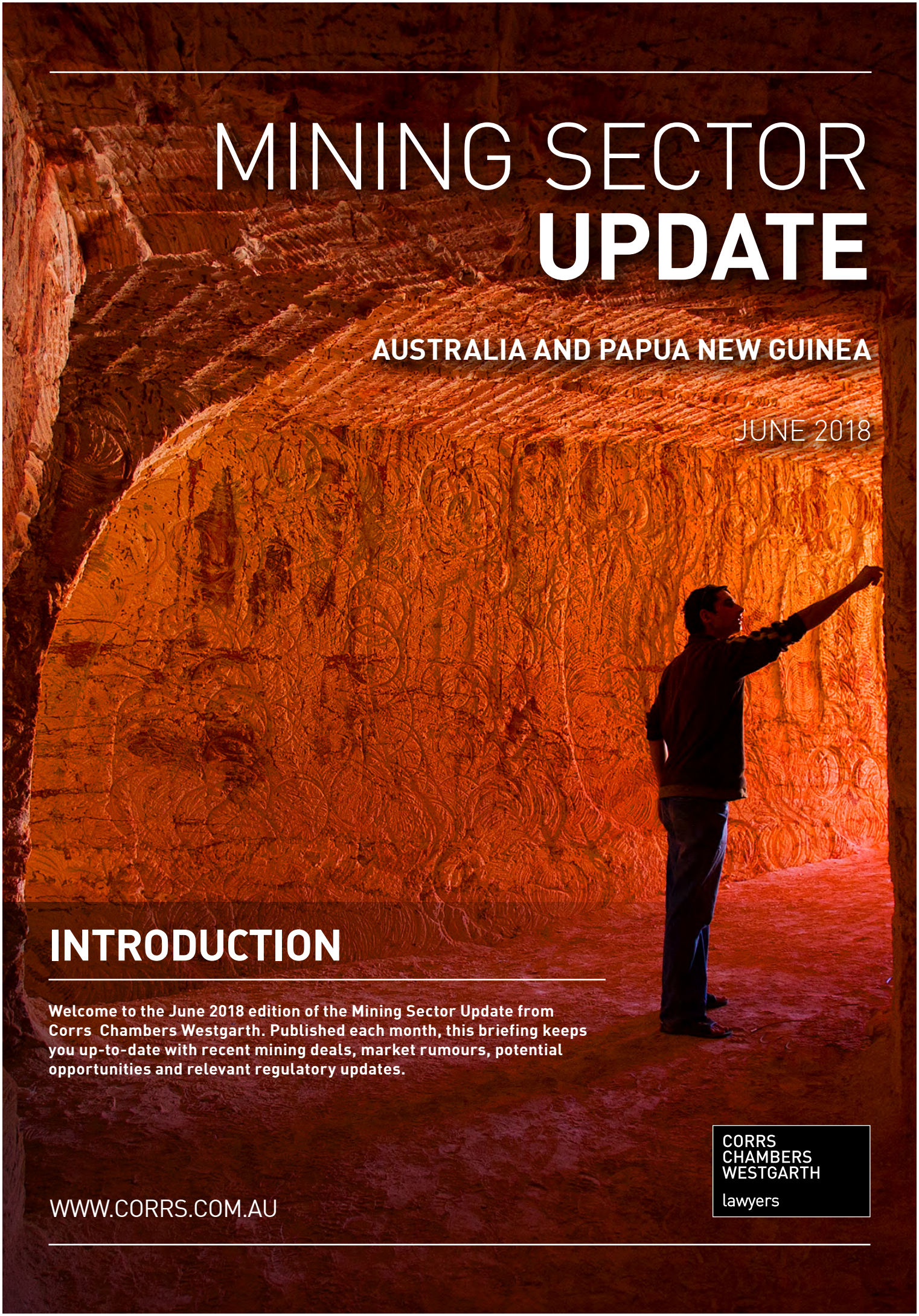
MINING SECTOR UPDATE

AUSTRALIA AND PAPUA NEW GUINEA

JUNE 2018



INTRODUCTION

Welcome to the June 2018 edition of the Mining Sector Update from Corrs Chambers Westgarth. Published each month, this briefing keeps you up-to-date with recent mining deals, market rumours, potential opportunities and relevant regulatory updates.

