GILBERT +TOBIN

A YEAR OF PROGRESSION AND DISRUPTION: 2022 CLEAN ENERGY AND DECARBONISATION YEARBOOK

2023

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FOREWORD

2022 was a year of simultaneous progress and disruption as governments and private enterprise continued to work feverishly to align with public expectations while maintaining energy security during the clean energy and decarbonisation transition.

The past year has featured major developments in climate, energy and environmental policy at both Federal and State levels, and progress continues to be made towards the realisation of clean energy projects of significant scale, and the scaling of technologies they rely on. However, the evolving international geopolitical landscape has also brought energy security to the forefront, resulting in both an accelerated transition towards clean energy generation and an increased reliance on traditional fossil fuels.

Gilbert + Tobin has continued to closely follow developments in the clean energy and decarbonisation space throughout 2022, and has published commentary and thought leadership on key issues affecting the clean energy and decarbonisation transition. This yearbook compiles those articles by topic, providing a comprehensive guide to the transition in 2022.

We expect 2023 to be a year of consolidation and further rapid scaling up of projects and technologies that will be critical to the energy transition, particularly in the energy and wider infrastructure and metals and mining sectors. We will continue to see early commercial scale clean energy projects coming online and further investment decisions being made as the public and private sectors continue to move to meet ambitious decarbonisation targets and as they ride the wave of momentum generated by the raft of recent regulatory reforms across Australian jurisdictions.

G+T operates at the forefront of the energy and resources sector and interacts extensively with industry, Government, regulators, First Nations people and other key industry stakeholders to provide a meaningful contribution on the clean energy and decarbonisation transition. Our work spans the full spectrum of decarbonising opportunities – wind, solar, energy storage developments, new clean energy and carbon capture technology, carbon farming, and right through to advising Boards on ESG and meeting safeguard requirements.

G+T is proud of its role as a leader in the legal industry and the wider community, and we seek to operate in a manner that benefits our clients and our communities. We remain committed to this role as we seek to create value through impactful contributions in the clean energy space.

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CLEAN ENERGY AND DECARBONISATION YEAR IN REVIEW (2022) – 5 KEY HIGHLIGHTS

14/12/2022

2022 has seen major developments in climate, environment and energy policy at both the Commonwealth and State level. With the change in Federal Government, Australia has re-engaged on the international stage on issues such as climate change and biodiversity, as well as introducing a raft of national policies. In Western Australia, we have seen a suite of changes in relation to land tenure and indigenous engagement, as well as a push to move away from coal reliance. This article summarises our top 5 highlights from 2022.

1. COP27 CONCLUDES WITH A BREAKTHROUGH ON LOSS AND DAMAGE, AND WITH IMPORTANT DIRECTIONS FOR THE BUSINESS COMMUNITY

The 27th UN Climate Change Conference, COP27, was held in Sharm el-Sheikh in November 2022. Significantly, country Parties agreed on a global loss and damage fund to provide climate change assistance to vulnerable countries. Financing climate change mitigation and adaptation was a key theme of the conference: a new long-term climate finance goal was and will continue to be deliberated, even if the current goal remains elusive. Adaptation was another focus, with Parties agreeing to develop a framework to guide the achievement of enhancing adaptive capacity, strengthening resilience and reducing climate change vulnerability. Parties also continued to finesse the rules for Article 6.

Australia was noticeably active and involved in this COP, a marked change from previous COPs, with the Australian pavilion running numerous side events focused on Pacific climate priorities, the importance of First Nations Peoples' perspectives on climate change and the role of nature-based climate solutions. COP27 also saw outcomes around

guidance to business on climate disclosure, with the recommendations of the United Nations' High-Level Expert Group on the Net Zero Emissions Commitments of Non-State Entities and the release of the Australian branch of the Business Council for Sustainable Development's 'Triple A+: The Business Role in Accelerating Australia's Climate Recovery: Ambition, Action, Accountability' report. Gilbert + Tobin's Head of Climate Change and Sustainability, Ilona Millar, was in attendance at COP27. For more, see our article COP27 concludes with a breakthrough on loss and damage, and with important directions for the business community.

2. UN BIODIVERSITY CONFERENCE CONVENES TO AGREE TO A NEW SET OF GOALS FOR NATURE OVER THE NEXT DECADE

The UN Biodiversity Conference (**COP15**) is currently underway, having commenced on 7 December in Montreal, Canada. Although covering related issues to COP27, COP15 focuses on the Convention on Biological Diversity, a treaty adopted for the conservation and sustainable use of biological diversity and related issues. This year, the 'Post-2020 Global Biodiversity Framework' is expected to be adopted, the first biodiversity framework in 12 years. The framework includes 21 targets for 2030, including:

+ a $200 billion increase in international financial flows from all sources to developing countries;
+ at least 30% of land and seas globally conserved; and
+ a 50% greater reduction in the rate of introduction of invasive alien species, and controls or eradication of such species to eliminate or reduce their impacts.

On 8 December 2022, the Commonwealth Minister for the Environment and Water announced that the government will reform Australia's existing environment laws and develop National Environmental Standards to improve protections and guide decision-making. In addition, a National Environmental Offsets System will be released by the end of this year which is proposed to enable proponents to make conservation payments where they are unable to finalise proposed developments due to the inability to find suitable environmental offsets. The announcement comes as a response to Professor Graeme Samuel AC's independent review into the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) which concluded such Act is outdated, ineffective and requires fundamental reform.

3. MOMENTOUS PROGRESS IN AUSTRALIA'S CLIMATE AND ENERGY POLICY

Since the Commonwealth Labor Government came into power, Australia's climate and energy policy has undergone rapid transformation, including:

+ **Rewiring the Nation**: In October this year, the Federal Government announced its first step in its "rewiring the nation" election promise with the entry into an agreement, alongside Victoria and Tasmania State Governments, for:
  - $1 billion in concessional finance put towards the Marinus Link, interconnecting Victoria and Tasmania; and
  - $1.5 billion in concessional finance put towards renewable energy zones in Victoria.

  The funding for Victoria's renewable energy zones includes a $750 million loan from the Clean Energy Finance Corporation to ensure the KerangLink, which interconnects the states of Victoria and NSW, is completed by 2028. AEMO has stressed the urgency of completing KerangLink to ensure appropriate transmission infrastructure is in place before the anticipated closure of coal-fired power stations.
+ **Safeguard Mechanism reform**: The Department of Climate Change, Energy, the Environment and Water released a Consultation Paper in August outlining its proposed reforms to the Safeguard Mechanism, the pillar of such proposed reforms being the introduction of tradeable Safeguard Mechanism Credits (**SMCs**) to be issued to facilities covered by the Mechanism whose emissions fall below their designated 'baseline' emissions limit. After receiving over 200 submissions, the Department released draft legislation which would enable the issuance by the Clean Energy Regulator, transfer and surrender of SMCs. For the key features of the draft legislation and accompanying draft rules, see Safeguard Mechanism reform: Government publishes draft Safeguard Mechanism Credits legislation.
+ **Climate Change Bill**: August 2022 also saw the introduction of the *Cliimate Change Bill 2022* (Cth) (**Climate Change Bill**) and *Climate Change (Consequential Amendments) Bill 2022* (Cth) in the first sitting week after Labor came to power. Prior to the introduction of the Climate Change Bill, the Federal Government updated its Nationally Determined Contribution (**NDC**) under the Paris Agreement with a commitment to achieve net zero emissions by 2050, and a 2030 target of 43% below 2005 levels. If passed, the Climate Change Bill will embed Australia's updated NDC in legislation and pave the way for subsequent NDCs to have the same legal force. For more on the Climate Change Bill and other changes in climate and energy law, see Movement in Australia's climate and energy policy.
+ **Offshore Wind regulations**: In November, the *Offshore Electricity Infrastructure Regulations 2022* (Cth) and *Offshore Electricity Infrastructure (Regulatory Levies) Regulations 2022* (Cth) (**Regulations**) came into force, following the release of the draft regulations earlier this year. Gilbert + Tobin was the only law firm to make a public submission on the draft Regulations. The Government has said that the aim

of the Regulations and the *Offshore Electricity Infrastructure Act 2021* (Cth) (**OEI Act**) is to provide a consistent and transparent regulatory regime for the full lifecycle of offshore renewable energy generation and transmission infrastructure developments. Further, the OEI Act and Regulations should work to ultimately provide a pathway to de-risking investments and reassure sponsors, financiers, and broader stakeholders alike. For an overview of Australia's offshore wind regulatory framework and the Regulations, see Hoisting the Sails: Charting Australia's offshore wind legislation.

+ **Capacity Investment Scheme**: In December, the State and Territory Energy Ministers endorsed the Capacity Investment Scheme (**CIS**) which will provide the national framework to drive new renewable dispatchable capacity. The Government has said this new revenue underwriting mechanism will unlock around $10 billion of investment in clean dispatchable power to support reliability and security as the energy market undergoes its biggest transformation since the industrial revolution.

4. WA GOVERNMENT OVERHAULS LAND TENURE AND ABORIGINAL HERITAGE LAWS AND ANNOUNCES TRANSITION AWAY FROM COAL

+ **New land tenure for large scale renewables and hydrogen**: 2022 saw the introduction of the WA Government's "diversification leases", a proposed new form of non-exclusive leasehold tenure intended to support large scale clean energy projects and the expansion of carbon farming and other broad-scale uses in WA. The Land and Public Works Legislation Amendment Bill 2022, which is proposed to enact the diversification lease reforms, was introduced into Parliament in November 2022. The Bill is expected to pass early in 2023 once Parliament resumes. The WA Government has also recently announced the introduction of:
  - the Renewable Hydrogen Guidance: Land tenure for large scale renewal hydrogen projects which provides guidance on land access and legal tenure for renewable hydrogen projects – including details of the Government's preference for how competing land uses should be managed by proponents and the recommended process for hydrogen proponents in obtaining tenure for their projects;
  - the Renewable Hydrogen Policy: Consideration of highest and best use which sets out a preferred, transparent and timely process for managing situations where competing projects are proposed for the same area of land, and the use of a Highest and Best Use Assessment in these cases; and
  - dedicated cross-government functions, supported by a $22.5 million funding commitment, to help streamline approvals for green energy proposals (including critical minerals, hydrogen and renewable energy projects). These will include a new Green Energy Assessment Unit responsible for streamlined assessment pathways, a new Green Energy Expert Panel to support Government agencies and the Environmental Protection Authority and a new Green Energy Major Projects Group to help steer individual projects through government processes.

  For more on diversification leases, see Diversification leases policy released for public comment in WA and WA Government diversification lease policy should be tough on land use.

+ **New Aboriginal Cultural Heritage Act**: *The Aboriginal Cultural Heritage Act 2021* (WA) (**ACHA**) took shape this year which will phase out the existing *Aboriginal Heritage Act 1972* (WA) and, according to the latest government advice, is expected to commence by July 2023. The ACHA introduces protections for intangible cultural heritage, a new tiered approvals process and a positive requirement to undertake a due diligence assessment prior to proposed activities. Notably, 'diversification of land use that is not like for like or less' is introduced as a Tier 3 activity, likely referencing the introduction of diversification leases. For a summary of the key takeaways, see Proposed Guidelines to the Aboriginal Cultural Heritage Act 2021.

+ **Closure of Coal in WA**: In June this year, the McGowan government announced WA's two remaining state-owned coal plants, the Collie and Muja Power Stations, would close by 2030. The announcement notes the continued uptake of rooftop solar and renewables forcing a change in the system to ensure security of electricity supply at an affordable price, with the phasing out of coal-fired power estimated to reduce Synergy's carbon emissions by 80% by 2030. To ensure continuity of supply, the State will invest an estimated $3.8 billion into new green power infrastructure in the South-West Interconnected System. This would leave the Japanese-owned Bluewaters Power Station as the last remaining coal-fired power station in WA.

5. 2022 LITIGATION TRENDS & WHAT TO EXPECT IN 2023

Litigation against Government in respect of alleged duties of care

The Full Federal Court's decision in *Minister for the Environment v Sharma* [2022] FCAFC 35 highlighted the legal and policy barriers to establishing a duty of care owed by government departments in respect of climate change risks and harm. Although the claim in Pabai Pabai (which relies on similar duty of care principles but is grounded in Native Title and cultural heritage rights) may yield a different outcome, that proceeding will not be determined for at least another year.

