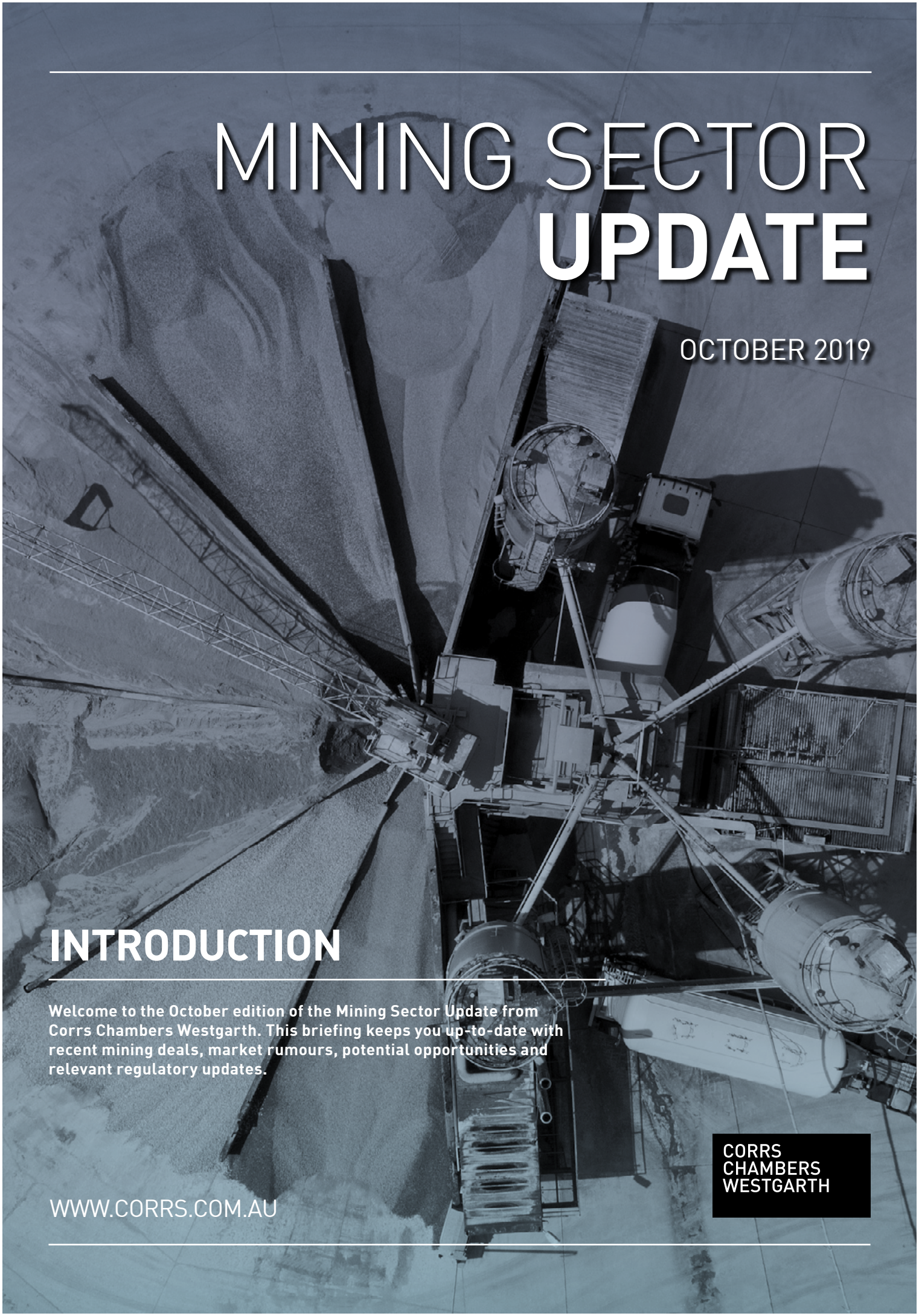

MINING SECTOR UPDATE

OCTOBER 2019

INTRODUCTION

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

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IN THIS EDITION

This month we look at:

- The Productivity Commission's Issues Paper for Resources Sector Regulation
- The NSW Independent Planning Commission refuses development consent for the Bylong Valley Coal Mine
- Glencore's victory over the ATO
- Next steps for New Acland

Evolution has the ability to earn a 75% interest in the Lake Austin portion of Musgrave's Cue Project

RECENT ANNOUNCEMENTS

Hanking Australia's offer to acquire Coolgardie Gold Project rejected

On 23 September 2019, Hong Kong Stock Exchange listed **China Hanking Holdings Limited**, an iron ore, nickel and gold mining company, announced that its Australian subsidiary, **Hanking Australia Investment Pty Ltd**, has submitted a non-binding indicative cash offer between A$56 million and A$65 million to acquire the **Coolgardie Gold Project** (**Project**) from ASX listed **Focus Minerals Limited**.

Although the Project was placed into care and maintenance in August 2013, its mining and exploration tenements cover approximately 235 km^2 and contain approximately 2.1 million ounces of gold in JORC resources. The Project has a pre-existing gold processing plant with an annual capacity of 1.2 million tonnes per annum.

However, on 26 September 2019, it was reported by *Australian Mining* that Focus Minerals rejected the offer, in preference for the company's existing exclusivity deed with **Horizon Minerals Limited**, as Horizon provided for greater execution certainty and had already completed due diligence.

Joint venture and subscription agreements announced between Musgrave Minerals and Evolution Mining

On 17 September 2019, ASX-listed **Musgrave Minerals Ltd**, an Australian gold and base metal exploration company, announced an Earn-in and Exploration Joint Venture Agreement with **Evolution Mining Ltd**, a gold exploration company.