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IN THIS EDITION

Our last instalment of the Mining Sector Update was all deals, deals, deals! This month we focus in on what we know best – the law – to leave you equipped to navigate the recent changes to our regulatory landscape.

We will look at:

- relevant allocations in the 2018-19 Federal Budget
- the Supreme Court's decision on the New Acland Coal Mine
- the imminent 'ipso facto' provisions and what they mean for you
- the new national security laws and their impact on port operators

RECENT ANNOUNCEMENTS

Federal Budget

The Federal Budget was released on 8 May 2018 and fortunately there were no nasty surprises for the mining industry.

According to **Queensland Resources Council** Chief Executive, Ian Macfarlane, "*the Federal Budget is expecting an extra $3.7 billion in taxes over the next four years based on improved mining profitability on the back of higher commodity prices*".[1]

The Budget commits (again) to a progressive reduction in company tax cuts in Australia from 30% to 25% for all companies, even though the Government has been unable to pass these proposed measures in full through the Senate. The Enterprise Tax Plan is designed to achieve this reduction by 2026.

Further, the budget includes a $260 million investment to develop GPS technology. Minister for Resources, Matt Canavan, stated that this allocation will benefit the resource sector through "*better control of mine infrastructure, safety and more precise data for environmental rehabilitation*".[2]

Funding of the Research and Development (**R&D**) Tax Incentive will continue for the 2018-19 financial year. Companies with an annual aggregated turnover of $20 million or more will receive an R&D premium that increases as the proportion of R&D expenditure to total expenditure increases.[3] The R&D expenditure threshold will increase from $100 million to $150 million.

1 Queensland Resources Council, "No surprises Federal Budget welcomes by resources sector", *Medi Release*, 8 May 2018.

2 Senator Matt Canavan, "Better GPS and satellite imagery to support a smarter economy", *Press release*, 8 May 2018.

3 Budget 2018-19, "Reforming the R&D Tax Incentive", Fact Sheet, https://www.budget.gov.au/2018-19/content/factsheets/6-tax-integrity.html.

RECENT DECISIONS

SUPREME COURT BREATHES NEW LIFE INTO PROPOSED STAGE 3 EXPANSION OF NEW ACLAND COAL MINE

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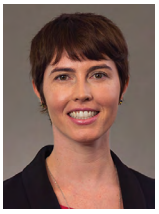

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The Supreme Court of Queensland has overturned the Land Court's decision to recommend refusal of an amendment to New Acland Coal's environmental authority. This most recent decision re-opens the door for the stage 3 expansion of the New Acland coal mine.

On 2 May 2018, the Supreme Court of Queensland delivered judgment in a judicial review proceeding (**the Judicial Review Decision**) that set aside previous orders made by the Land Court (**the Merits Decision**), and remitted the matter back to the Land Court for further consideration.

The Merits Decision had concerned an application by New Hope, the owner of the New Acland coal mine, to expand stage 3 of the mine. The Land Court heard objections about the application for the amendment of an environmental authority under the *Environment Protection Act 1994* (Qld) (**EPA**) and the application for two mining leases under the *Mineral Resources Act 1989* (Qld) (**MRA**).

The Background of the Case

In May 2017, in the Merits Decision, the Land Court recommended refusal of stage 3 of New Acland. See our 2017 article about the Land Court's lengthy decision here.

Substantially relying on that recommendation, a delegate of the Chief Executive, Department of Environment and Heritage Protection, issued its decision to refuse New Hope's application to amend its environmental authority for the stage 3 expansion application in February 2018. See our short article about that decision here.

The Judicial Review Proceeding

New Hope made an application for judicial review of the Merits Decision. A judicial review proceeding does not consider a decision on its merits, but instead seeks to set aside the decision based on errors of law. The proceedings were brought on the following main substantive grounds:

- apprehended bias;
- lack of jurisdiction, an error of law and an improper exercise of power (by taking into account irrelevant considerations) in relation to matters of groundwater, because:
  - the potential impacts of taking and interfering with groundwater were to be addressed by provisions of the *Water Act 2000* (Qld) (**Water Act**), which is outside the scope of the Land Court's jurisdiction; and
  - even if the impacts could be considered, it was not necessary for them to be fully considered as that would pre-judge the outcome of approvals under the Water Act;
- that the Land Court failed to properly interpret and apply the principle of intergenerational equity;
- an error of law by failing to ask the right question (and other errors associated with following certain judicial decisions) in relation to noise limits; and
- a breach of procedural fairness and the rules of natural justice, for a failure to put relevant concerns to certain witnesses.

