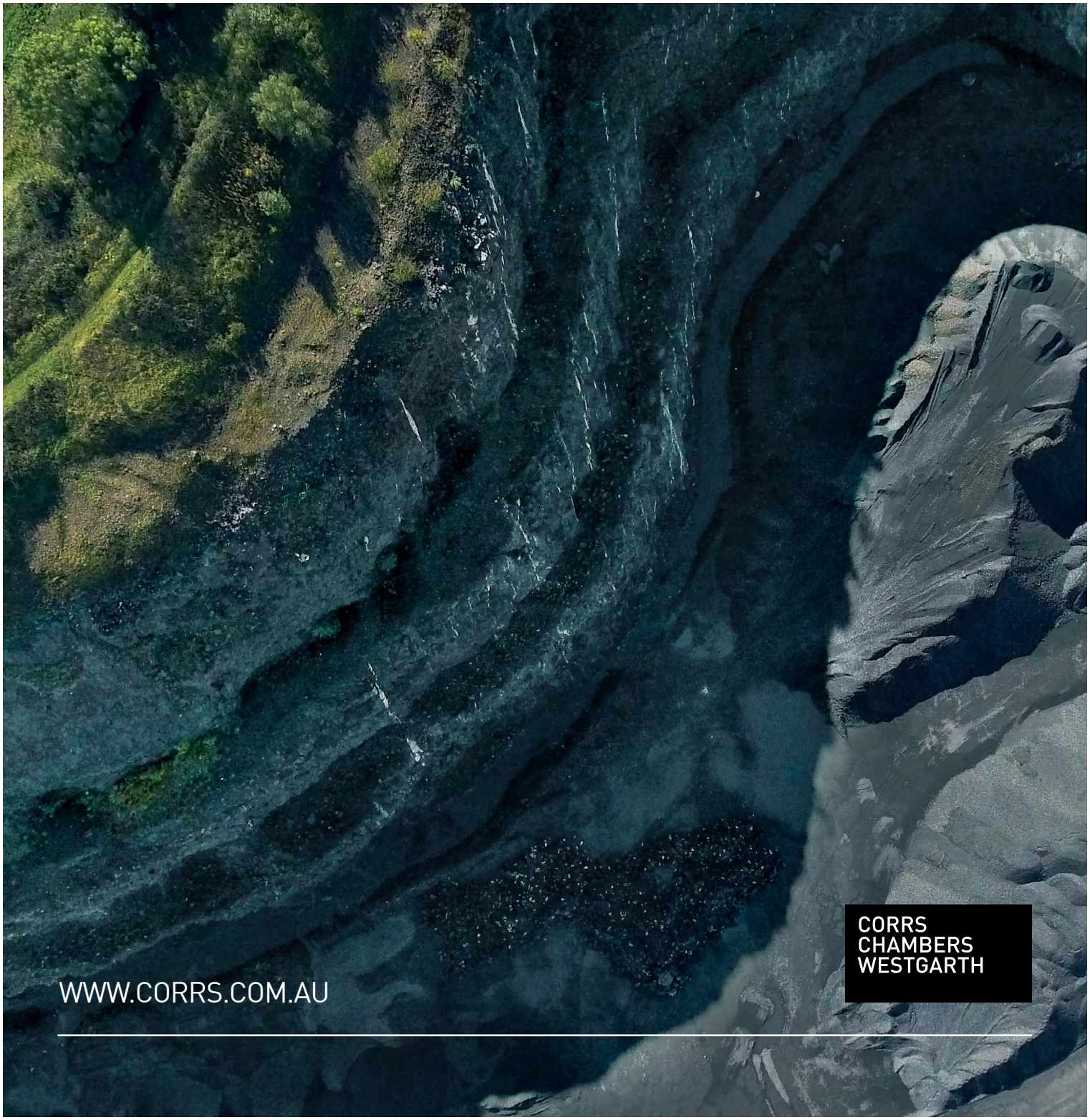
MINING SECTOR **UPDATE**

AUSTRALIA AND PAPUA NEW GUINEA

SPECIAL EDITION THE ROCKY HILL DECISION **MAY 2019**



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IN THIS EDITION

In this special edition of the Mining Sector Update, we have three separate articles which take an in-depth look at the Rocky Hill Coal Mine decision in New South Wales.

The first article, reproduced from our last edition of the Mining Sector Update, gives a summary of the NSW Land and Environment Court's decision to refuse development consent for the Rocky Hill Coal Mine. The second article examines the implications of the Rocky Hill decision, and gives some practical tips for project developers in response to the decision. The third article considers the impacts that the Rocky Hill decision may have in states other than NSW and in relation to resources other than coal.

NSW LAND AND ENVIRONMENT COURT REFUSES DEVELOPMENT APPROVAL FOR ROCKY HILL COAL MINE PROJECT ON CLIMATE CHANGE GROUNDS

The NSW Land and Environment Court (**Court**) has refused development consent for the Rocky Hill Coal Project in the Gloucester Valley, citing the mine's likely contribution to climate change as a key reason.

The decision will have wide-reaching consequences and will likely affect the viability of coal and other fossil fuel-dependent industries in Australia. The growth in international jurisprudence directly linking fossil fuel developments with climate change may also lead banks and others who would traditionally invest in these industries to consider alternatives.

Background

Gloucester Resources Limited (**GRL**) sought development consent for a new open cut coal mine approximately 5 km south of the Gloucester town centre in New South Wales. Extraction of 2 Mtpa of coal was proposed for a period of 21 years (**Project**).

The NSW Department of Planning and Environment referred the Project to the Planning Assessment Commission (**PAC**) (now the Independent Planning Commission) for determination, after receiving 2,570 submissions (2,308 objections).

On 14 December 2017 the PAC refused consent for the Project, citing:

- incompatibility with the underlying zoning of the land as primary production and environmental management zones, despite being a permissible land use under the State Environmental *Planning Policy (Mining Petroleum Production and Extractive Industries) 2007* (**Mining SEPP**). Also, the potential land use conflicts with existing established uses, including rural-residential and tourism;
- that the Project would likely have significant residual visual impacts and would not be sympathetic to the Gloucester Valley's character; and
- that the Project was not in the public interest, as any economic and social benefits were outweighed by the reduction in the residents' quality of life due to visual, noise and air quality impacts.