Under the terms of the Agreement, Evolution has committed to a minimum spend of A$4 million within the first two years, with the ability to earn a 75% interest in the Lake Austin portion of Musgrave's Cue Project located in the Murchison District of Western Australia, if they spend A$18 million within the first 5 years. Musgrave will retain 100% ownership if Evolution does not spend all $18 million within the five year period.

As part of the Agreement, Evolution has executed a Subscription Agreement to acquire 18,587,361 ordinary shares in Musgrave at A$0.0807 per share through a share placement. Musgrave is expected to hold approximately A$4.2 million in cash on completion of the placement.

Musgrave believes there is potential to extend mineralised zones that have already been identified, and discover new gold deposits within the Cue Project.

You can read the full announcement here.

RECENTLY COMPLETED DEALS

Saracen acquisition of Sinclair Nickel Project

On 27 September 2019, ASX-listed **Saracen Mineral Holdings Limited**, an Australian gold mining and mineral development and exploration company, announced that it has entered into a binding agreement to acquire the **Sinclair nickel project** (**Sinclair Project**) from **Talisman Mining Limited**.

Under the agreement, Saracen has agreed to acquire Talisman Nickel Pty Ltd, a subsidiary of Talisman Mining Limited, and owner of the Sinclair Project. Consideration for the acquisition is A$10 million and a 2% net smelter royalty payable on metal produced from the Sinclair tenements and non-precious metals produced from the Saracen-owned Waterloo tenement. The transaction is subject to conditions, including Glencore consenting to the sale of Talisman Nickel to Saracen.

You can read the full announcement here.

Wesfarmers completes acquisition of Kidman Resources

On 23 September 2019, ASX-listed **Wesfarmers** announced that its wholly owned subsidiary **Wesfarmers Lithium Pty Ltd** has acquired all issued ordinary shares in ASX listed **Kidman Resources Limited** for a cash payment of A$1.90 per share via a Scheme of Arrangement.

The acquisition leaves Wesfarmers with a 50% stake in the **Mount Holland Lithium Project** in Western Australia, a joint venture with Chilean chemical company Sociedad Química y Minera.

Wesfarmers is using the acquisition to leverage its existing strengths in chemical processing abilities.

You can read the full announcement here.

The acquisition leaves Wesfarmers with a 50% stake in the Mount Holland Lithium Project

MARKET RUMOURS AND OPPORTUNITIES

Highlights identified by Vista Gold include an estimated 413,400 ounces of gold production each year over the life of the Mt Todd project

Mt Todd gold mine reveals positive feasibility study

On 10 September 2019, New York and Toronto Stock Exchange listed gold producer **Vista Gold Corp** reported that it had uncovered positive results for its **Mt Todd gold mine** after undertaking an updated preliminary feasibility study (**PFS**). The Mt Todd mine is located 50 km north of Katherine, and 250 km south of Darwin in the Northern Territory.

Vista Gold identified that the process improvements have resulted in improved projected gold recovery and increased estimated gold production. Highlights identified by Vista Gold from the PFS include an estimated 413,400 ounces of gold production each year over the life of the Mt Todd project.

Frederick H. Earnest (Vista Gold's President and CEO) commented that the PFS gives Vista Gold a solid basis for conversations with prospective development partners.

Syrah makes cuts following weaker yuan

On 11 September 2019, *The Australian Financial Review* reported that ASX-listed graphite miner **Syrah Resources Limite**d will produce only half of its forecast total production for 2019, on the back of a 10 year low Yuan against the US dollar. Syrah will continue to produce the minimum tonnes of graphite needed to satisfy sales contracts and maintain its processing plant in good working order.

Analysts from the Macquarie Group reportedly have projected that the weaker Yuan will likely increase demand for Chinese exports, however Australia's currency is also depreciating against the US dollar so as to offset weaker Chinese buying power. The weakening Yuan could also affect prices of other natural resources where competition exists from Chinese miners, including alumina, coal and zinc.

REGULATORY UPDATES

In our September edition of the Mining Sector Update, we discussed the Federal Government's request for the Productivity Commission to undertake a 12-month review of the resources sector, specifically to explore material impacts on business investment in the resource sector and to highlight best practice regulation. This article can be found here.

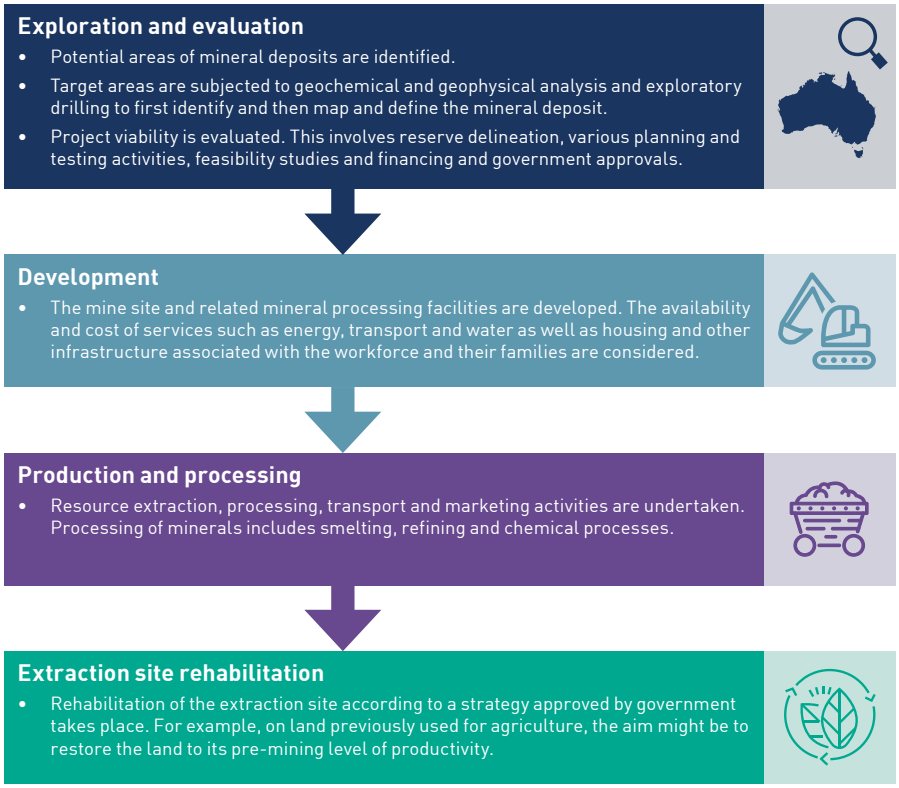
Following on from this announcement, the Productivity Commission has released its Issues Paper that identifies the relevant issues and questions, and assists individuals and organisations in preparing submissions.