Litigation against major industry players and the beginning of regulatory action in this space

Many of the proceedings commenced against major industry players in the last two years are still trundling towards hearing or

otherwise awaiting finalisation, including those against Woodside (in relation to the Scarborough gas project) and Santos (in relation to claims of 'greenwashing'). However, notable events in recent weeks and months include:

+ the *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193 decision, in which the Full Federal Court rejected Santos' appeal of a Federal Court decision which held that Santos had failed to adequately consult with all traditional owners of the Tiwi Islands in respect of its offshore petroleum development in the Barossa gas field;
+ the *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* (No 6) [2022] QLC 21 decision, in which the Queensland Land Court held that recommending the approval of Waratah Coal's coal mine application would (among other things) unduly impact the rights of children and First Nations people under the Human Rights Act 2019 (Qld). For more on this decision, see Mining leases rejected due to human rights and emissions impacts in Waratah Coal v Youth Verdict & Ors; and
+ ASIC's first enforcement outcome for 'greenwashing' in October. For more on this, see And so it beings … ASIC takes it first enforcement action for 'greenwashing'.

LOOKING FORWARD TO 2023

So long as there remains a disparity between society's expectations and the response of government and private enterprise to climate change risks and harm, activist litigation will inevitably continue in Australia in 2023. Although domestic legislative reform appears some way off, reforms are progressing in international law, with growing support for a new international crime of 'ecocide', which could be problematic for Australian-held offshore interests.

For more on the litigation trends of 2022, see 'Climate litigation' on ice for government, but industry to feel the heat.

KNOWLEDGE ARTICLES YOU MAY BE INTERESTED IN:

How the Pilbara is creating the most sustainable and secure clean energy

Financing challenges associated with clean energy projects and their implications

The Future of Clean Energy in a Decarbonising World

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ONLY A PIPE DREAM: REPORT INTO HYDROGEN GAS BLENDING IN THE DBNGP

25/02/2022

In January 2022, the Western Australian government published the findings of the 'Dampier to Bunbury Natural Gas Pipeline Public Knowledge Sharing Report' (**Report**) into hydrogen gas blending in the Dampier to Bunbury Natural Gas Pipeline (**DBNGP**). The Report found that the DBNGP is suitable for blending up to 9% hydrogen with natural gas. For proponents of green hydrogen as the next major form of clean energy and a leap towards rapid decarbonisation, this Report represents a step forward. However, our analysis of both the operational aspects of hydrogen gas blending as well as associated regulatory and legal issues indicates that blending green hydrogen, particularly in the DBNGP, is still something of a 'pipe dream'.

The key takeaways from this article are:

1. operational issues exist, as the ability to blend hydrogen with natural gas in the DBNGP is only possible in some sections of the pipeline which do not (for now) include the main section between the Burrup and Perth, thereby limiting the potential of gas blending. However, this may not be entirely incongruous with hydrogen's viable use cases in heavy industry;
2. safety issues arise in relation to blending high percentages of hydrogen with natural gas;
3. producers, transporters and users of hydrogen alike need to be aware of the potential for greenwashing in relation to hydrogen blends; and
4. the regulatory framework around gas transportation requires modification to allow for hydrogen blending.

OUTCOMES FROM THE HYDROGEN GAS BLENDING REPORT

The Report into hydrogen gas blending in the DBNGP was prepared by the Australian Gas Infrastructure Group (AGIG), the owner and operator of the DBNGP. This Report arises out of a goal of Western Australia's Renewable Hydrogen Strategy to distribute renewable hydrogen in Western Australia's gas network by 2022 as a means to partially decarbonise gas consumption and achieve deeper decarbonisation in the longer term. The Report received funding from the Western Australian State government's Renewable Hydrogen Fund.

Overall, the Report found that a 9% hydrogen blend with natural gas in the pipeline was achievable without causing harm to pipeline safety or performance. Indeed, the Report noted that some parts of the DBNGP (being some of the lateral pipelines extending from the main pipeline) may be suitable for 100% hydrogen if international hydrogen piping and pipeline standards are applied to them.

OPERATIONAL CONSTRAINTS ON HYDROGEN BLENDING AS A DECARBONISATION INITIATIVE

The DBNGP is made up of 42 unique pipeline sections, which transport the majority of Western Australia's natural gas. These can be subdivided into three main sections:

+ 'Mainline North', which runs from the Burrup Peninsula to Kwinana and incorporates extensive use of compression equipment;
+ 'Mainline South', from Kwinana to Bunbury, in which compression equipment is rarely utilised; and
+ so-called 'lateral' pipeline sections, which operate all along the main lines and extend to mining and industrial hubs. No compression equipment is required in these sections.

The Report notes that Mainline South and the laterals are well suited for hydrogen blending, with further studies to be done on these two pipeline areas by AGIG. Meanwhile, Mainline North may, in future, have some potential for hydrogen blending. This distinction is primarily due to the operating pressure of the different pipeline sections: Mainline South and the laterals rarely, if ever, operate with compression equipment, thereby making them suitable for hydrogen blending (as the gas is more likely to react under greater pressure). This indicates that the main section of the DBNGP is (for now) inaccessible for hydrogen gas blending, with only small sections of the overall network realistically capable of transporting hydrogen in the future.

On the one hand, the characteristics of the DBNGP network limit the extent to which gas blending is capable of facilitating material decarbonisation objectives in Western Australia across commercial and household uses. However, in order to decarbonise energy use, it is generally well accepted that the most viable use cases of green hydrogen relate to heavy industry and household energy should be derived directly from renewable electricity generation and not green hydrogen. From that perspective, if hydrogen is to be blended into the DBNGP, we consider that blending hydrogen into the lateral pipelines, which primarily lead to mining and industrial centres, makes the most sense, as these industries need to decarbonise in areas that renewable electricity alone cannot achieve. Of course, this begs the question whether a 9% hydrogen blend will achieve much, if anything—on that, see the next section on greenwashing.

The Report also notes, in passing, that 100% gas blending may be possible in sections of the DBNGP if international hydrogen piping and pipeline standards are applied. There appears to be general consensus that blending up to 10% hydrogen into existing gas networks is viable and safe (see, for instance, 'Hydrogen in the Gas Distribution Networks' published by the COAG Energy Council (among others)); increasing this blend will bring with it corresponding safety issues (such as embrittlement of the pipeline). This will require greater pipeline design changes as well as more significant regulatory changes than those currently envisaged (see below).

LEGAL AND REGULATORY OBSTACLES TO DECARBONISATION THROUGH HYDROGEN BLENDING

Greenwashing

While the thought of successfully blending green hydrogen into the DBNGP is exciting—and, crucially, seems to put Western Australia a step ahead in the race between States to encourage the growth of their nascent hydrogen industries—the risk of greenwashing is ever-present. Natural gas has been touted by some as the 'clean' fossil fuel; fundamentally, however, it still emits greenhouse gases. Blending hydrogen with natural gas will not make the natural gas 'clean' or 'green', particularly at blending percentages as low as 9%. If such blends are labelled as clean, green or even sustainable, this creates the potential for allegations of greenwashing or misleading and deceptive conduct. Should hydrogen gas blending occur in the DBNGP, producers, transporters and users of the gas derived from the pipeline need to be careful not to misrepresent the qualities of that gas.

Regulatory upgrade

Quite aside from operational and greenwashing issues, hydrogen gas blending faces regulatory obstacles that will need to be overcome prior to any actual blending. The Report noted that significant regulatory change is required to facilitate hydrogen blending in the DBNGP. Among these, the Report notes in section 4.7.1 that the following legislative issues require consideration:

- the definition of gas needs to be specified to include hydrogen under the National Gas Access (WA) Act 2009 (WA), its regulations and rules in order to allow hydrogen gas blending;
- the potential impact of the Work Health and Safety (Petroleum and Geothermal Energy Operations) Regulations (WA), which is yet to be passed, needs to be considered in relation to hydrogen blending from a safety case perspective;
- amendments to the Gas Supply (Gas Quality Specifications) Act 2009 (WA) are required to ensure that other entities (and not just gas producers) can supply gas (mixed with a specified hydrogen percentage) in a transmission pipeline—this is of particular relevance to companies such as Fortescue Future Industries and other miners-cum clean energy pioneers interested, for instance, in spoke and hub models of hydrogen distribution;
- the Gas Supply (Gas Quality Specifications) Regulations 2010 (WA) will require significant amendments for gas blending specifications of greater than 15% hydrogen, to ensure safe blending of hydrogen; and
- the definition of petroleum will need to be amended to include hydrogen under the Petroleum Pipelines Act 1969 (WA), to allow for hydrogen to be blended in the pipelines.

In addition, the Report notes that shipping contracts may need to be amended to allow for the transportation of hydrogen gas blends.

In short, much needs to occur from a regulatory perspective to even allow hydrogen into gas pipelines, quite aside from the question of whether the pipelines can withstand such blending. Recently, however, State Energy Ministers agreed to amend the National Gas Law, National Energy Retail Law and subordinate instruments to bring hydrogen into the regulatory fold: see our article 'Shifting the focus of economic regulation – adaptation, evolution or revolution?'

The Report suggests that hydrogen gas blending up to 9% is viable in the DBNGP, indicating a major step forward for clean energy and decarbonisation initiatives revolving around green hydrogen as the next major player in the energy transition. However, given the Report was penned by the owner and operator of the pipeline, AGIG, this finding is perhaps unsurprising. Our review of the Report indicates that there are inherent weaknesses and key issues that remain to be resolved. Most notably, hydrogen blending will only be possible in small sections of the DBNGP. Arguably, these are the parts that count most, given they connect to industry and can therefore help decarbonise otherwise hard to abate sectors. However, this serves to further underline the view of some commentators regarding the major inefficiencies of hydrogen as a common household fuel. Additionally, producers, transporters and users of green hydrogen blend gas should beware of the perils of greenwashing, given the low level hydrogen blending currently envisaged. Not least, fundamental regulatory change is required to even get hydrogen into the pipelines in the first place. As presently contemplated, it appears the role of green hydrogen blending to achieve material decarbonisation objectives remains a pipe dream.