The PAC did not cite climate change impacts as a reason for consent being refused.

Court appeal

GRL appealed to the Court on 19 December 2017.

The proceedings were later joined by a local community action group, Groundswell Gloucester Inc (**Groundswell**). In joining the proceedings, Groundswell sought to bring additional arguments centred around the climate change impacts of the Project and its incompatibility with Australia's commitments under the United Nations Framework Convention on Climate Change (**UNFCCC**) and the Paris Agreement.

Summary of the Court's decision

The Court's decision in *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 was handed down on 8 February 2019. His Honour Chief Justice Preston dismissed GRL's appeal and upheld the PAC's decision to refuse consent to the mine.

The Court's reasons for refusal included that:

- the mine would have significant adverse impacts on the visual amenity and rural and scenic character of the valley, and social impacts on the community;
- the mine would have significant impacts on the existing, approved and likely preferred uses of land in the vicinity of the mine;
- the costs of the mine, exploiting the coal resource at this location in a scenic valley close to town, would exceed its economic benefits; and
- **construction and operation of the mine, and transportation and combustion of the coal from the mine, would result in the emission of greenhouse gases (GHGs), which would contribute to climate change and would not assist in achieving agreed emissions targets.**

Ultimately his Honour held:

> *'In short, an open cut coal mine in this part of the Gloucester valley would be in the wrong place at the wrong time. Wrong place because an open cut coal mine in this scenic and cultural landscape, proximate to many people's homes and farms, will cause significant planning, amenity, visual and social impacts. Wrong time because the GHG emissions of the coal mine and its coal product will increase global total concentrations of GHGs at a time when what is now urgently needed, in order to meet generally agreed climate targets, is a rapid and deep decrease in GHG emissions. These dire consequences should be avoided. The Project should be refused.'*

Incompatibility with other land uses

The primary arguments against approval of the Project centred around clause 12 of the Mining SEPP. This required the consent authority to consider the compatibility of the proposed mine with other land uses in the vicinity.

The Court had regard to existing uses, approved uses and likely preferred uses in the vicinity of the Project in determining that:

- because of its visual, amenity and social impacts, the Project would be incompatible with the rural character of the land and the residential and rural-residential, agricultural and tourism uses in its vicinity;
- visual impacts would not be ameliorated by the amenity barriers proposed by GRL or the rehabilitated post-mining landforms;
- although the Project was compliant with relevant development standards for noise and air quality, residual noise and air quality impacts on residents would have adverse social impacts, including perceived impacts on health and wellbeing;

the mine would have significant adverse impacts on the visual amenity and rural and scenic character of the valley, and social impacts on the community

The Court found that the Project's GHG emissions would be sizable over the life of the mine.

- the Project was likely to have major negative social impacts including impacts on the composition, cohesion and character of the community and local people's sense of place, adverse impacts to the culture and Country of Aboriginal people, and issues of distributive inequity which would not be adequately addressed by way of the mitigation measures proposed by GRL; and
- the alleged public benefits of the Project (suggested by GRL to include an economic benefit to NSW of $224.5 million over the life of the mine) were substantially over-stated and did not outweigh either the public costs of the proposed mine or the public benefits of the existing, approved and likely preferred uses in the vicinity of the Project, if those uses were left unaffected by the Project. Significantly, while the benefits of the Project would be present only for the life of the Project, the negative impacts would endure.

Climate change

Groundswell argued that the Project should be refused because the GHG emissions from the Project, both direct and indirect, would be inconsistent with Australia's commitments under the UNFCCC and the Paris Agreement to keep global temperature increases to below 1.5º to 2ºC above pre-industrial levels, and would have a cumulative impact on climate change in the long term.

GRL argued that:

- although it did not contest the scientific evidence behind climate change, consent for the Project did not need to be refused to meet Australia's commitments. There are no governing structures under the UNFCCC and the Paris Agreement, or under State or Federal laws, that predetermine how GHG emissions reductions should occur. Therefore, 'to adopt a policy of no new coal mines would be to impermissibly legislate a strict rule of general application without jurisdiction to do so';
- scope 3 emissions (indirect emissions arising from sources not owned or controlled by GRL, such as from a third party purchaser burning coal) should not be considered when assessing the Project's impact, because Australia should not be held responsible for emissions caused by the burning of coal in other countries;
- preventing new coal mines might be consistent with reducing GHG emissions, but this is not the only way to achieve the desired emission reduction targets. Increasing the rate at which carbon is extracted from the atmosphere through carbon sequestration and preservation of carbon sinks could be an alternative means by which commitments are met; and
- most of the coal produced by the Project would be coking coal, an essential component in the making of steel, with limited substitutes. This critical role should justify the approval of the Project despite any climate impacts.

The Court found that the Project's GHG emissions would be sizable over the life of the mine. In response to each of GRL's arguments, the Court held that:

- scope 3 emissions should be taken into account, in accordance with clause 14(2) of the Mining SEPP and precedents set in other decisions of the Court, as well as in the United States;
- there is a causal link between the Project and climate change and its consequences, as all of the Project's direct and indirect GHG emissions would contribute cumulatively to total GHG emissions. His Honour cited *Australian Conservation Foundation v Latrobe City Council, Massachusetts v Environmental Protection Agency* and the *Urgenda Foundation v The State of the Netherlands* decisions in stating that this point has now been recognised in many courts;

- as there was no specific proposal to offset the Project's impacts by removing GHGs from the atmosphere, the argument regarding carbon sequestration as an alternative measure should be rejected; and
- the argument that coking coal is critical for the production of steel was overstated by GRL, as the demand for coking coal from steel production in Australia could be met by existing and approved mines.