When preparing submissions, participants should consider the following:

The scope of the Productivity Commission

1. Based on the definition provided by the mining industry, and the Australian and New Zealand Standard Industrial Classification, 'resources' includes minerals, oil and gas (both conventional and unconventional), coal, iron ore, other metal ores including gold, silver, bauxite, uranium and mineral sands, and construction material mining.
2. 'Regulations' has been interpreted broadly, and includes (for the purposes of determining regulatory burdens on the resources sector) formal legal instruments (statutes, subordinate legislation, ministerial orders), informal instruments (standards, guidelines, codes of conduct) and government policies.
3. 'Resource projects' will focus on regulations relevant to the four stages in the life cycle of resource projects. These stages are exploration and evaluation; development; production and processing; and site rehabilitation.

Figure: Four stages of the projects life cycle



(Source: Australian Government Productivity Commission, Resources Sector Regulation – Issues Paper (Webpage, September 2019) ‹https://www.pc.gov.au/inquiries/current/resources/issues/resources-issues.pdf›).

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The Productivity Commission has released its Issues Paper that identifies the relevant issues and questions

REGULATORY UPDATES

The Commission has been tasked with identifying best practice regulatory approaches

The Commission will also focus on four stages within the 'approvals process'. The four stages are application (information and guidance provided on the policy and regulatory framework); assessment (identifying and assessing the nature and significance of the risks and impacts of the project); approval (whether or not to approve the project and if any conditions will apply); and monitoring of compliance (the proponent's compliance with the conditions over the life of the project).

Identifying best practice

The Commission has been tasked with identifying best practice regulatory approaches and the course of action that imposes the least burden on business. In consideration of the COAG principles of best practice regulation, three criteria have been identified to determine effectiveness:

1 regulatory design;

2 regulator governance; and

3 regulator conduct.

Assessment criteria for best practice regulation

Regulatory design	*Regulator governance*	*Regulator conduct*
• Consultation during regulation making is sufficient • Objectives of regulation are clearly defined and consistent across different regulations • Regulation is not overly complex or excessively prescriptive • Regulation is regularly reviewed	• Roles, responsibilities and requirements of different regulatory agencies are clear and duplication is avoided • Decision makers are accountable • Regulators are independent • Regulators are adequately resourced and have necessary capabilities	• Regulators' processes are clear, predictable, open and transparent • Regulatory outcomes are consistent with objectives • Administrative costs are no higher than necessary

(Source: Australian Government Productivity Commission, Resources Sector Regulation – Issues Paper (Webpage, September 2019) ‹https://www.pc.gov.au/inquiries/current/resources/issues/resources-issues.pdf›; Council of Australian Governments (2007); Organisation for Economic Co-operation and Development (2014); Productivity Commission) (2009, 2013a, 2013b)).

Participants should provide information, feedback and examples (including case studies) of best practice approaches and address any problematic approaches in relation to:

- how a jurisdiction's regulation design impacts the resources sector (including the consultation process, whether objectives are articulated and defined clearly, and if there are any aspects to regulation that are overly complex and prescriptive);
- the regulator governance in Australia and overseas (including whether duplication occurs across numerous regulatory agencies, accountability of decision makers, independence of regulators and adequate resourcing and capabilities); and

- the regulator's conduct in Australia and overseas (including whether processes are clear, whether outcomes are consistent and any unnecessary costs and delays that are capable of being minimised).

Importantly, for all three criteria, participants should identify instances and consequences of poor regulatory design, governance and conduct and any possible remedies that can be applied.