RECENT DECISIONS

New Hope made an application for judicial review of the Merits Decision.

On 2 May 2018, the Supreme Court held that the following grounds had been established:

- groundwater: it was an error for the Land Court to decide it fully needed to consider groundwater issues when considering the MRA and EPA objections;
- intergenerational equity: the Land Court failed to properly interpret and apply the principle of intergenerational equity; and
- noise: the Land Court failed to exercise a statutory discretion to make recommendations in relation to noise conditions.

The Court ordered that those grounds having been established, the Land Court decision be set aside and referred back to the Land Court for further consideration. The parties have been invited to make submissions about the proposed orders. New Hope has intimated it would like orders remitting the matter back to the Land Court for hearing by a member other than the original Land Court member.

New Hope for New Hope?

The Judicial Review Decision does not result in an approval of the New Acland stage 3 expansion (or even a recommendation for one). It does, however, mean there is now new hope for the stage 3 mine expansion, as the Land Court will have to reconsider the objections made under the EPA and the MRA in light of the findings in the Judicial Review Decision.

Most significantly, the objectors to the proposed New Acland stage 3 expansion face certain challenges.

Transitional legislative provisions have the effect that before the stage 3 expansion can occur, New Hope will need to obtain the relevant associated water licences to take or interfere with underground water under the Water Act. That means the taking or interfering with underground water (i.e. quantity) is beyond the scope of the Land Court's consideration during an objections hearing. However, the objectors may take some comfort that the Water Act process will continue to allow submissions and, if necessary, a hearing in the Land Court on the legislative requirements for these particular water licences.

Her Honour Justice Bowskill noted that authorised activities under a mining lease could impact on groundwater quality issues, and those issues might be considered by the Land Court in an objections hearing.

The Merits Decision has been set aside and will be remitted to the Land Court, with a limited scope of further consideration to those issues. New Hope had raised the idea of whether the matter should be remitted to a different member of the Land Court and the Supreme Court has invited submissions on that issue, as well as costs.

While the Judicial Review Decision certainly will have the effect of reviving New Hope's mining lease applications and amendment to its environmental authority, it will remain to be seen if or when all necessary approvals are issued for the stage 3 expansion.

We note that on 28 May 2018 the Supreme Court delivered a further judgement, making orders giving effect to its decision on 2 May 2018.

RECENTLY COMPLETED DEALS

Corrs advises MACH Energy on Mount Pleasant Joint Venture

The Corrs team, led by Partner, Bruce Adkins, and supported by Special Counsel, Stuart Clague, recently advised **MACH Energy Australia Pty Ltd** in relation to its recently announced agreement with **JCD Australia Pty Ltd** (**JCDA**) to establish the **Mount Pleasant Joint Venture**.

Under the agreement, JCDA will acquire a 5% interest in the Mount Pleasant coal project and MACH and JCDA will establish the Mount Pleasant Joint Venture to develop and operate the Mount Pleasant coal mine.

Japan Coal Development Co Ltd (**JCD**) (the parent of JCDA), will acquire Mount Pleasant Newcastle benchmark product MTP 6000 coal from the Mount Pleasant Joint Venture under a coal offtake agreement, and will undertake exclusive marketing activities for the Mount Pleasant Joint Venture to a select group of Japanese power utilities. JCD will also undertake non-exclusive marketing activities for the Mount Pleasant Joint Venture to other customers in Japan.

MACH will market coal to non-exclusive customers in Japan, alongside JCD, and to the rest of the world.

Mount Pleasant is located in the NSW's Hunter Valley and once fully developed will be one of the premier thermal coal mines in Australia. Construction at Mount Pleasant is nearing completion and first coal sales from the operation are expected in the second half of 2018.