His Honour referred to statements made in evidence by Professor Will Steffen on behalf of Groundswell, that in order to reach emissions reductions targets 'most fossil fuels will need to remain in the ground unburned'. Deciding which fossil fuel reserves should be allowed to be exploited and burned requires evaluating the merits of each potential fossil fuel development by considering its GHG emissions and the likely contribution to climate change, as well as the development's other impacts.

In this case:

> *'Refusal of consent to the Project would prevent a meaningful amount of GHG emissions, although not the greater GHG emissions that would come from refusal of a larger coal mine. However, the better reason for refusal is the Project's poor environmental and social performance in relative terms. As I have found elsewhere in the judgment, the Project will have significant and unacceptable planning, visual and social impacts, which cannot be satisfactorily mitigated. The Project should be refused for these reasons alone.'*

Implications

Building upon a growing international jurisprudence directly linking fossil fuels and climate change, this decision is likely to have wide reaching consequences for the viability of coal and other fossil fuel-dependent industries in Australia. Future proponents will need to seriously consider the decision, as will banks and others who would traditionally invest in or support coal and other fossil fuel-dependent industries.

It is possible that the increasing recognition of causative links between fossil fuel developments and climate change could pave the way for future compensation claims of the kind now being seen in the United States.

SOME PRACTICAL TIPS IN RESPONSE TO THE ROCKY HILL DECISION

A number of clients have asked us about the implications of the recent NSW Land and Environment Court decision in *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, (where Gloucester Resources Limited's (**GRL**) appeal against the Planning Assessment Commission's refusal of the Rocky Hill Coal Project was lost).

In the table below we have extracted some key commentary by the Court, against which we've indicated how we think these comments should alter the approach taken by proponents of mining projects seeking development consent.

Decision	Consequences for future developments
Indirect emissions to be assessed	
Clause 14(2) of the Mining SEPP requires a consent authority to consider the 'downstream emissions' of a proposed mining, petroleum production or extractive industry development. Scope 3 (or indirect greenhouse gas (**GHG**) emissions generated by burning of the coal mined by GRL) were held to fall within the term 'downstream emissions' and must be taken into account in assessing project environmental impacts.	Proponents should ensure their development applications fully assess the full range of GHG emissions likely to be generated by their Project, both directly and indirectly. Scope 3 emissions must be explicitly addressed and accounted for within each mining environmental assessment.
More justification required for appropriateness of proposals for GHG generating mining developments	
The Court drew heavily upon the evidence of Professor Will Steffen, who applied the carbon budget model in assessing climate change impacts. In order to achieve the target of restricting warming to 2º Celsius, Professor Steffen said that net zero emissions must be reached within 21-22 years, requiring a rapid phase out of fossil fuel combustion. While the Professor suggested only existing fossil fuel developments should be allowed to continue, before being rapidly phased out, the Court decided that the better approach is to evaluate the merits of each particular fossil fuel development including consideration of: • the GHG emissions of the development and the likely contribution to climate change in absolute terms ie preferring smaller fossil fuel developments with lower emissions over larger projects; and • other environmental, social and economic impacts of the development, ie preferring better located developments with fewer adverse impacts.	Proponents should specifically instruct their consultants to acknowledge and address the: • 'carbon budget' methodology, including a comparison of the emissions to be produced by the development with other fossil fuel developments, and how the proposal is better placed to minimise emissions; and • particular site-based or environmental benefits of the proposal. The weight given by the Court to Professor Steffen's climate change evidence indicates that it is prudent to engage highly skilled and well-credentialed experts in the respective fields of climate change and social impact.

Decision	Consequences for future developments
Mitigation measures must be concrete proposals, not an afterthought	
To counteract the carbon budget evidence presented by Professor Steffen, GRL argued that the climate change impacts of the Project could be mitigated if enough carbon could be removed from the atmosphere to counteract the emissions of the Project by others using carbon capture technology, carbon sinks or by reducing emissions created from other sources. However the Court found this suggestion to be speculative and hypothetical, as there was no evidence presented by GRL as to any specific proposal to offset the emissions of the Project.	Proponents should prepare well-defined and concrete proposals as to how carbon offsets or sinks will be achieved to address the direct and indirect GHG emissions likely to be generated by their project.
Economic analysis in support of proposals should be thoroughly peer reviewed	
The Court accepted evidence that GRL had overstated the estimated: • direct benefits of the royalties and company income tax likely to be paid in respect of the Project; and • indirect benefits from the creation of jobs and to local suppliers. The Court also held that the indirect costs of the Project would be greater than GRL contended, including because many environmental and social costs of the Project had not been quantified or addressed, and consideration of indirect costs to other industries like agriculture and tourism were limited.	Any economic analysis prepared in support of fossil fuel and other mining applications should be peer reviewed, to ensure it is rigorous, compelling and fulsome. These reports are crucial to demonstrate that the benefits of the proposed project outweigh adverse environmental and climate change impacts.
Social impacts of proposed mining developments should be fully addressed	
The Court extensively considered the multifaceted social impacts of the Project. Residents' way of life, the cohesion and composition of the community, health and wellbeing, and personal property rights were considered. Ultimately the Court felt the impacts of the Project outweighed any social benefits, which were mainly restricted to short term boosts to the local economy and employment. The Court recognised that: • a further social impact would be caused by the distributive injustice/inequity of the Project, in that the benefits of the mine would be experienced by a select few for a limited period of time, while the detriments would be ongoing and would not necessarily be experienced by those who benefit; • the suggested mitigation strategies not only failed to address key social impacts but may exacerbate those impacts. Specifically, the proposed 'amenity walls' were argued to worsen the visual impact of the mine and the changed sense of place; and • social impacts may be perceived as well as actual. For example, although Project particulate, noise and light pollution levels would be compliant with the applicable regulatory criteria, these impacts would still be perceptible to local residents. Impacts would cause high levels of concern, stress and anxiety, with consequent mental and physical health effects. This was held to be sufficient to establish an extreme social impact, justifying refusal of the mine in the context of the other identified impacts.	Be mindful in preparing social impact assessments about the enduring implications of the project on local communities including after the project's operations conclude - this includes demographic changes to local communities and their ability to remain sustainable after operations finish.

