORE

Sean Prior
T +65 6602 9155
sean.prior@ashurst.com

Keith McGuire
T +65 6416 3340
keith.mcguire@ashurst.com

TOKYO



Rupert Burrows
T +81 3 5405 6205
rupert.burrows@ashurst.com

PORT MORESBY

Tim Glenn
T +675 309 2004
tim.glenn@ashurst.com

JAKARTA (ASSOCIATED OFFICE)

Ratih Nawangsari
T +62 212 996 9220
ratih.nawangsari@oentoengsuria.com

KOREA

John K.J. Kim
T +852 2846 8991
john.kim@ashurst.com

ashurst

www.ashurst.com

Design AU Ref: 17953 Jun 16