Preparing a submission

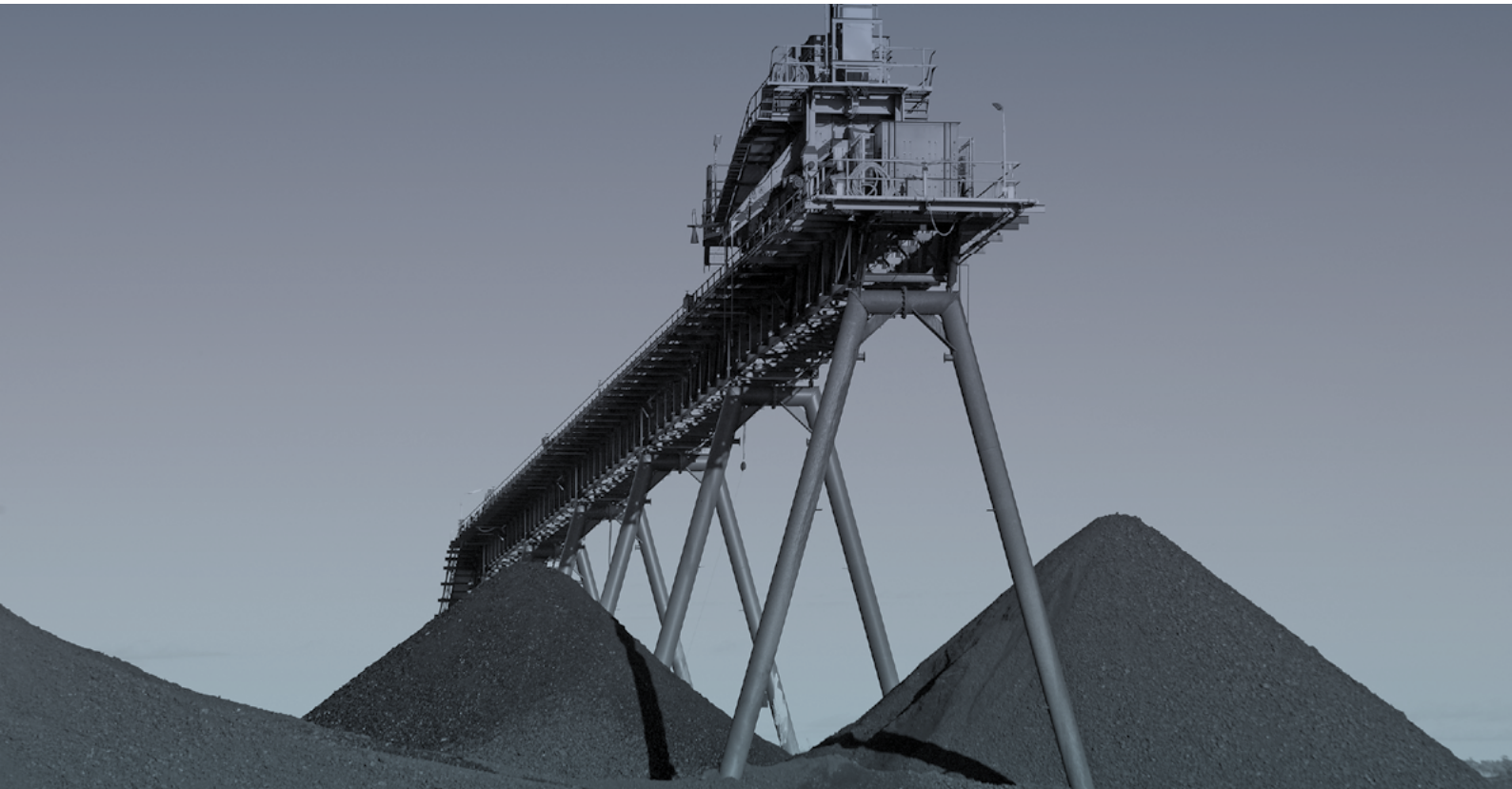
Submissions may range from a short letter with an outline of views on a particular topic, up to a substantial document that covers a wide range of issues. Participants are encouraged to provide evidence (relevant data, documentation and specific examples) to support their views.

Key steps in the Commission's study process

(Source: Australian Government Productivity Commission, Resources Sector Regulation – Issues Paper (Webpage, September 2019) ‹https://www.pc.gov.au/inquiries/current/resources/issues/resources-issues.pdf›).

Further information on the Issues Paper can be found here.

We encourage you to make a submission by **31 October 2019** here. Following the public release of the draft report in March 2020, there will be a further opportunity to make a submission.



INSIGHTS

NSW INDEPENDENT PLANNING COMMISSION REFUSES DEVELOPMENT CONSENT FOR BYLONG VALLEY COAL MINE

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A recent decision by the NSW Independent Planning Commission (IPC), in which it refused development consent for the Bylong Valley Coal Mine (Project), highlights the challenges involved with having new mines approved in areas of particular scenic, cultural and heritage significance.

The refusal came on 18 September 2019, despite the NSW Department of Planning, Industry and Environment (**DPIE**) recommending approval and the proponent having revised its mine plan to address concerns raised in a Review Report prepared by the IPC's predecessor, the Planning Assessment Commission (**PAC**).

The IPC cited long-lasting environmental, agricultural and heritage impacts as the main reasons for refusal. In a statement that referred extensively to the Land and Environment Court's judgment in *Gloucester Resources Ltd v Minister for Planning* [2019] NSWLEC 7 (**Rocky Hill**), the IPC stated the proponent had not done enough to minimise greenhouse gas (**GHG**) emissions associated with the Project.

The Project

The Korea Electric Power Corporation (**KEPCO**) sought approval for an open cut and underground coal mine producing 124 million tonnes of run-of-mine coal over 25 years for the thermal coal export market.

The mine was to be located at a greenfield site in the Bylong Valley, approximately 55 km north east of Mudgee, New South Wales. There were no other coal mines within 20 km of the proposal site, and the Valley has a long history of agricultural land use. The Project site included land mapped as Biophysical Strategic Agricultural Land (**BSAL**) and equine Critical Industry Cluster (**CIC**) land under the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* (**Mining SEPP**).

Estimates of employment were up to 645 people during peak construction and up to 450 during peak operation. The Project was expected to generate A$290 million in royalties for New South Wales.

Background of the case

KEPCO submitted its request for Director-General's Requirements in October 2014, with a detailed Environmental Impact Statement (**EIS**) submitted in September 2015.

Following public exhibition of the EIS, the PAC was requested by the Minister for Planning to undertake a Project review. The PAC published its Review Report in July 2017. Both the PAC Review Report and a subsequent letter from the DPIE in May 2018 raised a number of concerns with the Project – they considered that revisions were required, particularly with respect to impacts to the heritage values of the Tarwyn Park property.

In response, KEPCO submitted a Revised Mine Plan to the DPIE in 2018. This reduced the surface disturbance area by approximately 100 ha, including by reducing impacts on Tarwyn Park. It also proposed reducing both direct disturbance on 113 ha of native vegetation, and direct disturbance on 22.7 ha of BSAL and 112.8 ha of equine CIC.