Decision	Consequences for future developments
Risk of community groups seeking to be joined in litigation is increased when climate change and social impacts have not been adequately addressed	
The Court granted an application made by a community group, Groundswell Gloucester, to be joined to the proceedings. In allowing the joinder, the Court referred to section 8.15(2) of the *Environmental Planning and Assessment Act 1979*, finding that the arguments made by Groundswell satisfied the tests, in that Groundswell sought to raise two new issues before the Court, relating to the climate change and social impacts of the Project. The Court agreed that: • the climate change issue would not be sufficiently addressed by the Department of Planning & Environment. Although climate change was identified in the Director-General's environmental assessment requirements, this was not one of the reasons for objecting to the Project; • the social impact of the Project would not be properly considered in the absence of Groundswell's evidence, which sought to bring evidence from an anthropologist regarding the social impact issues; and • it was in the public interest that the community be given the right to be heard, considering the number of submissions made (2,308) and the significant public interest in the Project.	Although applicants cannot dictate matters which a consent authority will place in contention in an appeal, they should ensure that their applications fully respond to concerns of the community, climate change and social impacts. Briefing consultants with previous experience giving expert evidence in Court will help equip proponents for an appeal, should that become necessary, either because consent is refused or because the validity of a consent is subsequently challenged in Court. Early and full engagement with local communities will also assist in reducing the risk of legal challenge.

BROADER IMPLICATIONS OF THE NSW ROCKY HILL COAL MINE DECISION

Introduction

As reported in previous Mining Sector Updates, the NSW Land and Environment Court (**LEC**) recently dismissed an appeal brought by Gloucester Resources Limited (**GRL**) and refused development consent for the Rocky Hill Coal Mine, located just south of Gloucester in New South Wales.

Although Preston CJ stated in *Gloucester Resources Limited v Minister for Planning*[1] (**Rocky Hill**) that he would have refused the Project on social and visual impact grounds alone, it is the climate change aspects of the decision that have garnered significant industry and media attention.

This is because it is the first time an Australian court has highlighted a mine's contribution to total global greenhouse gas (**GHG**) emissions as a key reason for refusal.

Implications for other Australian jurisdictions

As *Rocky Hill* was decided on the basis of NSW planning legislation, it will not set a precedent (in a strict legal sense) for projects in other Australian jurisdictions. However, the reasoning is likely to be influential. Accordingly, proponents in other jurisdictions should be mindful, particularly when preparing their project applications and environmental assessments, of how climate change-based objections to a project could be mounted, and the evidentiary requirements that *Rocky Hill* suggests may be necessary to overcome such objections.

In *Rocky Hill*, Preston CJ held that the climate change impacts of the mine justified its refusal on a number of bases, each of which is considered below in the context of other State legislative regimes and judicial decisions, with a particular focus on Queensland and Western Australia.

Different statutory schemes and levels of judicial oversight

As a starting point, it is important to observe that in other jurisdictions, mining approvals are granted under different legislative regimes, many of which are not subject to the same level of judicial oversight as occurs in New South Wales. In merit appeal proceedings in New South Wales, such as *Rocky Hill*, the LEC will, in effect, 'stand in the shoes' of the planning authority and weigh all relevant considerations in order to determine whether a project should be approved or refused.[2]

By comparison, in Queensland, mines are not subject to town planning legislation and the Planning and Environment Court is not involved in the approvals process. Instead, the Land Court makes recommendations to the Minister as to whether the project should be approved or refused. Ultimately, the Minister decides whether the project will go ahead.

Similarly in Western Australia, applications for approvals of mining projects stand outside the planning system and do not require planning approval. Section 120 of the *Mining Act 1978* (WA) provides that in considering any grant of a mining tenement, a planning scheme is only a relevant consideration, and cannot prohibit or affect the grant of a mining tenement.

proponents in other jurisdictions should be mindful of how climate change-based objections to a project could be mounted

1 [2019] NSWLEC 7.

there remains scope for judicial review of decisions on environmental (and potentially climate change) grounds

While ultimately, therefore, the approval of coal mines (and other mining projects) in other jurisdictions, particularly Queensland and WA, falls within the ambit of executive, rather than judicial, power, there remains scope for judicial review of decisions on environmental (and potentially climate change) grounds, where opponents can find avenues to mount such arguments.

This is because the legislative schemes in these States are subject to environmental assessment requirements and legislative considerations, prior to the relevant Minister making the ultimate decision. For example, in making its recommendation to the Minister, the Queensland Land Court must consider factors including any adverse environmental impact of the operations of the project,[3] ecologically sustainable development, conservation of biological diversity and ecological integrity,[4] and whether the public right and interest may be prejudiced.[5]

In WA, the *Mining Act 1978* (WA) is generally subject to the *Environmental Protection Act 1986* (WA), meaning mining proposals which have a significant effect on the environment will be subject to environmental impact assessment.

In Victoria, the interaction between the *Mineral Resources (Sustainable Development) Act 1990* (Vic) (**MRSD Act**) and the *Planning and Environment Act 1987* (Vic) (**PE Act**) means that in most cases, a planning permit will be required before a mining approval can be granted, unless an exemption applies. An example of an exemption is where an Environment Effects Statement (**EES**) is requested by the Minister responsible for administering the *Environment Effects Act 1978* (Vic), which generally occurs where a project is considered to have a significant effect on the environment.[6] Where a planning permit is required, a decision to grant a planning permit may be the subject of third party merits appeal on application to the Victorian Civil and Administrative Tribunal (**VCAT**). In determining whether a planning permit should be approved or refused, VCAT will weigh all relevant considerations, including the requirements under section 60 of the PE Act, relevant environmental considerations and any relevant State Environment Protection Policies (**SEPPs**) declared under the *Environment Protection Act 1970* (**EP Act**).[7]

Apart from satisfying any planning permit requirements, mining proposals are assessed under the MRSD Act. Such decisions are also subject to review by VCAT. However, they are not subject to third party appeal rights. Any approvals required under the EP Act may also be subject to third party review on appeal to VCAT, as occurred in the case of *Dual Gas Pty Ltd v Environment Protection Authority*[8] (**Dual Gas**). However, in such instances, VCAT's review function is limited to the consideration of specified matters pertaining to the works approval.