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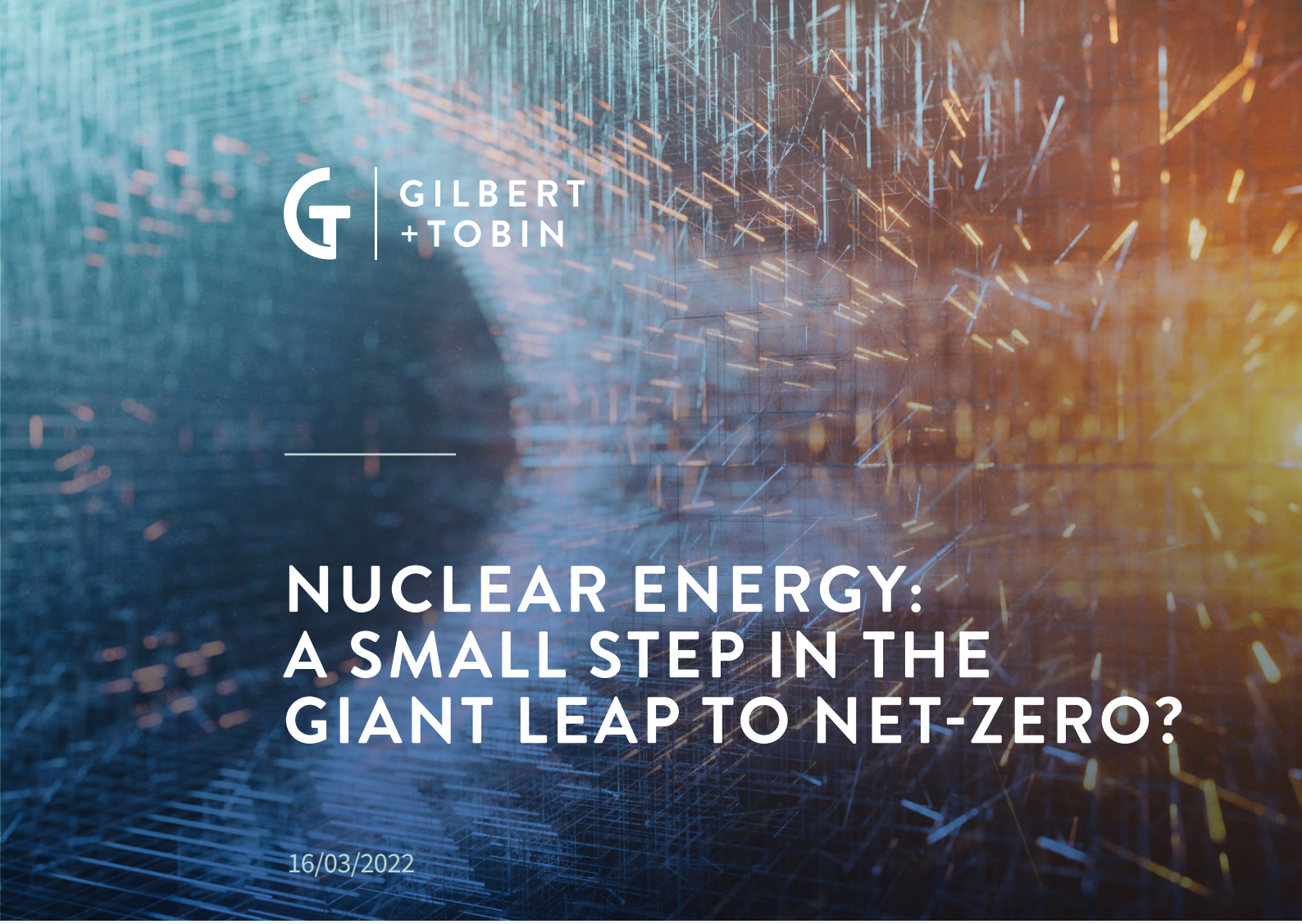
KNOWLEDGE ARTICLES YOU MAY BE INTERESTED IN:

Green Hydrogen: The New Commodity of the 21st Century

Greener Pastures - Land tenure and other legal reforms flagged for WA's renewable or green hydrogen industry

Green hydrogen in Australia – our progresses towards a new industry



GILBERT +TOBIN

NUCLEAR ENERGY: A SMALL STEP IN THE GIANT LEAP TO NET-ZERO?

16/03/2022

Whatever way you slice it, Australia has set itself a monumental task.

Achieving net-zero carbon emissions by 2050 may be one of the most ambitious and forward thinking causes on our agenda today. The fact we have given ourselves less than 30 years to do it, ideally in a reliable, cheap, and practical way is something that should not be understated. With almost 70% of our energy supply still coming from oil (38.8%) and coal (29.1%), shifting away from fossil fuels to renewables such as solar and wind will have to be a top priority. To help us get there faster and give our grid more flexibility to reliably meet our energy needs, it is important we diversify our power sources, and explore options for how we can best support our transition.

Nuclear power, delivered by small modular reactors (**SMR**) is one such option. This article does not make a case either for or against such nuclear power. Rather, we seek to take a frank look at whether nuclear power can support our push for net-zero, and what would need to happen for us to have a real and proper debate about the current technology.

GOING NUCLEAR: LET'S TALK ABOUT IT

If you were to go back in time a hundred years to Yallourn, Victoria 1921, you would have seen the cutting-edge technology that started our last big energy revolution. Two buildings that looked more like sheds than a power plant, with a large chimney to let smoke from the boiler house escape. A temporary coal-fired power station that, when it proved successful, led to the construction of the Yallourn power station seven years later.

Yallourn Temporary Power Station- Photo from Museums Victoria

The descendant of that early plant, 'Yallourn W', currently provides 22% of Victoria's electricity and 8% of the National Electricity Market (**NEM**). That plant is scheduled to close in 2028, and its closure will symbolise the end of Australia's long, and in many ways' successful, dependence on fossil fuels.

In line with the global movement away from fossil fuels, coal in Australia is being crowded out by the "new kids on the block", renewable energy generated by solar and wind. Blessed with large tracts of land and plentiful sun and wind, Australia is rapidly moving towards a green energy future that is environmentally friendly, and consistent with our national goal of net zero emissions by 2050.

Until recently however, little has been said about the other tool in Australia's potential energy arsenal, nuclear power. As many other countries continue to explore and refine nuclear energy technology, Australia's main involvement in this sphere is as the world's third largest exporter of uranium – some might liken Australia to an umbrella salesman "*handing out their wares in the pouring rain, but not so much as propping open a parasol for themselves*"!

Nuclear power plants have been prohibited by the Australian Government since 1998 (ironically by Prime Minister John Howard, an advocate of greater engagement with nuclear power), and Australia has resisted lifting its moratorium despite successive calls, including most recently a 2019 Parliamentary report recommending a lifting of that ban for Generations III+ and IV reactors. Australia's latest attempt at repealing nuclear prohibitions, the Nuclear Fuel Cycle (Facilitation) Bill 2017, remains one of the oldest bills currently before the Senate. Meanwhile, the current Australian Government has made it clear, both in press announcements and their whole-of-economy plan (**Net-Zero Plan**), that they will not be considering adopting nuclear energy as part of Australia's net-zero strategy for now. At the same time though the Australian Government's Technology Roadmap signals that those developments in nuclear power, particularly modular reactors, will be kept under review.

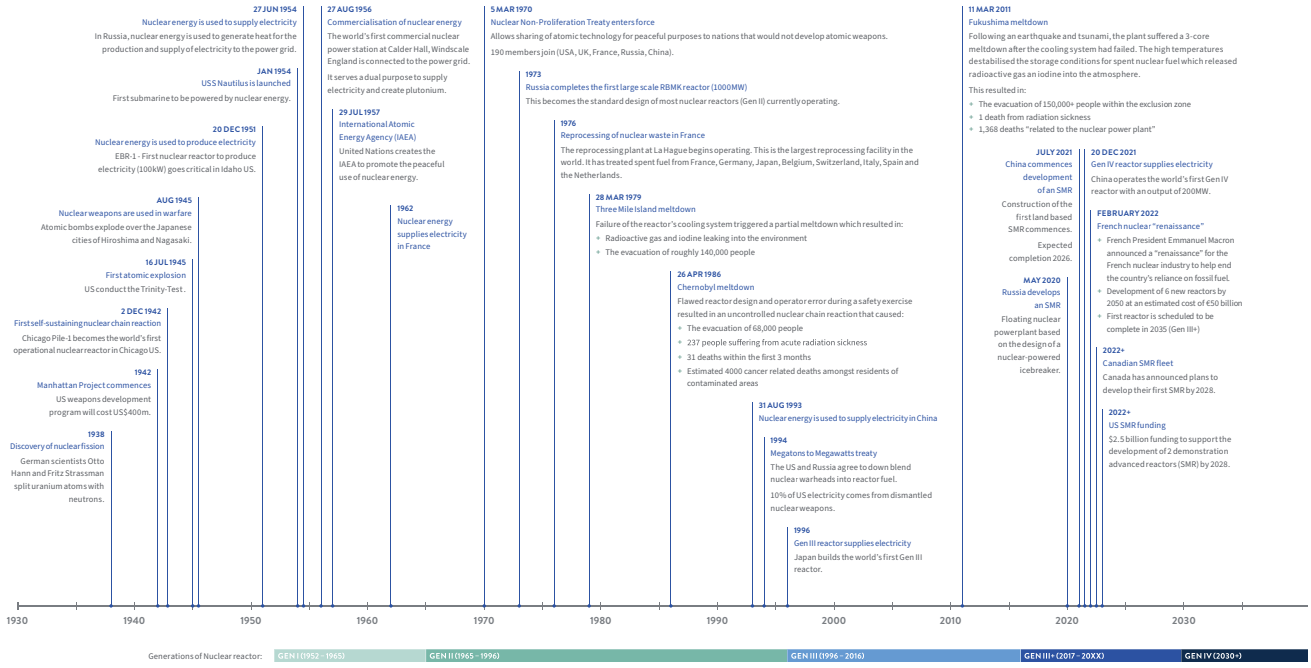
Many other countries already use nuclear power as one of the few realistic options to assist themselves in reaching net-zero emissions. France relies on nuclear power to meet over 70% of its energy needs (often using Australian uranium). China is on track to build and operate the world's first land-based commercial SMR by the end of 2026, with 150 more reactors planned over the next 15 years (totalling around 200 GW by 2035). The United States of America (**US**), long the world's largest generator of nuclear electricity, has been aggressively working to revive their nuclear energy capacity amidst the phasing out of older costly nuclear power plants. Pushing heavily for advanced light water and non-water-cooled reactors, the US is also looking at spending up to USD $2.5 billion in funding on the development of new advanced reactors with safer and more cost-effective designs.

The concept of nuclear power as a viable energy source in Australia may sound like a pipe dream. But Australia already has one nuclear facility at Lucas Heights in New South Wales – its purpose is not to produce power, but rather radioisotopes for various medical and industrial uses. When it comes to nuclear power, many people still have in their minds a vast, dangerous, toxic plant, like the kind featured in the Simpsons and represented by the disasters at Chernobyl and Fukushima. Such reactors are a relic of 1970's technology, more prone to operator error, higher costs, and slower to build than more recent plants.

Solar and wind will (and, in our view, should) be the backbone of Australia's energy needs going forward. Possessing some of the best sun and wind resources in the world, renewables currently produce 24% of Australia's total electricity generation and that percentage is growing. The technology will also continue to progress, with advances being seen in generation, battery capacity, transmission, cost, and even regulation as we continue to rehaul the NEM and open the way for offshore wind. But no energy source is perfect. Questions exist about battery capacity, transmission line construction, farm placement, space requirements, and, naturally, reliability and firming. Realistically a combination of different energy sources will be required on the path to net-zero, and nuclear power from SMR's may just be one of them.

BEYOND CARBON FUELLED POWER

The energy industry is constantly shifting. Responses to growing demand for clean energy in a practical way has pushed the development of non-carbon-based electricity generation. Exciting advancements are on the way in solar, wind, biomass, geothermal, oceanic, and of course nuclear power. While some of the technologies mentioned in this article are more speculative than others, at this stage none are purely theoretical, with proof-of-concept plants, or even working prototypes currently being developed or in operation.



SMALL MODULAR RECTORS

There is something very seductive about the idea of a one sentence solution. Alchemists used to chase a mythical cure known as a panacea, named after the Greek goddess of universal remedies. The idea that you could take one thing and instantly be cured of whatever ails you is a potent one. In politics a simple catchy slogan could help you win more votes than weeks of campaigning, never mind the nuance of your actual political message. When it comes to losing weight, forget about the complexities of diet and exercise, the USD $300 billion weight loss industry wants to give you one pill that will do it all. But how often does a simple solution really come along that fixes all your problems? How many things in life are really that simple? Well, when it comes to the problems of nuclear energy, on the surface SMR's almost present as that one sentence solution (although as we will see, things are a little more complicated).

Historically, nuclear reactors have been gargantuan monoliths of architectural design. There are reactors capable of generating thousands of megawatts of energy, which require cooling towers almost two hundred metres high, and hundreds of workers to run them. This has some obvious downsides - construction time and cost, space requirements, security, and suitable locations. SMR's may just solve all of this. While the concept of SMRs has only really taken off in the last decade, it already shows some promise, with Russia having built a floating prototype in 2020, known as the Akademik Lomonosov. The concept is simply to take the design of an existing nuclear reactor and scale it down, have it built using modular parts that can be fabricated off-site and shipped to location, reducing both costs and build time (particularly if multiple units are being built concurrently). Additionally, having potentially smaller designs means a greater number of possible locations. Imagine being able to decommission a coal plant and put a nuclear one right in its place, with minimal changes to infrastructure.

SMRs may be the closest thing we have to a one sentence answer to many of the concerns with nuclear power. However, as foreshadowed, the technology isn't perfect. With projects underway in China, Russia, the UK, Poland, the US, and Canada, SMR's are still in an exploratory stage. While some companies are advertising build times for reactors of one to two years, this has yet to occur, and may come with its own problems. Currently SMR's are also only cheaper to build in theory once you are able to mass manufacture the necessary parts and have the ability to put them together (the 'modular' part of an SMR). Where demand is low or in the pilot phase, this cost saving does not occur. Then there are also questions of nuclear waste and safety, while greatly reduced by a smaller footprint plant, these are still not eliminated entirely.