The IPC cited long-lasting environmental, agricultural and heritage impacts as the main reasons for refusal

In October 2018, the DPIE recommended approval of the Project subject to 'stringent conditions', in line with the Revised Mine Plan. The DPIE's final assessment report concluded:

"Based on its assessment, the Department believes its revised recommended conditions of consent provide a comprehensive, strict and precautionary approach to ensuring the project can comply with relevant performance measures and standards, and that the predicted residual impacts can be effectively minimised, mitigated and / or compensated. Consequently the Department considers that the benefits of the project outweigh the costs, and that the project is approvable subject to stringent conditions."

Reasons for refusal

The IPC refused development consent for the Project for a number of reasons, including:

- incompatibility with land use objectives;
- unacceptable groundwater impacts;
- impacts to BSAL;
- long-term impacts on aesthetic, scenic, heritage and natural values of the current landscape;
- unacceptable indirect impacts on the heritage values of the Tarwyn Park property and the broader landscape values of the Bylong Valley;
- a lack of evidence regarding Aboriginal heritage impacts;
- a failure to minimise scope 1, 2 and 3 GHG emissions to the 'greatest extent practicable', having regard to clause 14(1)(c) of the Mining SEPP;
- a failure to propose any measures to offset the impacts of GHG emissions;
- the fact that, when considered cumulatively along with the climate change impacts due to GHG emissions, the environmental, social and economic impacts of the Project justified refusal;
- the fact that the Project would result in the inequitable distribution of costs and benefits over time (in that the economic benefits would accrue to current generations, and the environmental, agricultural and heritage costs would be borne by future generations);
- a 'reasonable level of uncertainty' in the proponent's estimation of economic benefits; and
- inconsistency with *Environmental Planning and Assessment Act 1979* (NSW) objectives relating to social and economic welfare of the community, ecologically sustainable development (**ESD**) and heritage management.

The IPC concluded that the Project would not be in the public interest as it was contrary to the principles of ESD, particularly the principle of intergenerational equity.[1]

The IPC concluded that the Project would not be in the public interest as it was contrary to the principles of ESD

1 The principle that 'the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations' as defined in the Protection of the *Environment Administration Act 1991* (NSW).

INSIGHTS

IPC's assessment of the impacts of GHG emissions was heavily influenced by the reasoning of Preston CJ in Rocky Hill

Influence of Rocky Hill

It appears that the IPC's assessment of the impacts of GHG emissions was heavily influenced by the reasoning of Preston CJ in Rocky Hill, as the judgment was quoted extensively throughout the IPC's statement of reasons.

Although the IPC did not make a quantitative comparison between the Project's proposed emissions and those of the Rocky Hill Mine, it is interesting to note that the Project's estimated cumulative Scope 1, 2 and 3 emissions (200,808,700 tonnes of CO2-e over the life of the mine), were approximately 5.3 times that of Rocky Hill (estimated at 38,091,747 tonnes of CO2-e).

In its statement of reasons, the IPC acknowledged that the Project's contribution to Australian and global GHG emissions would be 'very small' and have 'limited impact'. It was also acknowledged that there was:

- no agreed mechanism for reaching the Paris Agreement and NSW Climate Change Policy Framework targets; and
- no statutory or other prohibition on new mines.

However, the IPC disagreed with statements made by DPIE, to the effect that the NSW Climate Change Policy Framework applied only to government projects. The IPC also noted that NSW is currently in a transition away from the use of fossil fuels as an energy source.

Applying the reasoning of Preston CJ in Rocky Hill, the IPC considered the cumulative environmental impacts of the Project were to be considered in weighing the acceptability of GHG emissions associated with the mine, with preference to be given to projects of lower social, environmental and economic impacts.

Mitigation measures were proposed to reduce Scope 1 and 2 emissions but not Scope 3 emissions. The IPC considered this was not conducive to the imposition of conditions ensuring that GHG emissions were minimised to the 'greatest extent practicable', as required under clause 14(1)(c) of the Mining SEPP.

As no GHG offset measures were proposed as part of the Project, the IPC did not have regard to offsets generally, in line with Preston CJ's approach in Rocky Hill.

The IPC expressly rejected the DPIE's statements regarding market substitution, favouring Preston CJ's reasoning. Concluding that it could not be satisfied that market substitution would occur if the Project was not approved, the IPC said it did not have any evidence of this. The fact that other projects might be approved if the Project was refused did not, in any event, justify approval on its own.

Finally, the IPC concluded that although small, there was a contribution to global GHG emissions that would need to be factored into the overall environmental assessment. This was cited as one of the reasons for refusal of the Project.

Implications

Like Rocky Hill (as a merit appeal in Class 1 of the Land and Environment Court's jurisdiction), the IPC's decision will not set a precedent for other projects – at least not in a strict legal sense.

The Project is the second in which GHG emissions have been cited as a factor in the rejection by the IPC of a proposed coal mining project in NSW. The IPC appears to have whole-heartedly adopted the approach taken by Preston CJ in Rocky Hill. In particular, the IPC has asserted its independence in not just imposing additional conditions,[2] but in this case, by refusing consent for the Project, contrary to the DPIE's recommendation.

Absent reform of major project decision-making (and both the Deputy Premier John Barilaro MP and the Minister for Planning and Public Spaces Rob Stokes MP have hinted at this), the IPC is likely to continue down this track. This brings with it further uncertainty for proponents of new energy and resources projects.

To reiterate suggestions made in earlier articles, it is important that proponents fulsomely address Scope 3 emissions in their environmental assessments, including by proposing measures for Scope 3 emissions to be mitigated and/or offset. The IPC's decision also suggests proponents relying on the market substitution argument need to provide compelling evidence of this proposition.

This is especially the case where the proposed project has other adverse environmental, social and economic impacts. Both the Rocky Hill decision and the IPC's refusal of the Project highlight the challenges involved with having new mines approved in areas of particular scenic, cultural and heritage significance.