2 *Environmental Planning and Assessment Act 1979* (NSW), section 8.14.

3 *Mineral Resources Act 1989* (Qld), section 260(4)(j).

4 *Environmental Protection Act 1994* (Qld) section 191(g), Schedule 4.

5 *Mineral Resources Act 1989* (Qld), s 260(4)(k); *Environmental Protection Act 1994* (Qld) s 191(g), Schedule 4.

6 The *Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978* provide further guidance on projects which are considered to have a 'significant effect on the environment'.

7 The Environment Protection Authority can only recommend that an order for a SEPP be declared after taking into account the considerations set out in the *Climate Change Act 2017* (Vic), including the potential impacts of climate change and the potential contribution to the State's GHG emissions of the relevant decision or action.

8 [2012] VCAT 308.

Scope 3 emissions

In *Rocky Hill*, Preston CJ held that the LEC was required to consider the indirect, scope 3 emissions associated with the proposed Rocky Hill Mine, in addition to the project's scope 1 and scope 2 emissions. Scope 1 and 2 emissions are those resulting directly from mining activities and from activities necessary to facilitate the mine (such as emissions from electricity to support mine facilities). Scope 3 emissions are those indirectly associated as a consequence of the mining activities, such as the burning of coal produced by the mine.

Preston CJ's decision in this regard was primarily founded on clause 14(2) of *State Environmental Planning Policy (Mining Petroleum Production and Extractive Industries) 2007* which expressly requires a determining authority to consider GHG emissions 'including downstream emissions'.[9]

In Victoria, there is a requirement to consider 'potential direct and indirect greenhouse gas emissions' under section 17(4)(b) of the Climate Change Act 2017 (Vic). Section 17 applies to certain decisions where the decision-maker is required to have regard to climate change and GHG emissions. This includes a decision to grant or refuse a works approval by the EPA Victoria under section 19B of the EP Act, being the context in which the predecessor to section 17 was considered in the case of *Dual Gas Pty Ltd v Environment Protection Authority*[10] (**Dual Gas**). At issue in Dual Gas was the EPA's decision to issue a works approval for a new power station at 300MW capacity, being half the capacity Dual Gas had sought. VCAT held that it was limited to consideration of 'potential direct and indirect greenhouse gas emissions' only within the limited ambit of its review function under section 33B(2)(b) of EP Act, and not as a separate broader ground of review.[11] In its consideration, VCAT held that the cumulative impact of the proposed power station on Victoria's GHG emissions profile was of potential significance, and was a relevant factor to which VCAT had regard.[12] Ultimately VCAT issued a works approval at the 600MW capacity sought by Dual Gas, but subject to a new condition which effectively prevented commencement of the new power station pending retirement of an equivalent amount of higher GHG emissions intensity generation capacity in Victoria.

In Queensland, there is no express legislative requirement to consider 'downstream' or scope 3 emissions. In *Xstrata Coal Queensland Pty Ltd v Friends of the Earth* (**Xstrata**),[13] the Land Court held that scope 3 emissions did not need to be taken into account by the Land Court in making a recommendation to the Minister under section 269 of the *Mineral Resources Act 1989* (Qld), as to whether an application for a mining lease should be granted.

Section 269(4)(j) of that Act relevantly states that the Land Court must consider whether 'there will be any adverse environmental impact caused by the proposed operations and, if so, the extent thereof' before making its recommendation. The Land Court held that scope 3 emissions fell outside the ambit of the word 'operations' and that its consideration of adverse environmental impact was only required in respect of impacts caused by physical activities associated with coal extraction. Further, it would be beyond the Court's jurisdiction to take into account and consider activities which would be carried out beyond the area to which the authority of the proposed mining lease applied. This reasoning was affirmed by the Queensland Court of Appeal in the decision of *Coast and Country Association of Queensland Inc v Smith* (**Coast and Country**).[14]

Scope 3 emissions are those indirectly associated as a consequence of the mining activities, such as the burning of coal produced by the mine.

9 State Environmental Planning Policy (Mining Petroleum and Extractive Industries) 2007, clause 14(2).

10 [2012] VCAT 308.

11 Ibid at [243].

12 Ibid at [246].

13 [2012] QLC 13.

14 [2016] QCA 242.

However, the Court of Appeal also considered in *Coast and Country* that scope 3 emissions were 'potentially relevant' to the consideration of whether the public right and interest would be prejudiced, under section 269(4)(k) of the *Mineral Resources Act 1989* (Qld).

Preston CJ considered in *Rocky Hill* that the LEC was required to consider scope 3 emissions under section 4.15 of the *Environmental Planning and Assessment Act 1979* (NSW), as that Act requires consideration of the likely impacts of the development, including both direct and indirect environmental impacts, as well as the public interest. The public interest has been held to include the principles of ecologically sustainable development (**ESD**) and in turn, the principles of ESD, particularly the precautionary principle and the principle of inter-generational equity, require consideration of the impact of a development on climate change.[15]

Preston CJ held that in this context, taking scope 3 emissions into consideration was consistent with precedents set in other Australian and international decisions, including the decision of the Federal Court in Minister for the *Environment and Heritage v Queensland Conservation Council (Inc)* (**Natham Dam case**).[16]

In the Nathan Dam case, the Federal Court determined that 'impact' in the context of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) should be given its ordinary meaning to include the 'indirect' consequences of an action and the results of acts done by persons other than the principal actor.

The Nathan Dam case was also considered by the Queensland courts in *Xstrata and Coast and Country*. In each case the Court rejected an argument that the interpretation of the word 'impact' by the Federal Court in the Nathan Dam Case should apply to the use of that word in the phrase 'adverse environmental impact caused by those operations' in the *Mineral Resources Act 1989* (Qld), so that indirect environmental impacts would also need to be considered. In rejecting this argument the Court decided that indirect environmental impact should not be considered.