And while SMRs may not be the final word in the nuclear power debate, they are undoubtedly a cornerstone of its future. Australia doesn't need massive nuclear power plants to generate electricity – rather it needs cheap and efficient designs which can assist with load-following that can be in secure and safe locations and do not involve considerations such as wind or sun conditions.

GENERATION IV

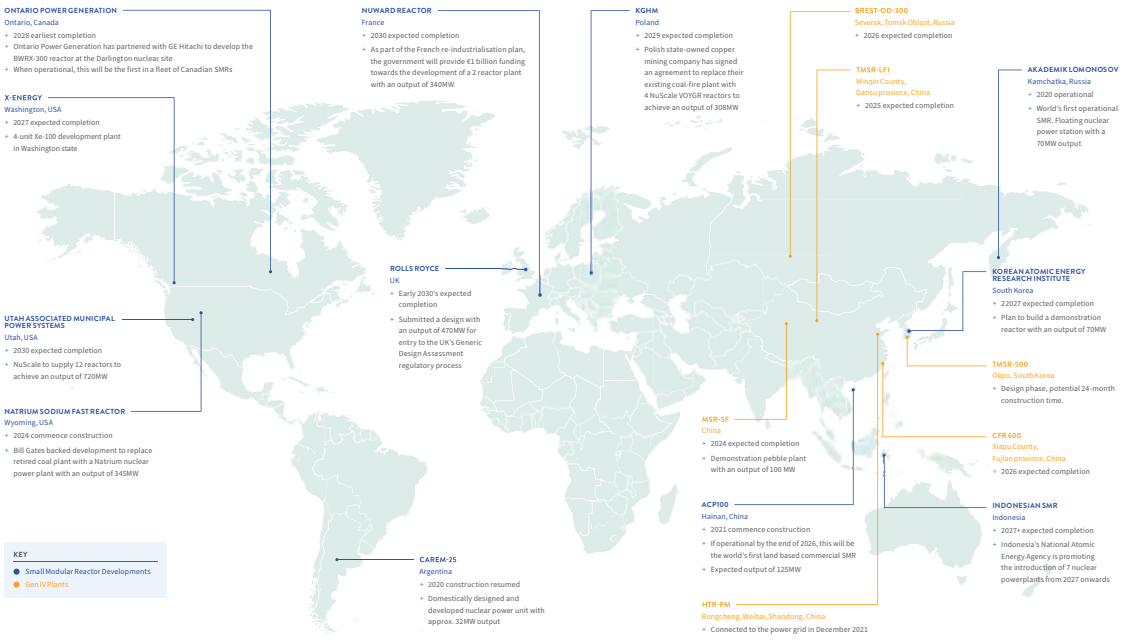
When Muhammad Ali returned to boxing in 1970, after a three-year absence as a result of his draft refusal in the Vietnam War, he was a markedly different fighter. Not as fast or as sharp as in his youth, he quickly suffered two back-to-back losses (the first losses in his career). By the time he was set to fight George Foreman in 1974, Ali was firmly the underdog against his younger heavy hitting opponent. With four to one odds against him, Ali's round 8 knockout was an almost impossible upset. How did he do it? A complete overhaul of his style. From relying on his once lightning-fast reflexes, he pioneered his 'rope-a-dope' technique, going against conventional boxing wisdom to invite punches that he would absorb against the ropes and in doing so tire his opponent out - he would cover-up and clinch to rest, techniques that persist today.

History is full of examples of adaptation and reinvention. Thomas Edison supposedly tested thousands of filaments before stumbling on one that would allow the invention of a functional and affordable lightbulb, Dick Fosbury completely changed how the high jump was accomplished after abandoning standard techniques, and Apple went against conventional marketing practices when it hired designers whose sole job is to unbox iPhones and provide feedback to make the unboxing experience a part of its strategic marketing plan. Nuclear technology is no different.

Because early reactors were more about facilitating nuclear weapons than nuclear energy, concerns such as waste or cost were not adequately addressed. By the second generation, reactors were on the way out, and from the late seventies to the mid-eighties when most of the world's reactors were constructed, fewer new reactor orders were coming in, with the public rightly concerned by issues around safety and radiation. By the time the first Generation III reactors were commissioned in the 1990s, the designs, including output, safety features, and efficiency had all advanced to the point of being almost unrecognizable compared to their initial counterparts. The technology of nuclear reactors advances still.

The Generation IV reactors are the latest in this long line. The objective of the Generation IV International Forum, a co-operative international endeavour which includes among its members, Canada, the European Atomic Energy Community, South Africa, the United Kingdom, France, Australia, China, Russia, South Korea, Switzerland and the United States, is to develop the research for better technologies. The focus on making commercial and industrial reactors more practical has placed a strong emphasis on safety. Rather than create reactors that can handle nuclear accidents, one goal of the new designs is to exclude accidents entirely. They incorporate passive nuclear safety systems that will shut down processes automatically in the event of a critical incident.

More efficient processing systems also mean that nuclear fuel is more efficiently consumed, and as a result, the waste output is greatly reduced, with the waste that is created only radioactive for centuries, instead of millennia. This also leads to a greater output, making these designs 100 - 300 times more efficient than previous generation counterparts. An add on effect is that this can also reduce the need to mine uranium - in fact some designs may even be able to run on processed fuel from previous generation reactors. And, of course, if the designs can be scaled down into an SMR, this has the potential to deliver safer, faster to build designs, with potentially less waste, and more flexibility in location.



TECHNOLOGY COMPARED

The table below shows a comparison of the various technologies in terms of key considerations:

CORE CONCERNS	TECHNOLOGY	TALKING POINTS
Safety	Current Generation (II and III) nuclear reactors	Currently almost all nuclear generators worldwide are Generation II reactors. It is estimated that based on the number of Generation II reactors currently operating, a nuclear meltdown is likely to occur once every 10 to 20 years.
	Gen IV nuclear reactors	These designs are much safer. For example, molten salt reactors have inherent properties such as a negative coefficient of reactivity, meaning they begin to cool once they reach a certain temperature, greatly lessening the likelihood of a meltdown.
Radioactive waste	Current generation nuclear reactors	A large reactor will produce 25-30 tonnes of used fuel per year. 3% of this is long-lived (up to 10,000 years) and highly radioactive and requires deep geological disposal facilities (which are also used for the disposal of other toxic wastes) for thousands of years. While not contributing towards carbon emissions, nuclear waste is itself an environmental hazard that must be monitored and dealt with.
	Gen IV nuclear reactors	Generation IV reactors produce significantly less waste than Generation II reactors, with some designs capable of reusing waste at a later date (although there may not be an economic benefit to doing so given the abundance in fuel). Unfortunately, the waste output, while significantly less than Generation II and III reactors (with some designs able to actually run on the waste of Generation III reactors), will still require purpose-built facilities to run for centuries if not millenia to properly house radioactive waste.
Cost	Current and future generation nuclear reactors	Historically, nuclear plants have incurred large costs overruns and build times relative to other sources. When new technologies such as SMRs are considered, build times are being advertised as low as 1 year for a fully operational plant. These predictions seem very optimistic. If the build time can in fact be shortened, SMRs are more likely to play a key role. There may also initially be higher costs involved in being an 'early adopter' in terms of training and operation. There has also been a trend observed in France and other nuclear reliant countries of 'negative learning'. When legislation and technological advances are introduced, costs increase rather than decrease, ostensibly due to shifting designs and the need for better procedures and protocols. It remains to be seen whether new generation nuclear technology will be able to overcome this obstacle.

BRINGING THE CONVERSATION TO LIFE

Clean, powerful and here

A car speeds through time, a superhero in a high-tech suit of armour fights aliens, and a space crew boldly goes where no one has gone before, all powered by the same source of energy. There's a reason why nuclear power is the power source of choice in science fiction. When a pellet of uranium smaller than one digit of your little finger can produce more energy than one ton of coal, it's difficult not to imagine the possibilities of using such a clean and powerful energy source.

The 2021-2022 global energy crisis threw into focus just how dependent the world is on traditional carbon-based energy. China, India, Europe, and the US are all facing sharp price increases and demands on energy for a variety of reasons, ranging from China's ban on coal imports from Australia, lower power generation from renewables in parts of Europe, and sanctions against Russian oil imports. As global pressure to move to clean energy increases and countries shift to renewables to take on a greater share of their electricity needs, nuclear becomes more and more attractive as a fuel source. It provides clean energy that can be adjusted to an extent to account for demand and supply shifts, stabilising the energy grid when seasonal fluctuations affect other renewable energy sources. Nuclear also has the capacity for significant electricity output, giving an additional practical option to countries without reliable solar and wind resources.

Currently, nuclear energy provides roughly 10% of the world's electricity from 440 reactors. This is a total of approximately 790 billion kilowatt hours of electricity and displaces around 1.6 gigatons of carbon dioxide emissions annually. Australia alone exports enough uranium ore concentrate (UOC) to power roughly 92% of Australia's electricity consumption each year, which is roughly 1.7 times more energy than we generate from coal.

In respect of sun and wind resources, Australia is more fortunately located than many other countries. As a country, we have time to consider our options while we are still phasing out coal and scaling up our sun and wind generation capacity. Now could be the best time to have an eye to the long term and consider other potential energy sources to help with our transition. Offshore wind, oceanic, geothermal, and hydropower (which may very well allow Tasmania to reach its goal of 200% renewable generation by 2040), are all worthy of investigation and expansion, but it could be time to include nuclear power on that list. In terms of carbon emissions per kilowatt hour for the full life of a nuclear plant nuclear power plants rank as one of the cleanest energy sources in the world.

No country aims to reach net-zero emissions on one power source or one solution alone – rather, it will be a combination of different energy sources and industries that will allow us to produce cheap, practical, and reliable energy to replace our need for coal and gas fuelled power.

The table below shows an estimated amount of carbon produced by different energy sources as a rough guide over the lifetime of their plants (including construction and, where applicable, fuel transport) from a report from the Intergovernmental Panel on Climate Change. Please note these figures are a rough guide, and do not take into account newer generations of reactors, nor may they fully take into account the impacts of mining and requiring a continued (or potentially expanding) uranium mining industry.

Source	Carbon produced gCO2eq/kWh	Median
Coal (worldwide average)	675-1689	820
Oil	510-1170	-
Gas	290-930	490
Modern-to-advanced hard coal plants	710-950	-
Natural gas combined-cycle plants	410-650	-
Coal with CCS (expected)	70-290	-
Gas with CCS (expected)	120-170 (assuming a leakage of 1% of natural gas) 90-370 (assuming current normal leakages of 0.8%-5.5%)	-
Solar PV	18-180	Utility-48 Roof-41
Solar CSP	9-63	-
Nuclear power (Gen II)	4-110	12
Wind	7-56	Offshore-12 Onshore-11
Geothermal	6-79	38
Ocean energy	2-23	-
Hydropower	Estimates range from: 40 (SRREN) 3-7 (Dones et. al. 2007) 20 (Hertwich, 2013) 70 (Global average) 2 (Large reservoirs)	24

Plug and play

Commercially, one of the most exciting advancements in nuclear technology in recent history is the construction of an SMR. As noted above, these are scaled down versions of existing nuclear plants, and as such, offer advantages in terms of safety, build times, flexibility in terms of output as well as location. Imagine being able to replace an existing coal fuelled power plant with a clean and more efficient nuclear plant. In doing so, you don't have to worry about site suitability for wind or sun, grid connections, or even space requirements, with plants being able to scale up and down as needed - the technology is almost perfect as a supplementary source.

As mentioned, the world's first land based SMR is currently under construction in China, but the rest of the world is not far behind. Russia has already built an off-shore SMR with plans to construct a land based one by 2028, repurposing icebreaker reactors for the design. France, the USA, and Japan have all announced a renewal in efforts to construct and operate an SMR within the next decade. If these developments can be combined with Generation IV technology (advanced SMRs), then the safety features and efficiency of SMRs can be further enhanced.