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Gregory Crinum mine given new life

The *Australian Financial Review* has recently reported **BHP Billiton** and **Mitsubishi** (**BMA**) have sold their **Gregory Crinum coal mine** to Japanese company **Sojitz Coal Resources**,[4] owner of nearby Minerva Mine.

The Gregory Crinum mine has been out of operation since November 2015, with BMA making a number of attempts to sell the asset since 2013.

As part of the A$100m deal, BMA will provide funding to Sojitz to contribute to the rehabilitation costs, with a view to Sojitz re-starting operations at the mine as soon as possible.

South32 to operate Eagle Downs coking coal project

ASX listed **South32** has recently announced its agreement with a subsidiary of **BaoWu Steel Group** to acquire a 50% interest in the **Eagle Downs Coking Coal Project** in the Bowen Basin.[5] The remaining 50% interest will remain owned by **Aquila Resources Pty Ltd**, also a subsidiary of BaoWu. South32 will pay around US$106m on completion, with payment of a further US$27m due three years after completion.

The transaction is conditional upon the completion of BaoWu's acquisition of Brazilian mining company **Vale's** 50% interest in the project, and involves a capped royalty payment that will be triggered when the price of coal produced from the project exceeds US$140 per tonne.

The project is currently in the construction phase and is estimated to produce 4.5 million tonnes of coking coal over the first 10 years of production.

The deal is expected to close before the end of the year.

4 Peter Ker, "Sojitz buys BHP mine for $100m", *Australian Financial Review*, 31 May 2018.

5 South32, "South32 to acquire 50% interest in Eagle Downs and assume operatorship", *Media Release*, 29 May 2018.

MARKET RUMOURS AND OPPORTUNITIES

Queensland's coal industry will contribute A$3.7 billion in revenue this financial year

Exploration tender released for Queensland's coal producing basins

More than 540 square kilometres of the Bowen, Surat and Galilee basins have been released for tender by the Queensland government.[6] This area is comprised of four areas covering 490 square kilometres of the Bowen Basin, one 32 square kilometre area of the Galilee basin and one 19 square kilometre area of the Surat Basin.

All six areas contain thermal coal, with one area in the Bowen Basin possibly also containing metallurgical coal.

Tenders are due to close 2 August 2018.

The **Queensland Resources Council** has projected that Queensland's coal industry will contribute A$3.7 billion in revenue this financial year from royalties alone, a figure set to increase over future years as more land is released for exploration.

More asset sales on the horizon for Rio Tinto

Bloomberg has reported negotiations for a US$3.5 billion dollar deal with Indonesian State-owned company, **PT Indonesia Asahan Aluminium** (**Persero**), to purchase ASX listed **Rio Tinto's** entire interest in the **Grasberg** copper and gold mine joint venture with **PT Freeport Indonesia**.[7]

Grasberg, located in Indonesia, is the world's biggest gold producer and the second-biggest copper mine.[8]

6 Anthony Lynham, "New coal exploration opportunities up for grabs", *Media Statement*, 3 May 2018.

7 David Stringer and Danielle Bochove, "Rio Tinto is ready to accept $3.5 billion deal to exit Grasberg", *Bloomberg*, 23 May 2018.

8 Matthew Stevens, "Rio, Jakarta near Grasberg deal", *Australian Financial Review* (online), 17 May 2018.

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COMMONWEALTH

Stay on enforcement of Ipso Facto clauses in contracts

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The mandatory stay on enforcement of so-called "ipso facto" clauses arising out of the *Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Act 2017* (Cth) (**the Act**) will apply to contracts entered into on or after 1 July 2018.

Ispo facto clauses are commonly found in contracts and allow a party to terminate or vary an agreement upon the occurrence of a specific insolvency type event, such as a counterparty entering into a scheme of arrangement or appointing a voluntary administrator.

The purpose of the stay is to allow a financially distressed business to continue to trade or implement a successful restructure, where it may otherwise (if any contracts were terminated on the basis of the insolvency issue) lose value or be unable to be sold as a going concern.

How will it work?