Causation

In *Rocky Hill*, Preston CJ held that '[t]here is a causal link between the Project's cumulative GHG emissions and climate change and its consequences', thereby ascribing the impacts of the Rocky Hill Mine as contributing to global climate change. His Honour cited *Australian Conservation Foundation v Latrobe City Council*,[17] *Massachusetts v Environmental Protection Agency* [18] and the *Urgenda Foundation v The State of the Netherlands* decisions[19] in stating that this point has now been recognised in many courts.

In the Victorian *Dual Gas* case,[20] the parties did not contest that there was a link between the emission of GHGs and climate change. However, the proposal in that case was not for a coal mine, but rather for a new coal-fired power station. The proponent for the power station submitted that it should be allowed on the basis of its lower GHG emissions intensity technology, having regard to the Victorian Government's emissions reductions targets and the Australian Government's *Contract for Closure* program in place at the time.

15 Citing Gray v Minister for Planning (2066) 152 LGERA 258; Aldous v Greater Taree Council (2009) 167 LGERA 13 and Hunter Environment Lobby Inc v Minister for Planning [2011] NSWLEC 221.

16 (2004) 139 FCR 24.

17 (2004) 140 LGERA 100.

18 549 US 497 (2007).

19 Urgenda Foundation v The State of the Netherlands C/09/456689/HA ZA 13-1396, 24 June 2015 and The State of the Netherlands v Urgenda Foundation 200.178.245/01, 9 October 2018.

20 [2012] VCAT 308.

In comparison, the Queensland Land Court has not been as willing to accept that a causal nexus exists between a particular mine and climate change. McDonald P in *Adani Mining Pty Ltd v Land Services of Coast and Country Inc*[21] stated that, '[i]n assessing the extent to which the proposed mine would cause additional cumulative emissions, the mine cannot be viewed in isolation but should be seen in terms of the change in global net emissions … Whether those climate impacts are additional to what would have occurred in the absence of the mine's approval depends on the extent the mine increases global coal consumption.'[22] Similarly, Member PA Smith in Hancock Coal Pty Ltd v Kelly (No.4)[23] held that 'it is the demand for coal-fired electricity, and not the supply of coal from coal mines, which is at the heart of the problem.'[24] In other words, the Courts in Queensland take the view that the impacts of scope 3 emissions on climate change do not result from each individual coal project in so much as they result from the global demand for electricity.

It remains to be seen whether courts in Queensland and other Australian jurisdictions will be more willing to make this causative link between individual mining and extractive industry projects and global climate change in light of *Rocky Hill*.

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Market substitution

In *Rocky Hill*, the LEC rejected GRL's argument that refusal of the mine would lead to equivalent scope 3 emissions of poorer quality being emitted elsewhere in the world, on the basis that there was no certainty on the evidence that market substitution would occur.

In contrast, in Queensland, the Land Court has accepted market substitution arguments in a number of cases involving thermal coal mines. In *Hancock Coal Pty Ltd v Kelly (No.4)*[25] (**Hancock Coal**), Member PA Smith found that the expert evidence clearly demonstrated that if the proposed mine was refused, other suppliers would meet the demand that would otherwise have been met by the proposed mine.

In *Adani Mining Pty Ltd v Land Services of Coast and Country Inc*[26] (**Adani**), McDonald P suggested that it is not necessary for the proponent to demonstrate that market substitution would certainly occur. In recommending approval of the mine, her Honour found that increase in supply was not 'a necessary consequence' of approving the mine, and that approval 'may equally fulfil increasing demand or remove other suppliers from the market'. Rather, it was sufficient that market substitution be a reasonable possibility. This lack of certainty as to the effects of the mine's approval would arguably not meet the standard required by the LEC, following the *Rocky Hill* decision.

21 [2015] QLC 48 at [447]-[449].
22 [2015] QLC 48 at [429]
23 [2014] QLC 12 at [221]-[232].
24 [2014] QLC 12 at [231].
25 [2014] QLC 12 at [221]-[232].
26 [2015] QLC 48 at [447]-[449].

The LEC also rejected GRL's argument that any climate change impacts of the mine would be offset by other projects, such as carbon sequestration projects

Carbon offsets

The LEC also rejected GRL's argument that any climate change impacts of the mine would be offset by other projects, such as carbon sequestration projects, on the basis that there was no specific proposal to offset the mine's impacts by removing GHGs from the atmosphere.

On 7 March 2019, less than one month after Preston CJ handed down his decision in *Rocky Hill*, the WA Environmental Protection Authority (**EPA**) released guidelines which required proposals with scope 1 emissions in excess of 100,000 tonnes per annum to set out measures to avoid, reduce or offset emissions associated with the proposal, including offsetting any residual (net) scope 1 emissions. The offset requirements did not apply to scope 2 or scope 3 emissions. However, the guidelines also provided that the EPA could consider scope 3 emissions from a proposal where there was a proximate link between the proposal's activity and emissions from downstream consumption (such as combustion of fossil fuels), and where scope 3 emissions would be relatively large compared to scope 1 and 2 emissions.

By 14 March 2019, following significant outcry, the guidelines were withdrawn until 'consultations with industry and stakeholders are more fully complete.'[27] However, to the extent that the EPA's actions have highlighted greenhouse gas emissions as a factor of environmental impact assessment, proponents and stakeholders in WA will need to deal with the uncertainty surrounding the position of the WA State Government and the EPA. How this translates to the commencement or expansion of projects in WA is yet to be seen.

Economic importance of coking coal

Finally, in *Rocky Hill* the LEC dismissed GRL's argument that the Rocky Hill Mine should be approved on the basis that coking coal is critical for the production of steel. Preston CJ considered that this argument was overstated and not demonstrated on the evidence, as the demand for coking coal from steel production in Australia 'could be met by existing and approved mines.'