An embarrassment of riches

Even with outdated technology, nuclear energy manages to produce a remarkable output in comparison to the amount of fuel consumed. Of the 440 nuclear reactors currently operational, less than 30 are Generation III and III+, with the rest being Generation II reactors. These reactors, largely constructed in the 70's and the 80's are much less technologically impressive than their newer counterparts. As Generation IV reactors come online (currently in the prototype phase, with designs being rolled out around the world over the next ten years), designs that are up to 300 times more efficient than Generation II reactors are on the horizon, becoming more fuel efficient, and requiring less space.

This bodes well for Australia, a country which is currently the world's third ranking producer of uranium. We are selective as to

how and to where we export our uranium, requiring treaty-level assurances that the materials will only be used for peaceful purposes, and further International Atomic Energy Agency (IAEA) safeguards such as monitoring the use of these materials. Should a domestic demand for uranium ever arise, Australia has access to the world's largest readily available supply of fuel.

In defence

The announcement of AUKUS, the trilateral security pact between Australia, the UK and the US on 15 September 2021 has implications for Australia that are too significant to ignore. As a result of this pact, Australia will join the US, Russia, the UK, France, China and India as one of the few countries with nuclear submarine capabilities, but unlike them will not have a civilian nuclear industry to lend its expertise or build up local specialist capability. In comparison to previous diesel designs, nuclear submarines move at high speeds for longer periods of time and allow longer submerging and travel durations. Importantly, they will also require enriched uranium as a fuel source. Once the on-board reactor has been fuelled with enriched uranium provide by the US, it should not need to be replaced for the lifetime of the submarine. This is presumably why Prime Minister Scott Morrison has provided assurances that the AUKUS deal is not meant to signal the start of Australia's own nuclear industry.

However, refuelling isn't the only factor that will require nuclear expertise – there are also potential issues regarding maintenance. In an opinion piece for the Sydney Morning Herald, former PM Malcolm Turnbull questions whether it is credible to expect that a nuclear submarine will not need inspection and maintenance for 35 years, and what Australia's options are if something does need to be done. Training workers to build, maintain, and refuel nuclear submarines is not an overnight job. Are the submarines to be maintained and repaired by sending them to the US if something were to go wrong? These is not a question that necessarily must be answered by a full scale civil nuclear industry, but the development of such an industry is one possible solution.

ADDRESSING THE CONCERNS

For as many problems as nuclear power could potentially solve, there are strong negatives that should be acknowledged. Since the discovery of nuclear fission in 1938, the technology has had a history of high-profile failures. Critical safety events, such as the ones at Three-Mile Island, Chernobyl, and more recently Fukushima, are rightly at the forefront of public perception when it comes to questions of safety. Additionally, while not a direct contributor to greenhouse gases, by-products in the form of nuclear waste, made worse by poor early storage and disposal mechanisms, continue to throw up environmental challenges. Furthermore, nuclear plants typically have significant start-up costs. In countries like the US or China where there is greater need for energy and less availability of reliable sun and wind than Australia to fuel clean energy sources, such an investment may be more easily justified to achieve net-zero in time to meet emission goals. However, in Australia where alternative clean energy sources are plentiful, the initial financial investment and risk may be harder to swallow, perhaps it is of too significant a scale for a nuclear industry to ever develop here. But unless we ask the right questions, commission the appropriate studies, and be frank and realistic about what is needed for safe, reliable, and cheap nuclear energy, we can't have the needed mature national discussion and debate at this critical environmental and commercial juncture in Australia's energy evolution.

Below we outline what we consider are several key issues with nuclear power that need to be addressed before Australia can consider a civil nuclear industry, as well as possible regulatory and potential technological solutions.

Safety

Nuclear power's critical safety incidents can be horrific, with dramatic consequences for humans and the environment. While scientists have learned from each event and there is now much less likelihood of the same mistakes being repeated, human error, unforeseen dangers, and deliberate sabotage or terrorist attack will always loom on the horizon.

No one can deny that nuclear facilities are potentially dangerous. Studies of previous generation reactor designs predict that nuclear reactor accidents will occur every 10 to 20 years. Fukushima's nuclear disaster in 2011, triggered by unforeseen consequences from an earthquake and tsunami, brought these dangers to the forefront of the public's mind, and led to the idling of many of Japan's nuclear power stations (which have only recently begun to restart amidst Japan's energy needs and its obligations under the Paris climate accord), and also to Germany's phasing out of nuclear power completely.

SMRs and Generation IV technology have the potential to address these concerns. Inventive designs such as molten salt reactors, for instance, have inherent safety features to prevent meltdowns. But these safety improvements need to be put under the spotlight to a greater extent, so that the broader community can become better educated and we can all better understand the advantages and drawbacks of these more advanced technologies. As these technologies become commercially available, Australia should, as a first step, ensure it is able to properly evaluate and, if it chooses, acquire such technologies accordingly.

Waste

Nuclear energy is clean, at least in the sense that it emits no carbon. However, nuclear energy does produce something else, nuclear waste that is both hazardous and requires careful management once produced.

The very real consequences of carbon emissions and climate change are significant, and quicker measures to move towards net-zero emission are needed. Where countries lack the necessary space and reliable sun and wind resources, nuclear energy may well be the backbone of their energy needs, but it will come at a cost.

Most Generation II fission plants utilise 1-10% of the potential energy from the plant's uranium fuel source. The by-product of the fission process is a highly radioactive material that can cause serious harm to humans and the environment. In addition, materials around the reactor itself can also absorb radiation and itself become low level radioactive waste. While background radiation is ever present in our lives, even these low and medium-level waste items need to be disposed of. Of all the waste produced by a nuclear plant each year - the average American nuclear reactor is estimated to produce roughly 2000 metric tons of waste each year - roughly 3% will be high level nuclear waste (i.e. highly radioactive). Dealing with this high-level nuclear waste needs to be addressed - it represents roughly 95% of the radioactivity and will remain fatally dangerous to humans for thousands of years.

Reprocessing

Currently, all nuclear waste is stored in temporary storage facilities, and until the Onkalo spent nuclear fuel repository in Finland becomes operational in 2023, most waste will be cooled for several years in the nuclear plants that generate them or placed in dry casks rated to last a little over 200 years. One alternative solution is to reprocess the waste. As previously stated, Generation II plants are notoriously inefficient at processing their fuel source. At the end of a complete chain reaction which takes roughly 8 years, 90-99% of usable energy in in the fuel rod is still usable in the form of plutonium, provided the rod has been reprocessed. This usually occurs by separating plutonium, uranium and other wastes from the spent fuel and enriching the uranium with plutonium to create a fresh product with similar characteristics to the original fuel. Many countries, such as France, China, Japan, and Russia also invest heavily into reprocessing, and it's not hard to see why. Despite the heavy cost to fabricate, the reprocessing theoretically greatly reduces the amount of nuclear waste produced and can vitrify some of the high-level radioactive waste, transforming it to glass that is heavily radioactive for hundreds instead of thousands of years.

But reprocessing is not without its flaws. Reprocessing plants (such as La Hague in France or Sellafield in the UK) both require the intentional release of low levels of radioactive material. While the amount released each year is minimal and less than received from doing something as low risk as boarding a transatlantic flight, significant controversy has arisen about the long-term effects of the collective dose and its impacts on both environmental and human health. Additionally, Australia's abundance in uranium means that reprocessing is even less desirable from an economic standpoint. At this time, Australia will not have any significant need to reuse the nuclear material, and it will be more cost effective to simply insert new fuel rods and dispose of the spent rods. The reprocessing will also greatly increase the volume of low level and very low-level waste, and once the radioactive liquids and gases discharged by the reprocessing plants are factored in, there is no clear advantage for the reprocessing in terms of waste volume or required repository area. That said, more advanced forms of waste processing are being explored. Techniques such as Synroc production (a method pioneered by ANU in 1978 of solidifying high-level liquid nuclear waste to make it easier to store and less likely to leak into waterways) may well be worth investigating. As pointed out in the final inquiry report for the Uranium Mining and Nuclear Facilities (Prohibitions) Repeal Bill standing committee, Synroc production is capable of reducing by volumes on average by up to 90 per cent compared to traditional waste treatment methods such as cementation, and its development, even without a nuclear industry gives potential for Australia to become an innovator and leader in radioactive waste management.

Deep geological disposal

Internationally, broad consensus is that deep geological disposal is the only effective way to deal with the long-term problem of nuclear waste. This would require the construction of specialist facilities deep underground, where waste will be transferred to over the course of decades, before finally being sealed using state of the art technology. France, Finland and Sweden are some of the most advanced countries in this area, with proposed sites very close to completion. There are a range of technical considerations, requiring stable sites, ensuring no leaks to groundwater, combined with site selection problems and landowner consent. The idea also presents challenges that are almost entirely new, such as estimating the impacts of having to seal the sites for longer than recorded human history.

Potential Australian Storage

Given Australia possesses large tracts of remote, relatively stable land, the idea of building a suitable storage facility here for high level nuclear waste is something that has been floated before. Former Prime Minister Bob Hawke famously pushed for the idea in 2005, and again in 2014, advocating for land to be allocated with the full consent of Australia's Indigenous leaders.

'In other words, we make the world a safer place, we earn an enormous amount of new money, and we use that money to help close these unacceptable gaps between Indigenous and non-Indigenous Australians.'

Whether this is actually a viable answer needs far more information than is currently or publicly available to assess. Whether Australia actually has suitable storage sites (the US spent decades and approved millions in spending to develop the Yucca Mountain nuclear waste repository, only to abandon the project due to, among other reasons seismic activity and cultural impact), the technical requirements of building a suitable facility and its associated upfront costs (the estimated cost of the Onkalo spent nuclear fuel repository, the only one in the world, was estimated to be €818 million for construction and operation costs), are all areas that need to be explored in great detail before Australia can fully consider the operation.

One of the most recent inquiries we have into this exact topic is the 2016 Nuclear Fuel Cycle Royal Commission in South Australia. Economically findings were conservatively estimated that just one above ground interim storage facility and an integrated secure underground repository would bring in a total revenue of $257 billion against total costs of $145 billion (including security and construction), both over the period of roughly 130 years, as well as creating several thousand jobs. It would also allow the storage of 390,000 m3 of intermediate nuclear waste, removing an environmental hazard not just from Australian nuclear waste production, but also around the world. It was also concluded that such a facility would not require significant state investment if a pre-commitment to accept used fuel was secured. However, the inquiry was met with public outcry and concerns about environmental and cultural impact.

At present, nuclear waste in Australia (apart from that produced by mining which is stored at the mines), is processed overseas and then stored at more than 100 locations around the country. A proposed National Radioactive Waste Management Facility has been approved in Napandee in South Australia to host the facility. This will not be a high-level waste management facility, and therefore will not require many of the costs or jobs that a deep geological disposal site would require. There are currently no concrete plans to build a deep geological waste storage facility within Australia.

So where does Australia stand? We could either consider a deep geological storage facility or look more into advanced processing methods such as REMIX fuel or Synroc, but like it or not this is a problem we will have to tackle one day. Even if Australia chooses not to develop a further civil nuclear industry, responsible long-term waste storage is a problem we cannot ignore. Given the importance of nuclear materials in medicine and industrial uses, even if no civil nuclear energy industry is developed, the Lucas Heights reactor will continue to produce waste, and a more responsible solution will eventually need to be developed.

COSTS

Almost every nuclear plant that has ever been built has suffered overruns in construction costs, both financial and temporal. If Australia were to commit to building a Generation III+ reactor tomorrow, similar to say the unit 3 reactor in the Olkiluoto Nuclear Power Plant in Finland, it could take up to 15 years or more to be constructed (the Olkiluoto plant broke ground in 2005, and officially started production in December 2021).

Studies in France also suggest that nuclear power has a 'negative learning' curve. The more production is scaled up, the higher costs seem to increase. These cost increases arise as the complexity of the technology increases, requiring more expertise, better materials, and different designs. This curve is largely based on trends observed in the 70's and 80's during the initial push in most countries for nuclear power, and again in the early 2000's when the US and Europe began commissioning new plants after decades of relative inactivity in terms of nuclear plant construction.