This brings with it further uncertainty for proponents of new energy and resources projects

2 On 28 August 2019, the IPC approved the United Wambo Open Cut Coal Mine subject to conditions requiring the applicant to use all reasonable and feasible measures to ensure that extracted coal is only exported to countries that are parties to the Paris Agreement or have equivalent policies for reducing GHG emissions. These 'novel' conditions were imposed notwithstanding a submission made by the Planning Secretary in which the Planning Secretary stated (amongst other things) that 'it is not this State Government's policy that greenhouse gas policies, or planning conditions, should seek to regulate, directly or indirectly, matters of international trade.'

COURT LIMITS AUSTRALIAN TAXATION OFFICE'S POWER TO RECONSTRUCT RELATED PARTY TRANSACTIONS IN TRANSFER PRICING DISPUTES

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In recent years, the Australian Taxation Office (**ATO**) has identified transfer pricing as a major focus of its compliance and review processes. In a speech delivered on 14 August 2019, Second Commissioner of Taxation Jeremy Hirschhorn reaffirmed that 'transfer pricing (and avoiding transfer mispricing) is a key focus of the ATO given its criticality to the Australian taxation system.'[3]

Since the ATO's win in the landmark 2017 Chevron case (*Chevron Australia Holdings Pty Ltd v Commissioner of Taxation* (2017) 251 FCR 40; [2017] FCAFC 62), the ATO has asserted that it has a broad power to reconstruct and re-price related party transactions under Australia's transfer pricing rules.

In that case, the Full Federal Court rejected the taxpayer's argument that the ATO was limited to working out an arm's length interest rate on a Chevron intra-group loan by reference to the actual terms of the related party loan entered into by the parties, but could price it by adding terms as to security and repayment that arm's length parties would be expected to adopt. The case remains the leading authority on Australian transfer pricing law, but its application to other cases is not straightforward given the specific facts of the case.

On 3 September 2019, in the first major transfer pricing decision since the Chevron case, *Glencore Investments Pty Ltd v CoT* [2019] FCA 1432 (Davies J) (**Glencore Case**), the Federal Court indicated the Commissioner's reconstruction power is much more limited than he may have thought.

Background

The main issue in the Glencore Case was the pricing of an offtake agreement entered into by an Australian subsidiary to sell copper concentrate produced from its Australian mine to its Swiss parent company, Glencore.

The ATO took issue with Glencore changing from a 'market-related' contract to a form of agreement known as a 'price sharing agreement'.

Glencore was able to show that this form of contract was used in copper markets by unrelated parties. Nonetheless the ATO argued that an independent miner in the position of the Australian subsidiary would not have entered this kind of contract with an unrelated party.

The price sharing agreement included several features that the ATO argued would not have been agreed to by an independent miner, which the ATO said led to the Australian entity being underpaid almost $241m for its copper concentrate over three years. The ATO assessed it to additional tax, interest and penalties exceeding $92m.

The ATO in effect sought to displace the actual 'price sharing' agreement entered into between the parties with a hypothetical, 'reconstructed' 'market-related' transaction that it argued would have been entered into by independent entities dealing with each other at arm's length.

The judge disagreed with the ATO, delivering a decision that has brought into question the ATO's approach in addressing other cases under its review, audit or subject to objections by taxpayers. The ATO is now considering whether to appeal.

1 Jeremy Hirschhorn, *Transfer pricing a key focus for ATO* (Webpage, 14 August 2019) ‹https://www.ato.gov.au/Media-centre/Speeches/Other/Transfer-pricing-a-key-focus-for-ATO/›.

The arm's length principle and reconstruction

The arm's length principle in the OECD Transfer Pricing Guidelines uses the behaviour of independent parties as a guide or benchmark to determine the pricing of goods and services in international related party dealings. The ATO interprets the principle to mean that it involves comparing what a business has done and what an independent party would have done in the same or similar circumstances, and that this permits reconstruction of the terms of transactions where appropriate.

In the Glencore Case, Davies J cautioned that the interpretation of Australia's domestic transfer pricing rules should be consistent with the arm's length principle outlined in OECD Transfer Pricing Guidelines. The judge referred to the OECD Transfer Pricing Guidelines, which limit a 'reconstruction' of the transaction to 'exceptional circumstances' such as where the form of the arrangement differs from the substance, or where the actual arrangement differs from those that would have been adopted by independent enterprises. The judge held that neither of these exceptions were applicable to this case.

Glencore argued that its agreements were consistent with copper concentrate market pricing structures and it tendered agreements between unrelated parties for the sale of copper concentrate with terms comparable to those adopted by Glencore. The judge held that this evidence had probative value and that, in this case, there was nothing to suggest that the pricing outcomes were inconsistent with outcomes under arm's length dealings between independent parties. The judge appeared to be persuaded by evidence that the price sharing arrangement was consistent with industry practice as a means of sharing and minimising risk at a time when market prices were unpredictable and volatile.

The key finding of the decision is that the ATO did not have the general power to assess the taxpayer based on a hypothetical agreement between 'abstract independent parties' that was different from the actual transaction entered into by the parties – the so-called power of 'reconstruction' was not available or appropriate on the facts.

In arriving at this conclusion, the judge made some important observations:

- It is sufficient if the actual price is within an arm's length range for the taxpayer to discharge its burden of proof – the pricing does not have to be perfect.
- Australia's transfer pricing rules do not require an inquiry into the commercial prudence of the actual related party transaction entered into by the parties.
- Hindsight cannot be used to second-guess the commercial judgment of the parties at the time. The price sharing agreement was a reasonable contract when entered. The fact that in retrospect it could be seen that the Australian entity may have made more profit if it had not moved to a price sharing agreement was irrelevant.

Broader implications for the mining and resources industry

More broadly, the decision brings into question the ATO's approach of relying heavily on a reconstruction approach in existing review, audit and objection cases before the ATO. On the facts of this case, at least, the circumstances did not satisfy the OECD Guidelines threshold for the ATO to adopt such an approach. Miners with offtake agreements that are consistent with industry practice, and which are priced within an arm's length range, may take some comfort from this case. However, miners with cross-border related party transactions should continue to comply with best practice transfer pricing documentation whilst all avenues of judicial appeal in this case have not yet been exhausted.