Along similar lines, in the *Dual Gas* case VCAT had regard to wider market considerations in determining the weight to be given to the potential benefits of the power station. VCAT considered that some of the benefits relied upon by Dual Gas were 'somewhat speculative' and that it was questionable whether it would displace or replace electricity generation in the national electricity market with a higher GHG emissions intensity. However, on balance, VCAT held that this was counter-balanced by other longer-term benefits if the technology could be successfully demonstrated, along with other direct and indirect benefits.[28]

In light of *Rocky Hill*, proponents in other jurisdictions should be mindful of the evidentiary requirements that *Rocky Hill* suggests are necessary to sustain economic and market-based arguments.

27 Media Release, *'Further consultation on Environmental Protection Authority Greenhouse gas guidance recognised'*, Environmental Protection Authority, 14 March 2019.

28 [2012] VCAT 308 at [255].

Ecologically sustainable development (ESD) and the precautionary principle

Preston CJ's decision in *Rocky Hill* is reminiscent of a decision-making approach based on the precautionary principle, being one of the pillars of ESD.

The precautionary principle is enlivened in conditions of scientific uncertainty over potentially serious environmental consequences.

In the context of climate change impacts, a precautionary approach resulted in his Honour erring on the side of caution and weighing against approval of the mine, on the basis of its overall contribution to global climate change. The evidentiary focus was not so much on the causative links between the mine and global climate change – this was accepted by Preston CJ – but rather on the proponent's inability to justify that the mine's GHG emissions would not contribute to global climate change in an unacceptable manner.

Application of the precautionary principle by VCAT in the *Dual Gas* case did not result in refusal of the proposal. Rather, VCAT considered that application of this principle necessitated a proportionate response, rather than a 'zero risk approach'.[29] However, VCAT did accept that the uncertainty of the risk of climate change and the lack of certainty as to where the 'tipping point' of more serious and irreversible consequences lay, meant that any net increase in GHG emissions was to be viewed as an important, albeit small, incremental move towards an unknown point. VCAT's detailed consideration of the precautionary principle as set out in *State Environment Protection Policy (Air Quality Management)* and the EP Act indicates that similar considerations will be given for future works approval applications in Victoria to which these legislative instruments apply, including mining and extractive industry projects.

It is also conceivable that in Victoria, climate change will be considered by VCAT on applications for review under the MRSD Act. Although there are no decision guidelines in the MRSD Act that explicitly apply to the statutory endorsement of mining approvals, the accepted approach is that the primary decision maker, and VCAT on review, will have regard to the purpose and objectives of the MRSD Act and the principles of ESD set out in the MRSD Act.[30] This includes having regard for economically viable mining and extractive industries which operate in a way that is compatible with the economic, social and environmental objectives of the State.[31] As noted above, however, decisions under the MRSD Act are not subject to third party appeal rights.

In light of *Rocky Hill* and the growing body of Australian and international jurisprudence to which it has added, Courts in other jurisdictions may be more willing to apply the precautionary principle in support of arguments which link the climate change impacts of individual projects to wider, policy-based emissions targets, placing greater evidentiary burdens on proponents to demonstrate that a project's emissions will be acceptable or can be justified.

29 [2012] VCAT 308 at [214].

30 In particular, section 2A(1) requires that in the administration of the MRSD Act that regard should be given to the principles of sustainable development.

31 *Hanson Construction Materials Pty Ltd v The Department Head, Department of Economic Development, Jobs, Transport and Resources* [2015] VCAT 1365 at [19].

it is possible that similar objections will surface against future coal mines and potentially other extractive industry and fossil fuel development projects

Although the precise basis upon which such links may be able to be made in judicial review cases in other jurisdictions, particularly Queensland and WA, remains to be seen, it is important to recognise that the principles of ESD are required to be considered under environmental protection legislation in both States. In WA, for example, the *Environmental Protection Act 1986* (WA) contains the principles of ESD in its objectives.[32] The definition of 'environment' also points to the inter-connectedness of the environment in so far as it includes not only living things and their surroundings, but the interaction of all of these.[33]

In Queensland, the Land Court is required to consider the principles of ESD, including the precautionary principle, in making an objections decision regarding the grant of an environmental authority under the *Environmental Protection Act 1994* (Qld). However, the Land Court held in *Xstrata* that, although these principles contemplated account being taken of the global impacts of a project, including consideration of GHGs, the function of the Land Court in that respect was limited to considering only such of those matters as resulted from a 'mining activity' as defined in section 147[34] namely, an activity authorised under the *Mineral Resources Act 1989* (Qld) to take place on land to which the relevant mining tenement relates. Accordingly for now, it appears unlikely that the same causative links will be made between a project and global climate change in consideration of environmental authorities by the Queensland Land Court, notwithstanding the requirement to consider ESD in the exercise of its functions.

Key takeaways

In light of *Rocky Hill*, it is possible that similar objections will surface against future coal mines and potentially other extractive industry and fossil fuel development projects. It is also likely that any such objections will have as their basis a renewed focus on the principles of ESD, particularly the precautionary principle, which are enshrined in various States' legislation.

Although there is a lesser risk of such arguments being successful in other jurisdictions, particularly the 'mining States' of WA and Queensland, given the different legislative regimes and judicial precedents, proponents should nonetheless be wary of the evidentiary requirements that *Rocky Hill* suggests are necessary to defend such claims and to sustain market substitution arguments.

It is likely that in light of *Rocky Hill*, more information regarding GHG emissions will now need to be included in development applications and environmental assessments for new fossil fuel projects. In WA, the recent actions of the EPA have highlighted the uncertainty surrounding the extent to which GHGs, and measures to mitigate GHGs, should be part of the environmental impact assessment process. The consultations proposed by the WA EPA, following the withdrawal of the EPA guidelines, will no doubt be a fertile forum in which the views of industry and stakeholders will be vigorously advanced.

32 *Environmental Protection Act 1986* (WA), section 4A.

33 *Environmental Protection Act 1986* (WA), section 3.