Will this trend still hold? It's difficult to say, but almost all traditional reactors have required heavy upfront costs in the billions of dollars. Given returns won't be realised until the plant is constructed and begins producing electricity, it is easy to see why financing may be difficult to raise. If a plant were to be constructed in Australia using current technology, it would almost certainly have to be an SMR to be viable. An SMR which is able to be built faster and cheaper, and potentially with a modular design so pieces can be manufactured and assembled in Australia with significantly lower cost and time commitments.

Even so, such a plant is likely to be expensive - for example, Russia's first and so far only operational floating SMR cost USD $740 million (noting that this was a pilot plant of this design and built offshore) for 70MW of energy. By comparison a solar farm of equivalent MW, say the 70MW Morwell Solar Farm in Victoria which is due to break ground in the second half of 2022, is estimated to cost roughly AUD $105 million. Final determinations from a financial perspective will need to consider what value can be attributed to not just a plant's generation capacity, but also to its despatchability, security of supply and its capacity to support an otherwise largely intermittently generating network (noting the Australian government's current push to re-create the Australian Electricity Market with capacity factors and payments).

The table below sets out some estimated costs for construction of SMRs in Australia per kilowatt as provided from three independent studies (Heard, B. (2021). Small modular reactors in the Australian context. Report prepared for the Minerals Council of Australia, figures converted to USD on 1 March 2022):

Plant type	Costs USD $/kWh	Comments
SMR Small	Low $5,267.79	WSP Parsons Brinkerhoff (2015) based on adjusted vendor est. from National Nuclear Laboratory
	Central $6,191.00	
	High $7,437.55	
SMR Large	Low $5,784.12	
	Central $6,819.68	
	High $8,148.75	
Energy Innovation Reform Project (2017)	Minimum $2,078.05	Anonymised study of seven vendor cost details
	Average $3,828.48	
	Maximum $5,924.51	
SMR Roadmap (2018)	Low $3,565.07	Analysis of 47 estimates from vendors and literature
	Median $5,263.03	
	High $7,039.39	

By comparison, here are several estimated costs for the construction of several other sources of energy (US Energy Information Administration. (2020). Capital cost and performance characteristic estimates for utility scale electric power generating technologies):

Energy	Capital cost in 2019 (USD $/kW)
Solar	$1,313
Onshore Wind	$1,265

On the issue of build times, while the projects that receive the most attention are usually those that have had very significant cost and time overruns, it is not unusual for plants to take upwards of 10 – 15 years to construct (incorporating material delays to originally expected timing).

However, the trend for timing delays has reduced recently. The table below shows build times for countries with multiple nuclear plants built over the last 10 years which suggests that nuclear power plant times have trended downwards, although ultimately build and cost times are likely to vary from project to project and will differ greatly by country and expertise (A Mycle Schneider Consulting Project (2021). The World Nuclear Industry Status Report).

Country	Units	Construction time (years)		
		Mean	Minimum	Maximum
China	37	6.1	4.1	11.2
Russia	10	18.7	8.1	35.1
South Korea	5	6.4	4.2	9.6
India	3	11.5	8.7	14.2
Pakistan	3	5.4	5.2	5.6

Ultimately, the front-end costs of nuclear reactors are a large hurdle, and possible delays in their construction gives rise to issues as to whether they can be operational in time to make a meaningful contribution to Australia's achievement of net-zero emissions is questionable. As new generation SMRs come into operation over the next 10 years, Australia will be in a better position to assess these costs. As yet, no truly 'modular' design reactor (where parts of the plant are prefabricated and then shipped to save on build time and costs) has been implemented. If truly modular designs can be implemented, build times should drop dramatically.

A NUCLEAR FUTURE IN AUSTRALIA?

We have seen that there are significant hurdles that the technology must overcome before Australia can comfortably consider implementing nuclear power. How will storage of nuclear waste be handled? Can we ensure that implementation will be safe? What are the projected likely costs for bringing nuclear power to Australia? What are the alternatives if we don't?

The first step to properly considering whether nuclear power (ie. almost certainly from SMR's), has a role or potential role in Australia's energy future at this important junction in our energy history, is to facilitate an informed discussion, and to have the transparent and mature debate between stakeholders and Australian society.

Ultimately, such a debate needs to be informed by feasibility studies of nuclear technology in the modern era, with input from experts and interested parties, and contribute a perspective towards Australia's unique needs and energy mix. In recent years three separate State inquiries (Nuclear Fuel Cycle Royal Commission Report (2016); Report 46 – March 2020 final report for the Uranium mining and Nuclear Facilities (Prohibitions) Repeal Bill 2019 for NSW; and Inquiry into nuclear prohibition for the Environment and Planning Committee in Victoria in 2020.)

have looked at different potential opportunities related to nuclear power in Australia. All three inquiries concluded that Australia's moratorium on nuclear power hampered our ability to obtain necessary business cases, properly assess costs, test commercial viability, or truly consider with public policy dialogue whether nuclear power has a place in Australia.

In our view, either a temporary or permanent removal of the moratorium is a key legal and economic step to enable government, business and Australian citizens to begin to obtain the information each of them need to properly consider the relevant opportunities, and associated pros and cons of SMR nuclear power contribution to Australia's future carbon-free energy mix.

The moratorium grew out of political drivers influencing the Howard Government in 1998, and perhaps the net-zero goal we now share can be the catalyst to re-open this important debate for the betterment of all Australians.

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THE MARKET STRUGGLES TO FIND DIRECTION WITH 'GREEN' INITIATIVES

28/03/2022

The ACCC is the latest regulator to take aim at "greenwashing", a term encompassing an array of actions that overstate or misrepresent the "green" credentials of a company or product.

In a speech delivered to the Committee for Economic Development of Australia, outgoing ACCC Chairman Mr Rod Sims noted that the Commission's focus would go beyond consumer goods, taking a closer look at claims made in the manufacturing and energy sectors relating to the carbon neutrality of production processes. Mr Sims stated that the ACCC would be working closely with other regulators, particularly ASIC, to identify the most appropriate regulator to deal with issues given the overlap in the regulatory frameworks.

This position aligns with global regulatory collaboration efforts, with the International Organization of Securities Commissions (**IOSCO**) working to develop IFRS International Sustainability Standards Board (**ISSB**) Exposure Drafts of proposed climate and general sustainability disclosure requirements in 2022. The ISSB intends to deliver a comprehensive global baseline of sustainability related disclosure standards in the near term.

Notably, the U.S. Securities and Exchange Commission (**SEC**) has recently released proposed rule changes to enhance and standardise climate-related disclosure for investors. The rule changes would require companies to include certain climate-related disclosures in their registration statements and periodic reports, including information about material climate-related risks and certain climate-related financial statement metrics (such as scope 1 and 2 greenhouse gas emissions) in a note to their audited

financial statements. This represents a significant move towards standardisation in what is still the largest and most important capital market in the world.

WHY GREATER CLARITY IS NEEDED

Given the nascent and dynamic nature of the "E" component in ESG, the development of globally accepted, universally acceptable disclosure standards is a mammoth task, yet one for which there is increasing consumer and investor demand.

Boards too are seeking greater clarity and certainty around climate and general sustainability obligations, as they face increasing pressures (both internal and external) when it comes to environmental disclosure (see our article - "Net zero commitments": the latest minefield for directors).

We believe that the role of Australian regulators is to maintain confidence in the markets and provide some level of guidance for industry, investors and consumers alike. While there is an existing regulatory framework for climate-related disclosure, it remains a patchwork of requirements without uniform principles or standards to guide either the preparers or users of information.

CURRENT REGULATORY FRAMEWORK

The Clean Energy Regulator (**CER**), ASIC, ASX, APRA and the ACCC each play a critical role in regulating market behaviour in the climate and general sustainability matters in their own domains. Still, there is as yet no standardised model of reporting for non-financial ESG matters.

The *National Greenhouse and Energy Reporting Act 2007* (Cth) (**NGER Act**) provides a framework for the disclosure of greenhouse gas emissions and energy production and consumption, but only for facilities and corporate groups that exceed specified reporting thresholds.

Australian companies have specific disclosure and reporting obligations under the *Corporations Act 2001* (Cth) (the **Corporations Act**) and a general duty to not be misleading or deceptive.

ASX-listed entities have the additional overlay of continuous disclosure obligations and are also encouraged to report material exposure to environmental, social and governance risks under Recommendation 7.4 of the ASX Corporate Governance Council's Principles and Recommendations. There is no positive obligation on ASX-listed entities to account for ESG matters. However, the "if not, why not" disclosure requirement in Recommendation 7.4 allows the market to assess the credibility of listed entity's policies (or lack thereof) for dealing with climate-related risks, both physical and transitional.

The ACCC, under the Australian Consumer Law (ACL), regulates environmental and sustainability claims on products and services which are misleading or deceptive through proper disclosure to consumers.

APRA has also released Prudential Practice Guide CPG 229 Climate Change Financial Risks (**CPG 229**), which sets out APRA's expectations regarding management of financial risks of climate change (see our article - APRA attention to climate risks hots up).

In each of the ASIC and APRA guidance documents, the recommendations of the Task Force on Climate-related Financial Disclosures (**TCFD**) are referred to as best practice, but, unlike other jurisdictions such as the UK and New Zealand, adherence to the TCFD framework is not mandatory.

CATCHING UP TO MARKET SENTIMENT

Today, investors and consumers are increasingly redirecting capital and consumption away from businesses perceived as having poor ESG credentials. This is most obvious in the environmental domain, where fossil-fuel and other carbon emitting projects are struggling to attract investment. A recent survey found that 88% of international investor respondents and 75% of international non-investor respondents expect companies to provide clear and appropriately detailed disclosure of climate change governance, strategy, risk mitigation efforts and targets.

While most environmental issues under the ESG umbrella are factual, measurable and reportable, boards and management of Australian companies often face problems in deciphering the legal framework in which they must operate, given measurement and reporting obligations are not standardised.

The increasing pressure on businesses to become "green" and disclose more information regarding their environmental impact may prompt them to make aspirational ESG claims or other vague statements that result in genuine confusion when users of that information attempt to assess the business through an ESG lens.

The ACCC, ASX and ASIC all seek to address similar market concerns by improving disclosure so that end-users (i.e. consumers or investors) can confidently rely on claims made in the market. Standards are vital in providing certainty around regulators' expectations and enhancing business and consumer confidence.

Of course, the science behind disclosure and reporting is complex, particularly for environmental matters. What is objectively reasonable involves an assessment of criteria such as the key metrics and assumptions used, the science behind the claims and technology utilised, which requires expert technical knowledge. This level of detailed information is seldom disclosed to the regulators, other industry participants, investors and consumers.

When the science gets sophisticated, expert scientific input becomes essential, extending beyond the remit of regulatory bodies' expertise.

A POTENTIAL GLOBAL SOLUTION WITH A LOCAL TOUCH?

One means to provide greater confidence to the market, and the participants within it regarding climate-related disclosure could involve the establishment of a representative body of cross-disciplinary experts to build on baseline standards provided by the ISSB to assist regulators in setting Australian standards.

This body could operate in a manner similar to the Australian Joint Ore Reserves Committee (**JORC**) which was established in 1971 and published several reports containing recommendations on the classification and public reporting of ore reserves prior to the release of the first edition of the *Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves* (known as the "JORC Code") in 1989.

Similarly, a body supported by input from experts in their respective fields (including climate scientists, engineers or accountants) could make recommendations to regulators regarding uniform standards for climate-related disclosure made by entities operating in the public domain.

To continue the JORC analogy, an ESG-style JORC Table 1 disclosure could complement climate and sustainability claims made by listed entities by setting out the key parameters and methods relied upon to arrive at their estimate of the relevant metric.

WHAT APPROACH CAN BOARDS TAKE IN THE MEANTIME?

Consumer and investor expectations will continue to drive companies to be more sophisticated in their approach to ESG-related disclosure. The reality is that these market forces will almost certainly pre-empt attempts by regulators to develop standardised frameworks and recommendations for disclosure, meaning boards will need to be proactive in developing their approach within the guide rails provided by existing regulation.