The new laws will operate to "stay" enforcement of a contractual right to suspend or terminate that arises as a result of:

(a) a company entering administration, receivership or where a scheme of arrangement is proposed;

(b) a company's financial position if in administration, receivership or subject to a scheme of arrangement;

(c) a reason prescribed by regulation that relates to (a) or (b); or

(d) a reason contrary in substance to (a) or (b).

Potential uncertainty

The ability to include additional reasons, either by regulation or as a result of the anti-avoidance provision in (d) above, (which extends the scope of the regime to capture contractual clauses that attempt to circumvent the new legislation), has created some uncertainty around the scope of the operation of the new law.

The stay (or suspension) of contractual rights also applies to so called "self-executing provisions". These are contractual provisions that apply automatically, for example, a provision that would activate upon a company entering into administration, receivership or a scheme of arrangement.

The Commonwealth Government has recently released an exposure Draft Regulation and Draft Declaration, which list excluded contracts and excluded rights respectively.

Relevantly, the Draft Regulation proposes the following types of contracts be exempt from the operation of the stay:

- government licences and permits;
- business sale agreements (including share sale and purchase agreements);
- arrangements where a special purpose vehicle is a party; and
- contracts entered into on or after 1 July 2018 as a result of novation, assignment or variation of a contract entered into prior to that date.

Ispo facto clauses are commonly found in contracts and allow a party to terminate or vary an agreement

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Further, the Draft Declaration proposes the following rights of lenders be exempt from the operation of the stay:

- rights to change the basis on which an amount is calculated in a financing arrangement (i.e. a lender may charge an increased interest rate to reflect the increased credit risk of a borrower entering into insolvency); and
- rights to indemnity for liability or loss incurred in enforcing or preserving rights (such as the cost of any legal advice a lender may obtain regarding the borrower's insolvency).

The new laws will not prevent parties from enforcing their independent contractual rights to terminate the contract for unrelated reasons (such as for non-performance or, if included, termination for convenience).

The consultation process closed for comment on 11 May 2018. We expect that the finalised Regulation and Declaration will be made available before the new law takes effect on 1 July 2018.

Operators of Critical Port Assets to provide information under new national security legislation

In the most recent attempt to respond to the increased risk associated with foreign investment in critical infrastructure, the Commonwealth Parliament has passed the *Security of Critical Infrastructure Act 2018* (Cth) (**the Act**). The Act received royal assent on 11 April 2018 and will commence on a date fixed by proclamation, or otherwise by 11 July 2018.

The Act lists existing critical infrastructure assets, but also grants power to the Minister to declare a particular asset to be a critical infrastructure asset.

The Minister can direct a reporting entity of a designated critical infrastructure asset to do, or refrain from doing a particular thing, if the Minister is satisfied there is a risk prejudicial to national security that cannot otherwise be mitigated.

A "reporting entity" is defined under the Act as:

1. the responsible entity for the asset, being:
    a. the licence or approval holder of the relevant critical electricity, water or gas asset; or
    b. the operator in relation to a critical port asset; or
2. a direct interest holder in relation to the asset.

The Act identifies particular ports that will be initially captured under the new legislation. These include (amongst others) the Port of Brisbane, Port of Cairns, Port of Darwin, Port of Gladstone, Port of Newcastle and Port of Townsville.

The Act requires that the responsible entity provide information regarding:

- the location of the asset;
- a description of the area the asset services;
- details of the responsible entity, including incorporation details;
- details of the Chief Executive Officer;
- a description of arrangements under which the asset is operated by the operator;
- a description of data maintenance arrangements; and
- any other information prescribed by the rules.

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Direct interest holders, being persons or entities with an interest in the asset of 10% or more, or with an ability to directly influence or control the asset, are to provide information regarding:

- details of the direct interest holder;
- information about the influence or control of the direct interest holder;
- information about the ability of any person to directly access the networks or systems necessary for the operation or control of the asset;
- details of entities with direct or indirect influence or control over the direct interest holder;
- information about the influence or control of that entity over the direct interest holder; and
- any other information prescribed by the rules

Operators of critical port assets will be required to provide an initial report containing the information set out above within 6 months of commencement of the Act. If a port asset is declared a critical infrastructure asset after commencement of Act, the port operator will similarly have 6 months to provide its initial report. This information will be recorded in the Register of Critical Infrastructure Assets monitored by the Secretary of the Department of Home Affairs.