34 Now section 110.

CONTACTS

Christine Covington
Head of Environment & Planning, Sydney
Tel: +61 2 9210 6428
christine.covington@corrs.com.au

Louise Camenzuli
Partner, Sydney
Tel: +61 2 9210 6621
louise.camenzuli@corrs.com.au

Michael Leong
Partner, Brisbane
Tel: +61 7 3228 9474
michael.leong@corrs.com.au

Brent Lillywhite
Partner, Brisbane
Tel: +61 7 3228 9420
brent.lillywhite@corrs.com.au

Kirsty Davis
Special Counsel, Sydney
Tel: +61 2 9210 6177
kirsty.davis@corrs.com.au

Julia Green
Special Counsel, Sydney
Tel: +61 2 9210 6157
julia.green@corrs.com.au

Anna White
Special Counsel, Brisbane
Tel: +61 7 3228 9489
anna.white@corrs.com.au

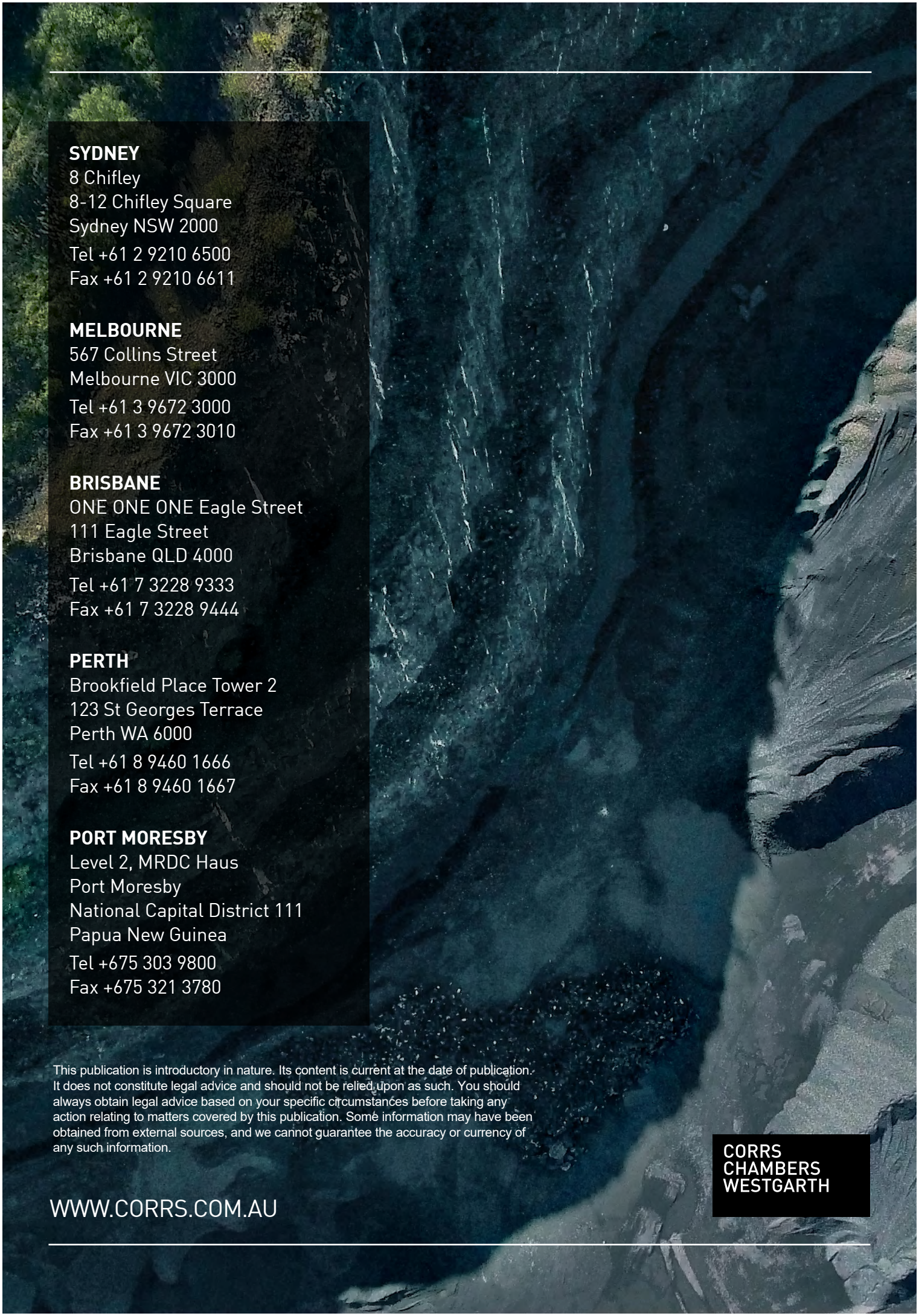
Marisa Taliangis
Consultant, Perth
Tel: +61 8 9460 1799
marisa.taliangis@corrs.com.au

Louise Lee
Senior Associate, Sydney
Tel: +61 2 9210 9121
louise.lee@corrs.com.au

Joanna Kenny
Senior Associate, Melbourne
Tel: +61 3 9672 3211
joanna.kenny@corrs.com.au

Morgan Pearce
Senior Associate, Brisbane
Tel: +61 7 3228 9763
morgan.pearce@corrs.com.au

Arielle Mayer
Lawyer, Sydney
Tel: +61 2 9210 6835
arielle.mayer@corrs.com.au



SYDNEY
8 Chifley
8-12 Chifley Square
Sydney NSW 2000
Tel +61 2 9210 6500
Fax +61 2 9210 6611

MELBOURNE
567 Collins Street
Melbourne VIC 3000
Tel +61 3 9672 3000
Fax +61 3 9672 3010

BRISBANE
ONE ONE ONE Eagle Street
111 Eagle Street
Brisbane QLD 4000
Tel +61 7 3228 9333
Fax +61 7 3228 9444

PERTH
Brookfield Place Tower 2
123 St Georges Terrace
Perth WA 6000
Tel +61 8 9460 1666
Fax +61 8 9460 1667

PORT MORESBY
Level 2, MRDC Haus
Port Moresby
National Capital District 111
Papua New Guinea
Tel +675 303 9800
Fax +675 321 3780

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CHAMBERS
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WWW.CORRS.COM.AU