The OECD Transfer Pricing Guidelines uses the behaviour of independent parties as a guide or benchmark

TRADITIONAL CUSTODIAN CLAIMS MINISTER ERRED IN REFUSING TO PROTECT 'SIGNIFICANT ABORIGINAL AREA'

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One of a number of recent claims highlighting the challenges involved with having new mines approved in areas of particular scenic, cultural and heritage significance

Introduction

Veronica Joyce (Dolly) Talbott, a member of the Gomeroi Traditional Custodians (**GTC**) in New South Wales, has commenced judicial review proceedings in the Federal Court of Australia, challenging the validity of the decision by the Commonwealth Minister for the Environment (**Minister**) to refuse to grant a declaration under the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) (**ATSIHP Act**). That application sought to protect several areas of significant cultural heritage located within the footprint of the Shenhua Watermark coal mine.

While the matter is still to be heard, lawyers for Ms Talbott claim this will be an important test case which they say will interrogate:

1 the matters which the Minister is lawfully permitted to consider when deciding whether to grant a declaration; and

2 the Constitutional basis of the ATSIHP Act and the limit that imposes on the Minister's discretion.[4]

The proceeding is one of a number of recent claims highlighting the challenges involved with having new mines approved in areas of particular scenic, cultural and heritage significance. See, for example, our earlier article in this publication on the recent decision of the NSW Independent Planning Commission to refuse development consent for the Bylong Valley Coal Mine.

Background

Shenhua Watermark Mine

The Shenhua Watermark mine is proposed to be located in the Liverpool Plains in north-western New South Wales, approximately 25 km south-east of the township of Gunnedah and 3 km to the west of the village of Breeza. The project, proposed by Chinese mining giant Shenhua Group, is to consist of an open cut coal mine producing up to 10 million tonnes per annum for a 30-year period.

While the project has received a number of planning and environment approvals at both State and Federal level, it has been met with significant community opposition from environmentalists, agriculturalists and Indigenous groups.

In 2015, the GTC lodged an application under section 10 of the ATSIHP Act for the Minister to make a declaration for the protection of several areas of cultural heritage significance. Those areas are located within the footprint of the proposed Shenhua Watermark mine. GTC claims that the construction of the coal mine will destroy cultural heritage areas that are important to the cultural landscape.

Overview of the ATSIHP Act

The stated purposes of the ATSIHP Act are the 'preservation and protection from injury or desecration of areas… that are of particular significance to Aboriginals in accordance with Aboriginal tradition'.[5]

4 'Environment Minister being sued by traditional owners for failing to protect Aboriginal sacred sites', ABC Radio News and Current Affairs (ABC, 27 August 2019) https://www.abc.net.au/radio/programs/am/environment-minister-being-sued-by-traditional-owners/11451774.

As set out in the 1984 second reading speech, the ATSIHP Act was meant to provide a last resort for Indigenous Australians to seek protection of their traditional areas and objects, if there is no effective protection of the areas or objects under the laws of their state or territory.

While that is not expressly stated in the Act itself, section 7 provides that the ATSIHP Act is not intended to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with the ATSIHP Act. Further, section 13 requires that prior to making a declaration in relation to an area located in a State or Territory, the Minister must consult the State/Territory government to determine whether there is effective protection under State/Territory law.

Section 10 declarations

Upon the receipt of an application satisfying the requirements of section 10(1)(a) of the ATSIHP Act, the Minister may issue a declaration where he or she is satisfied that the area:

(i) is a 'significant Aboriginal area'; and

(ii) is 'under threat of injury or desecration'.

For the purpose of the Act:

- to cause injury or desecration, an activity must be 'inconsistent with the relevant Aboriginal tradition' or must adversely affect the traditional use or significance of an area or object;
- to be a threat, the activity must be occurring or be likely to occur; and
- a 'significant Aboriginal area' means an 'area of particular significance to Aboriginals in accordance with Aboriginal tradition'.[6]

While the Minister's satisfaction is a necessary pre-condition to the exercise of the power under section 10 to make a declaration,[7] the scheme of the Act requires a consideration of other matters as well.

In particular, the power is also conditional upon a consideration of the matters referred to in sections 10(1)(c) and (d) which require, before a declaration may be made, that the Minister:

- has received a report under subsection (4) in relation to the area from a person nominated by him/her and has considered the report and any representations attached to the report; and
- has considered any other matters he/she thinks relevant.

Subsection 10(4) requires that report to deal with a range of matters, including, amongst others:

- 'the particular significance of the area to Aboriginals';
- 'the nature and extent of the threat of injury to, or desecration of, the area'; and
- 'the effects the making of a declaration may have on the proprietary or pecuniary interests' of other persons.

Where the Minister decides that a declaration is to be made, he or she has broad power to set out provisions for and in relation to the protection and preservation of the area from injury or desecration. It is a criminal offence to contravene the provisions of a declaration.[8]

The ATSIHP Act was meant to provide a last resort for Indigenous Australians to seek protection of their traditional areas and objects

5 ATSHIP Act s 4.

6 ATSIHP Act s 3.

7 *Norvill v Chapman* (1995) 133 ALR 226 at 263.

8 ATSIHP Act s 6A.

The challenge is understood to be on the basis that the Minister made an error of law

The Minister's decision

In July 2019, the Minister issued her decision in respect of the GTC's application, ultimately refusing to grant the declaration.