The Act lists existing critical infrastructure assets, but also grants power to the Minister

QUEENSLAND

Draft review of *Environmental Protection (Chain of Responsibility) Amendment Act 2016* provides no comfort around risk of legacy liability

Since the introduction of the *Environmental Protection (Chain of Responsibility) Amendment Act 2016* (Qld) (**CORA**), the industry has expressed concerns regarding the implications of the legislation for resources investment in Queensland, with the uncertainty around the potentially very broad application of CORA threatening investment.

Last month, the Department of Environment and Science released its "Draft review of Queensland's Environmental Chain of Responsibility laws", calling for public consultation on the review of the legislation.

The review shifts the focus from the risks to investment, by instead drawing our attention to the positive trends in the sector in 2016 and 2017, including a number of significant investment projects announced or progressed since the commencement of CORA, and a significant increase in the value of coal, mineral and LNG exports.

The CORA provisions have potentially very broad application to M&A in the resources sector (both share sales and asset sales), and may expose the seller to legacy liability, via the issue of an Environmental Protection Order, following the sale of the project, even if:

- the sale is on arm's length commercial terms for fair market value; and
- there is no breach of the environmental authority at the time of the sale.

This is because the CORA provisions would allow the State to decide that, despite the sale, the seller is a '*related person*' with a relevant connection to the company undertaking the activities after the sale.

Both existing and potential investors in resources projects have a very real and valid concern that the CORA regime makes any former owner of a resources project who has deep pockets (or the deepest pockets of those available) a 'related person' of last resort, who the State may look to at any time in the future in the event that all else fails.

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The review shifts the focus from the risks to investment, by instead drawing our attention to the positive trends

This is a risk that should not be borne by former owners of resources projects when they have exited a project in good faith, on market terms and with environmental obligations up to date at the time of their departure. There are other mechanisms through which the State can gain adequate protections against unfulfilled rehabilitation obligations, without leaving the door open for CORA to fill this gap. These other mechanisms include:

(a) the Minister's power under the *Mineral and Energy Resources (Common Provisions) Act 2014* (Qld) (**MERCP Act**) to approve the transfer of a tenement to the buyer. The Minister has discretion whether to refuse or give the approval, and in doing so, must consider whether the proposed buyer has the human, technical and financial resources to comply with the conditions of the tenement; and

(b) the *Mineral and Energy Resources (Financial Provisioning) Bill 2018* (Qld) (**Financial Provisioning Act**), once commenced, will provide the following protections to the State:

  (i) empower the scheme manager to review the risk category to which the environmental authority is allocated, and to determine the contribution to the scheme fund (or surety to be provided), having regard to the financial soundness of the buyer and its parent companies;

  (ii) amendment to the *Environmental Protection Act 1994* (Qld) to require a condition of an environmental authority that the holder cannot carry out activities under the environmental authority unless the contribution or surety has been provided; and

  (iii) amendment to the MERCP Act to prohibit the registration of the transfer of a tenement until the relevant contribution or surety under the Financial Provisioning Act has been provided.

The above safeguards provide a more than adequate means of protecting the State against the risk of a buyer defaulting in its environmental obligations without the investment uncertainty which flows from the potential application of the CORA provisions.

Submissions closed on 22 May 2018 and responses are now being reviewed.

OTHER NEWS

NORTHERN TERRITORY

Northern Territory proposes hybrid royalty scheme

The Treasurer for the Northern Territory, Nicole Manison, has announced proposed changes to the royalty scheme to require all operating mines to pay a minimum royalty for the value of minerals they extract.[9]

Under the new scheme, mining companies with annual revenue above A$500,000,[10] will pay the greater of 20% of profits (as per the current royalty scheme), or a percentage of their gross mineral production revenue in accordance with the following rates:

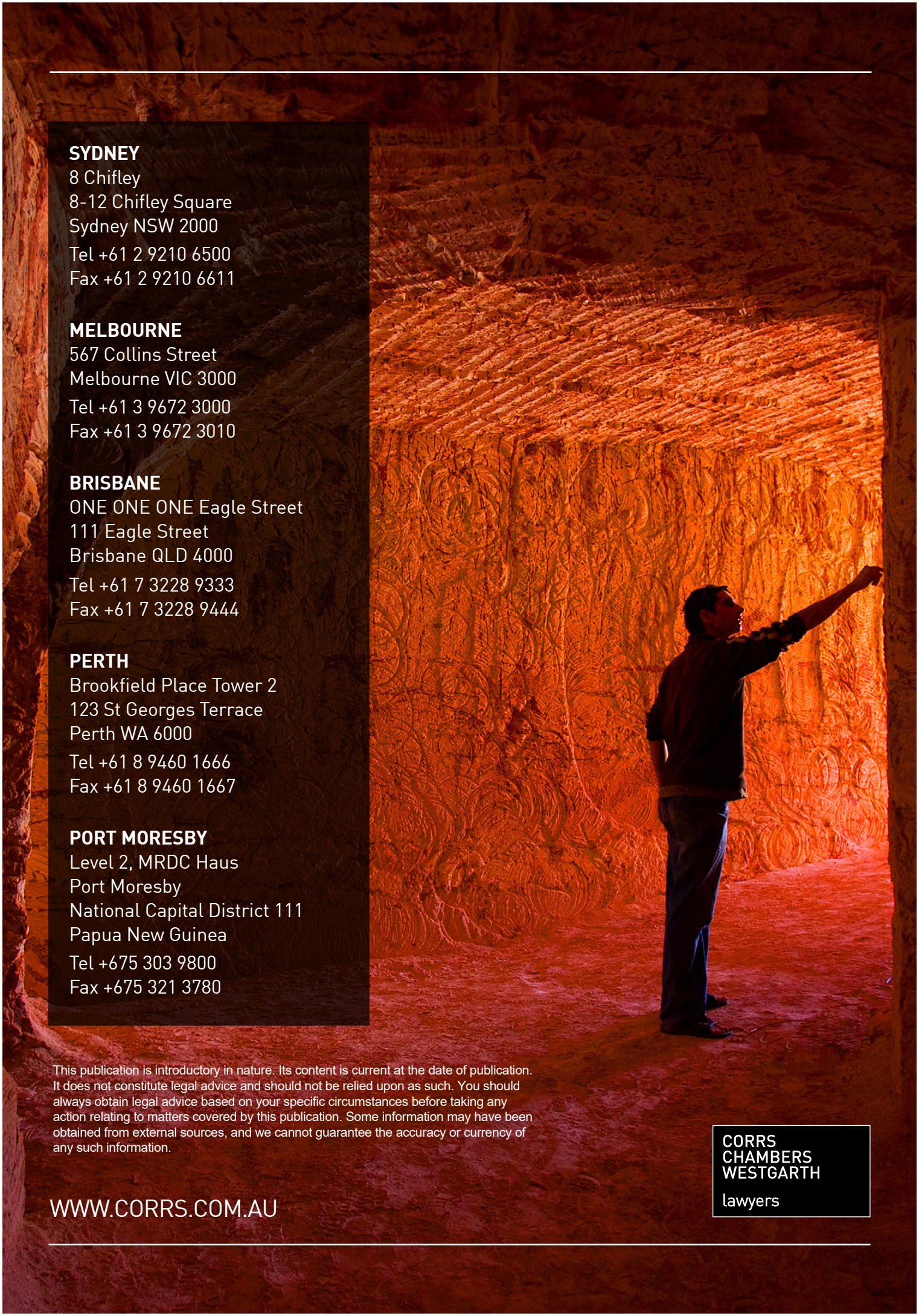
- 1% for the first royalty year after 1 July 2019;
- 2% for the second royalty year; and
- 2.5% in the third mineral year, and any that follow.

Further, the territory government has also announced the removal of the stamp duty exemption on the transfer of petroleum and pipeline interests.

Proposed changes to the royalty scheme to require all operating mines to pay a minimum royalty

9 Nicole Manison, "Budget 2018: Responsible savings and revenue measures for budget repair", *Media Release*, 20 April 2019.

10 Deloitte, "Northern Territory Budget 2018-19: New revenue measures", 1 May 2018.



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