The Santos case in Australia and the recent case against Shell directors in the UK is a testament that directors may be pursued for breaches of their director's duties.

In our experience, practices vary greatly. However, ASIC Regulatory Guide 170, which relates to the preparation and presentation of forward-looking financial information, is a good starting point in helping boards satisfy themselves that the company's disclosures or product claims have reasonable grounds.

ASIC suggests companies should be asking themselves three key questions:

1. Is there a relevant factual foundation for the claim to ensure that the information behind those claims is not artificial?
2. Is the claim supported by verifiable information, or is it based only on hypothetical assumptions?
3. Are all material assumptions, including implied assumptions, objectively reasonable?

If boards assess these matters through a typical due diligence approach, engaging and relying upon independent industry experts to the extent required, they are more likely to be able to establish "reasonable grounds" for their ESG claims. For further information on establishing reasonable grounds, please refer to our article on Net Zero Commitments.

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PILBARA'S POWERHOUSE - OUR OBSERVATIONS FROM THE 2022 PILBARA SUMMIT

06/07/2022

It is not surprising that Karratha in Western Australia is the host of the Pilbara Summit.

Karratha is a major operational centre for several global key industry players, including Rio Tinto, Woodside Energy and Yara. Karratha is also home to one of the largest, densest and most diverse collections of incised or carved rock art in the world, referred to as petroglyphs, located on the Burrup Peninsula. It also has a thriving local community and the City of Karratha itself refers to Karratha as the "Powerhouse of the Pilbara".

Now in its 4th year, the Pilbara Summit aims to bring together senior industry, investors, businesses, community, and government representatives to look at the economic growth, investment, development, productivity and innovation across the region. Gilbert + Tobin had the pleasure of sponsoring and attending this year's Pilbara Summit in Karratha from 29 – 30 June 2022.

The Pilbara Summit undoubtedly brought together key global industry players at a pivotal time as the region, Australia and the world seek to unlock the opportunities of the clean energy and decarbonisation transition. The Summit was an incredibly valuable opportunity to hear from leading experts and prominent organisations about recent developments, key challenges and future opportunities in the industry.

Members of Gilbert + Tobin's Perth, Sydney and Melbourne offices also took the opportunity to swap their suits for high vis and steel caps in attending site tours of:

+ Rio Tinto's Dampier Port operations;
+ BCI Minerals' Mardie Salt and Potash Project; and
+ Yara Pilbara Fertilisers and Yara Pilbara Nitrates Technical Ammonium Nitrate plants.

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KEY TAKEAWAYS

Below are our key takeaways from the Pilbara Summit and our time in Karratha. We were encouraged by the vast growth opportunities that exist in the Pilbara and we are optimistic about continuing to collaborate and make a meaningful contribution to the future of the region and the nation as the challenges of the clean energy and decarbonisation transition are scaled.

The boom is back

The Pilbara region is the driving force behind the State of Western Australia, providing 19.7% of Western Australia's Gross State Product and generating $9.65 billion in State royalties in 2021. This is not likely to change any time soon, with an estimated $170 billion of future development planned in the Pilbara pipeline over the next 10 years. In addition, industry is expected to broaden beyond the extraction of traditional resources, like iron ore and LNG, into the production of clean energy that aims not only to power industry, but also to result in the decarbonisation of regional economies.

The rise in clean energy is accompanied by the expectation that substantial investment will be made in developing local downstream processing opportunities (such as green steel). In this context, Nicole Roocke, CEO of the Minerals Research Institute of Western Australia (**MRIWA**), spoke about the significance of MRIWA's efforts to assess the viability of creating a sustainable green iron ore-to-steel value chain in Western Australia.

However, the dynamic of operating in the Pilbara is changing, and project proponents are now, more than ever, expected to engage with local communities to deliver enduring and self-sustaining benefits as part of their social licence to operate. This means that industry players looking to do business in the Pilbara must engage meaningfully with local communities to ensure that the benefits derived by industry flow to deliver more transformational outcomes to the community.

Social considerations, such as housing and services, will play a key role in unlocking the development of significant renewable energy projects in the Pilbara. Sustainability is a key concern, and local communities are cognisant of the lessons that can be learned from previous boom-cycles in the region. The message from the Pilbara Summit was clear that investment in our communities is critical to ensuring the long term stability of the Pilbara region and the projects it supports.

Co-development with Traditional Owners

Traditional Owners are rightfully recognised as key stakeholders who will play a significant role in the future of clean energy in Western Australia. Land access is a key issue considering the large footprint of the projects currently being contemplated. However, approaches to consultation and engagement with Traditional Owners fluctuate within the industry.

Significant development presents the opportunity to create a culture of participation and to produce inter-generational benefits for Aboriginal communities in the Pilbara (such as equity ownership and energy security). It was largely acknowledged that companies will need to meaningfully engage with Traditional Owners in respect of the development of new renewable projects and solutions, at a far higher level than previously seen in the last resources boom. Many companies acknowledged previous levels of engagement would no longer suffice.

Pilbara Solar presented on its "first of a kind" projects in the Pilbara, including two solar farms which are currently being developed in partnership with the local Aboriginal communities.

Stephanie Unwin, CEO of Horizon Power, suggested that decarbonising the Pilbara would require the "re-wiring" of the North-West Interconnected System and transitioning communities to green energy.

It is clear that the industry is more open to considering partnering with Traditional Owners to find more commercial and long-lasting arrangements.

Collaboration is key

The logistical challenges and costs associated with doing business in the Pilbara region are significant and well known to key industry players. Long-haul transportation is expensive, the accessibility of fly-in fly-out workers are critical during project construction and operations, local housing is in short supply, and access to port

infrastructure is an ongoing focus. As noted in the Australian Industry Energy Transitions Initiative's Phase 2 report about setting up industrial regions for net zero, which was released on the eve of the Pilbara Summit, the decarbonisation of the Pilbara as part of the clean energy transition will cost an estimated $17.8 to $38.4 billion. Further, collaboration between industry stakeholders is absolutely necessary to ensure developments are able to progress within a meaningful timeframe.

Samantha Buchanan, General Manager – Energy Development WA at Rio Tinto pointed out that the industry has a proven history of collaboration in the areas of technology and safety, which provides great cause for optimism. However, the challenge for large scale producers in Western Australia will be to sacrifice the flexibility offered by the historical model of developing and owning their own infrastructure networks (such as previously port, rail and energy infrastructure) in favour of new common use infrastructure which is backed by Government and industry.

Brendon Grylls, former leader of the Western Australian National Party, spoke about his 'More than Mining' policy reform that seeks to normalise living costs in regional mining cities, and indicated that a failure to effectively collaborate may lead to peripheral community stakeholders facing the collateral fallout of unsustainable growth.

Decarbonisation targets – industry's changing approach

We have now seen a shift from the question of "will you be making decarbonisation and net zero commitments?" towards "how will you meet the ambitious commitments you have made?". Nowhere has this been clearer than at the Pilbara Summit, where a common theme was the promotion of increasingly bold decarbonisation and net zero targets and implementation strategies.

Strategies to reach these targets are varied, but a common theme is the decarbonisation of transportation. For example, Rio Tinto and Fortescue Metals Group are working towards electrifying locomotives, and Mineral Resources Limited plans to transition its road trains from diesel to electric. Continued innovation is likely to be focussed particularly in the areas of heavy haulage, shipping and equipment manufacturing. Whether this innovation will be able to keep pace with industry demand remains to be seen.

Is it still too early for green hydrogen?

Green hydrogen is seen by many people as the key to decarbonising heavy industry and heavy haulage transportation.

However, the cost of producing green hydrogen remains prohibitively expensive at this stage. The challenge is about scale and driving down costs with further investment as part of an orderly and gradual transition away from fossil fuels.

Differing opinions still exist on whether blue hydrogen is an appropriate alternative energy source to encourage mainstream adoption of clean hydrogen fuels in the interim. Some proponents, such as Woodside Energy, are favouring a phasing approach by utilising blue hydrogen until the production cost of green hydrogen becomes compelling. Justin Nash, Head of Integrated Solutions – WA at bp, suggested that project location will dictate the colour of hydrogen that is able to be targeted.

It was repeated throughout the Pilbara Summit that there is no one "silver bullet" solution and that further investment into research and development is needed. Furthermore, the "early movers" that attended the Summit (such as bp, Woodside Energy and Yara) are testament to the fact that investment in large scale clean energy projects in the Pilbara is now under way.

Decarbonisation – it's not a choice

Industry is united in acknowledging that accelerating the transition away from fossil fuels is critical, not just to combat climate change, but also to remain competitive in the market. Mr Nash of bp made it clear that the industry has far more to gain than it has to lose by increasing the speed at which it transitions towards decarbonisation.

The key industry players present at the Pilbara Summit have each set ambitious targets, but they appear cautious in their implementation as they attempt to balance continued profitability with the scale of investment required to make clean energy technologies a reality. As indicated by Leigh Holder, Business Development Director at Yara Clean Ammonia – Australia, wasted expenditure is a concern when dealing with technology in early stages of development, and end commodities with uncertain price points. However, unnecessary caution will only serve to hinder our ability to make a meaningful impact to climate change.

Energy storage, or change how we work?

Wind and solar projects have vastly different output profiles than fossil fuel plants. In addition, the location chosen for wind and solar assets in the Pilbara must reflect the risks associated with extreme weather events (such as cyclones). While parts of the Pilbara have complementary solar and wind capabilities, energy storage and battery developments will be key to accessing energy when it is needed.

Industry suggests that an interim answer could be to change the way that we work. It may be feasible to restrict energy-intensive operations to the period of the day when a project's energy supply peaks.

The grid stability issues associated with renewable energy projects, and solar projects in particular, have long been recognised. Ms Unwin of Horizon Power explained that these

issues will intensify after 2030 in the absence of gas-fired power plants. Grid-scale batteries may provide an answer, and there may be a case for other energy sources (e.g. geothermal) to provide a reliable base-load energy supply.

Hubs are the way forward

The development of the Pilbara and Kwinana Hydrogen Hubs is a key area of focus for the Western Australian Government. Common use infrastructure, which is able to be utilised simultaneously by multiple project proponents, is a hot topic since it is key to driving down costs for the industry as a whole. The construction of interconnected common use infrastructure will be a major catalyst of demand and investment in the Pilbara region.

Andrew Sutton, Executive Director of Hydrogen and New Energies at the Western Australian Department of Jobs, Tourism, Science and Innovation (JTSI), indicated that JTSI intends to facilitate the coordinated planning of infrastructure in a manner that minimises duplication. This is critical if industry is to make significant development within a meaningful timeframe.

Opportunities for local training and development in hub areas will help to unlock the skills required to construct and operate the energy projects of the future.

Technology must accelerate

Major stakeholders in the energy and resources industry are leveraging partnerships to undertake feasibility studies into potential decarbonisation technologies. Pilot and demonstration projects have become commonplace as the industry seeks to establish supply chains that will support future growth.

Project proponents are starting to make the jump towards decarbonisation, even where the required technology does not yet exist. For example, Maia Schweizer, Director Australia – West at Fortescue Future Industries, stated that investment is being made in clean energy technologies with the hope that further developments will fully support operational feasibility. However, long lead times and delays affecting major components means that the industry must act now.

The industry appears to recognise that there is enough technology to get started on the road towards decarbonisation, and the rest will come with time. Government gap funding, provided by bodies such as the Clean Energy Finance Corporation or programs such as the Northern Australia Infrastructure Facility, often in consultation with Infrastructure Australia, will prove critical as proponents seek to balance profitability with innovation.

Legislation moves to catch up

The energy and resources industry is driving towards a rapidly approaching decarbonised future. However, land tenure options contained in the existing legislative framework fail to maximise access to Crown land for the renewable energy projects that are so critical to its progression. Claire Boyd, Energy + Resources Partner at Gilbert + Tobin, spoke about the Western Australian Government's intentions to rectify this issue by implementing reforms to the Land Administration Act 1997 (WA) via the *Land and Public Works Legislation Amendment Bill 2022*.