Media reports on the Minister's decision (which has not been made public) and her reasons for refusal, suggest she was satisfied that the impugned area is a 'significant Aboriginal area' for the purpose of the ATSIHP Act, and is under threat of injury or desecration. Importantly, the Minister also agreed that the construction of the coal mine will destroy or desecrate the cultural heritage areas, and found that current NSW laws were inadequate to protect the area.[9]

However, despite these findings, the Minister ultimately found the expected social and economic benefits to the local community from the coal mine outweighed the cultural heritage interests being considered.

Ms Talbott subsequently made an application to the Federal Court of Australia, seeking judicial review of the Minister's decision.

Relevant considerations under ATSIHP Act

The challenge is understood to be on the basis that the Minister made an error of law in her application of the ATSIHP Act and will examine the limits of the Minister's discretion in making her decision to refuse the declaration application.

While the Minister is entitled to take into account the effect the making of a declaration may have on the 'proprietary and pecuniary interests of other persons' (see section 10(4)(e)) and 'any other relevant considerations' (see section 10(1)(d)), what will be tested is whether this allows the Minister to consider the perceived social and economic benefits to the local community from the Shenhua Watermark mine.

Ms Talbott says the anticipated social and economic benefits to the local community are not a 'proprietary or pecuniary interests' of any person for the purpose of section 10(4)(e). Further, it is argued that because of the specific requirement for the Minister to take into account proprietary or pecuniary interests of persons under section 10(4)(e), it is implied that no more general account of expected social or economic benefits to a local community may be taken into account under section 10(1)(d).

9 EDO 'Veronica Dolly Talbott as a member of Gomeroi Traditional Custodians v Minister for the Environment' 27 Aug 2019 (https://www.edonsw.org.au/gomeroi_shenhua).

It is unclear whether the Court will accept this limitation on the scope of the Minister's discretion under section 10(1)(d), particularly in light of its earlier judgment in Anderson v Minister for the Environment, Heritage and the Arts [2010] FCA 57 describing the Minister's discretion as broad and perhaps unfettered.[10]

Constitutional basis of ATSIHP Act

The Notice of a Constitutional Matter filed in the Federal Court shows that Ms Talbott will interrogate the Constitutional basis of the ATSIHP Act and the limit that imposes on the Minister's discretion in deciding an application for a declaration.

The High Court of Australia has held that the ATSIHP Act was validly enacted by the Commonwealth pursuant to section 51(xxvi) of the Constitution, also known as the 'race power'.[11]

Under section 51(xxvi) the Commonwealth has power to make laws with respect to 'the people of any race for whom it is deemed necessary to make special laws'.

Ms Talbott contends that it is not possible to construct section 10(1)(d) of the ATSIHP Act (which allows the Minister to take into account any matter he or she thinks relevant) to authorise the Minister, in considering whether to make or refuse a declaration under section 10(1), to take into consideration perceived social and economic benefits to the local community of a project. This is because, as Ms Talbott claims, that 'local community' are not 'the people of any race for whom it is deemed necessary to make special laws'.

Current status of the proceeding

This matter has yet to be heard by the Federal Court of Australia.

Ms Talbott will interrogate the Constitutional basis of the ATSIHP Act

10 *Anderson v Minister for the Environment, Heritage and the Arts* [2010] FCA 57 at [20].

11 See, for example, *Kartinyeri v Commonwealth* [1998] HCA 22.

NEW HOPE FOR NEW ACLAND?

In September, the Queensland Court of Appeal set aside the decisions of the Land Court and the Supreme Court with respect to Stage 3 of the New Acland coal mine in the Darling Downs.[12] We take a look at this decision and what it means for New Hope, the owner of New Acland.

Background to the case

In 2017, the Land Court recommended refusal of the Stage 3 expansion to the New Acland coal mine. The Supreme Court overturned that decision, requiring the Land Court's recommendation be re-made, but held that the parties were bound by the findings and conclusions of fact at first instance. You can read our summaries of the Land Court's decision here and the Supreme Court's decision here.

The Court of Appeal's decision

The Court of Appeal held that the Land Court's decision was invalid on the basis of apprehended bias. Once a court's decision is affected by an apprehension of bias, the decision cannot be upheld, regardless of whether the decision is legally correct.[13]

The Court of Appeal detailed a number of matters which suggested that the Member of the Land Court had acted inappropriately towards the mine operator and project proponent. The Court of Appeal held that the Land Court Member had acted in a way that would cause an objective observer to reasonably apprehend that the Member might not have brought an impartial and dis-passionate mind in making his recommendation to the Minister.[14] This unfairness towards New Acland meant that the Land Court's decision could not be upheld, regardless of whether the Member's recommendation was appropriate or not.

As a consequence of this finding, the Court of Appeal also ruled that the Supreme Court's decision ought to be set aside.

We note that the Court of Appeal did not accept the environmental group's argument that the Supreme Court had erred with respect to its findings about groundwater, and upheld the Supreme Court's ruling in this respect. Nevertheless, this is of minor consequence in light of the Court's setting aside of the first instance decision.

What happens next?

Assuming no successful appeal is made to the High Court of Australia, the decisions of the Land Court must be made again, and New Acland faces the prospect of another lengthy hearing in that Court (as well as any further appeals).

Unlike the orders made by the Supreme Court, the Court of Appeal did not order that the Land Court's findings of fact remain. Therefore, the Land Court will likely be required to re-hear all of the evidence and make fresh conclusions of fact.

The first hearing spanned over a year, so it is unlikely that this matter will be resolved any time soon.

This case highlights the increasingly lengthy and complex nature of mining approvals and litigation, as well as the risk proponents face where their projects face strong opposition.

The Court of Appeal held that the Land Court's decision was invalid on the basis of apprehended bias

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12 *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd & Ors* [2019] QCA 184.

13 At [61], citing Kirby and Crennan JJ in *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577; [2006] HCA 55, and *Antoun v The Queen* (2006) 80 ALJR 497; [2006] HCA 2.

14 At [103].

The first hearing spanned over a year, so it is unlikely that this matter will be resolved any time soon

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