A key aspect of the proposed reforms is the creation of a new form of non-exclusive land tenure – the "diversification lease". Diversification leases are intended to permit various concurrent land uses, such as carbon farming, renewable energy projects, and grazing. Applications for a diversification lease will be considered where project proponents require a large area of Crown land, the proposed use provides social, economic or environmental benefits, and the proponent has demonstrated capability, capacity or experience to deliver the intended project outcome. These reforms are expected to be enacted by Parliament by the end of 2022.

Gilbert + Tobin operates at the forefront of the energy and resources sector and interacts extensively with industry experts, Government, regulators and key industry stakeholders to provide a meaningful contribution to the clean energy and decarbonisation transition. For advice on how the transition may affect your firm or its existing or proposed projects, please contact our team of Clean Energy + Decarbonisation experts.

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THE FUTURE OF CLEAN ENERGY IN A DECARBONISING WORLD

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On Friday 24 June, Gilbert + Tobin in conjunction with BusinessNews hosted The Future of Clean Energy at the Perth Convention Centre. This conference looked at the commercial opportunities, and Australia's global competitive advantage, in relation to hydrogen and lithium, both of which are considered integral to a clean energy future.

Keynote speakers at the conference included:

+ the Hon. Alannah MacTiernan MLC (Minister for Regional Development; Agriculture and Food; Hydrogen Industry) (Minister);
+ Julie Shuttleworth AM (Chief Executive, Fortescue Future Industries (FFI)); and
+ Shaun Gregory (Executive Vice President, New Energy Growth, Woodside).

The event concluded with a panel discussion involving Ilona Millar (Gilbert + Tobin Climate Change Partner), Leigh Holder (Business Development Director, Yara Clean Ammonia) and Hayley Lawrence (Non-Executive Director, Global Lithium Resources).

Gilbert + Tobin Energy and Resources Partner Michael Blakiston opened the event noting that the global momentum towards clean energy is "staggering", with both public and private sector aligning to reach net zero. Indeed, as noted by the Minister, the sheer turn out at the event was testimony to the "change in commercial psyche", which is putting clean and green energy at the forefront of industry thinking.

KEY THEMES

Topics emerging from the conference with regards to decarbonisation and clean energy are:

- the abundance of global and local opportunities for Australia (and Western Australia in particular) to capitalise on the pivot towards renewables, particularly with regards to hydrogen;
- the need to stimulate demand while increasing supply, and ensuring that pricing for new products reflects the amounts that end users are prepared to pay;
- the importance of collaboration, particularly in regards to the development of common user infrastructure and expanded downstream processing;
- the need to engage with First Nations people; and
- the importance of regulatory and policy reform in driving investment in new industry.

OPPORTUNITIES FOR HYDROGEN AND BATTERY METALS

The WA government recently committed to closing down its coal-fired power stations by 2030, concomitantly promising $3.8 million of investment in renewable energy. According to the Minister, this is a "symbol" of where the State is headed and indicates there will be ample opportunity for companies and communities to take part in a clean energy future.

Australia is well-placed to capitalise on the transition to renewable energy, given its vast landmass with ample wind and solar energy, as noted by both the Minister and Ms Shuttleworth of FFI . This makes the country a prime location for the production of green energy to create hydrogen and the industry necessary to achieve that.

Indeed, global demand for clean energy and hydrogen is expected to increase dramatically. The Minister indicated that the International Energy Agency expects green hydrogen to account for 60% of the world's global emissions reduction requirements. Currently only 0.3 gigawatts (**GW**) of green power is used to produce hydrogen globally: this will be required to increase to 3,600GW by 2050. The Minister expects WA alone to create 100GW of renewable energy by 2030 annually. Long-term, this could even match Australia's significant LNG exports as a key goal of WA's renewable hydrogen strategy.

Australia is beginning to see significant investment in renewable energy and green hydrogen: just a few weeks ago, BP acquired a 40% shareholding in the Asian Renewable Energy Hub as operator. This hub has the potential to generate 26GW of green energy. Across WA, projects such as the Denham microgrid, run by Horizon Power, FFI's Uaroo Project and Infinite Green Energy's Arrowsmith and MEG HP1 Projects are taking shape.

Many of these projects are being made possible with Federal government co-funding, such as the WA Hydrogen Hubs, which received funding for the development of initial infrastructure for the Pilbara and Kwinana Hydrogen Hubs.

The WA government is also funding smaller projects to develop the skills required for a clean energy future as well as to understand the hurdles in building green hydrogen projects.

Additionally, Australia clean energy projects are expected to present opportunities for our First Nations people to capitalise on new investments and projects through agreements with native title parties.

Though the conference largely focused on hydrogen, Ms Hayley Lawrence of Global Lithium Resources brought in a critical minerals angle, noting that WA already supplies 50% of the world's lithium spodumene concentrate, making it integral to the battery metals market. Noting that lithium operates in a more established market, Ms Lawrence emphasised that the value chain is already in place and the challenge is now to capitalise on that.

Local demand for hydrogen as well as lithium and other critical minerals is also expected to increase. As noted by the Minister, hydrogen is a viable replacement to the 7 billion litres of diesel that is imported annually into WA, with additional uses also ranging from chemical feedstock to a component in fertiliser and mining explosives, both substances that Yara Pilbara, as mentioned by Mr Holder of Yara Clean Ammonia, plans to produce at Yara's Burrup operations through the use of green energy.

KEY CHALLENGES

Stimulate demand, increase supply and ensure market pricing

The transition to a clean energy world is undoubtedly an iterative process, in which both supply of renewables and associated storage options along with stimulating demand will be required, as noted by numerous speakers. In that regard, the Minister noted that the WA government is working to prescribe renewable hydrogen targets, including a certain percentage of electricity on the South West Interconnected System that must be derived from green hydrogen, as well as targets for blending green hydrogen in gas turbines and i WA's gas networks. Julie Shuttleworth spoke about FFI's initial agreements with Airbus and EON to supply green hydrogen fuel and energy respectively.

Another important area for developing a viable market is accelerating technology innovation, as noted by Mr Gregory of Woodside. FFI, for instance, is investing in zero emissions haul trucks to be used from 2025, decarbonising its rail as well as focusing on the development of green iron production.

Another issue raised by Mr Holder of Yara Clean Ammonia was the importance of financial mechanisms to underwrite the establishment of large projects in the new global green hydrogen and ammonia marketplace as well as the current high cost of implementing green energy alternatives. Indeed, it is important that pricing reflect the amounts that end users are prepared to pay. Ultimately the end user has to be able to afford the green and clean product.

Collaboration, common user infrastructure and downstream processing

Mr Gregory of Woodside also noted the importance of collaboration to decarbonise entire supply chains. He stressed the importance of keeping hydrogen safe in doing so, particularly given the speed at which the transition is occurring, as well as affordable.

Mr Holder of Yara Clean Ammonia highlighted the importance of making "bold infrastructure decisions" with respect to common user infrastructure and the benefits that that will deliver in bringing down the cost of clean energy projects.

Speakers at the conference also noted the need for more downstream processing facilities to increase Australia's capabilities in that space.

Stakeholder engagement and regulatory reform

The conference also highlighted the importance of building trust with First Nations communities and enabling projects on their land. This is particularly important given WA's proposed diversification lease, for which processes under the *Native Title Act 1993* (Cth) will need to be followed.

Ms Shuttleworth of FFI and Mr Holder of Yara Clean Ammonia also called for clear, simplified approval pathways, something Ms Lawrence of Global Lithium Resources echoed in the lithium space. In that respect, Ms Millar of Gilbert + Tobin, noted the importance of policy certainty. With its more ambitious net zero target of 43% by 2050, Labor is beginning to provide this certainty along with the WA government's recent announcement that it will cut its own emissions by 80% below 2020 levels by 2030. This will only serve to increase investment incentives. However, the further policy and legislative reform that is proposed in WA in relation to land tenure to facilitate clean energy projects as well as carbon farming will be of critical importance.

Hand-in-hand with this drive to zero emissions comes adequate disclosure of companies' emissions performance. Indeed, as noted by Ms Millar of Gilbert + Tobin, regulators are focusing on companies' climate-related disclosures (see further in Gilbert + Tobin's article 'Summary of ASIC Guidance on "How to avoid greenwashing when offering or promoting sustainability-related products"). A real challenge surrounds consistency of disclosure. The Task Force on Climate-Related Financial Disclosures is current best practice and overseas governments are beginning to mandate standards, something that the Australian government may seek to emulate. Currently, we expect these standards will only extend to scope 1 and 2 emissions; only the US has indicated that it may require disclosure in relation to scope 3 as well (see further in Gilbert + Tobin's article "The effect of the SEC's proposed climate-related disclosures on Australian companies").

From a lithium perspective, Ms Lawrence of Global Lithium Resources noted the ongoing challenges of a tight labour market, as well as ongoing ESG concerns around minimising the sectors own carbon and environmental footprint. Indeed, a totally green supply chain is considered the "holy grail" for companies.

CONCLUSION

The driving message of the conference was the abundance of opportunity in Australia to capitalise on our naturally rich sun and wind endowment in order to play a key role in the clean energy transition. Global and local demand for clean energy and green hydrogen is only expected to increase, with uses of hydrogen in particular proving multi-faceted.

However, challenges remain to be surmounted, in particular the need to carefully balance supply with demand, while ensuring that pricing incentivises further investment. Collaboration between industry players as well as investment into common user infrastructure are likely to play a key role in bringing costs down. Opportunities should also be sought to increase downstream processing in Australia and thereby increase the value of Australia's natural advantage. Engagement with First Nations people will be important and should aim to benefit those communities.

Companies should all the while remain aware of their green messaging, while government should seek to streamline approvals and regulation.

Gilbert + Tobin operates at the forefront of the energy and resources sector and interacts extensively with industry experts, Government, regulators and key industry stakeholders to provide a meaningful contribution to the clean energy and decarbonisation transition. For advice on how the transition may affect your firm or its existing or proposed projects, please contact our team of Clean Energy + Decarbonisation experts.

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GREEN MINING: NET HEROES

08/07/2022

The Hon. Madeleine King MP, Australia's new Minister for Resources, stated last week that mining will be a key part of Australia reaching net-zero carbon emissions by 2050. The Minister's expressed view is that Australia's wealth of rare earths will place Australia at the "forefront of the global energy transition" and that mining companies should not be seen as the pariah of the world's efforts to reduce carbon.

The reason for this is essentially that technology assisting with the green revolution, is heavily reliant on minerals available in Australia in large volumes for:

+ wind turbine generators for wind farms; which require the production of iron;
+ the manufacture of solar panels for solar farms; which require the supply of cadmium, aluminium, copper and others; and
+ Electric Vehicle technology and most forms of power plant infrastructure, most of which require copper and nickel sulphide.

Juxtaposed against this is that, with the urgency of the climate crisis becoming more apparent each day, net-zero emission targets (whether aimed for 2050 or earlier) occupy a large part of any company's corporate ESG focus. Mining companies are no different and, if nothing else, the focus is possibly more central to mining companies due to the general perception of mining companies being environment-unfriendly and those same companies wanting to preserve or create a social licence. Investors and government institutions will likely not support mining companies that are not actively moving toward decarbonisation, and lenders may well require more extensive covenants in their loan documents surrounding the ESG undertakings and actions of their borrowers.

Directors increasingly have a duty to take active steps to reduce the environmentally damaging aspects of their businesses, in order to ensure they comply with their legislated obligations to act in the best interests of the mining companies on whose boards they sit. To ignore taking positive steps poses risks when viewed against those companies' stated ESG commitments and continuous disclosure obligations.

With the supply of power being critical to any mining endeavour (with energy being one of the biggest overheads constituting approximately up to 40% of total cash operating costs), the Australian Renewable Energy Agency estimates that Australia's mining sector accounts for over 10% of the total of Australia's annual energy use across more than 400 mines, with increasing mining volumes driving that usage upward every year. Several mines operate 24 hours a day and require a consistent supply of electricity across the day.

With that in mind, how do mining companies, on the one hand, achieve the stated carbon-zero goals in an electricity-intensive industry whilst, on the other hand, grow output to ensure the minerals and metals needed to drive the achievement of the goals are extracted?

Reducing the energy input cost would seem to be a low-hanging fruit in aiming for carbon-neutrality, and a large proportion of Australia's mining companies have already made significant inroads into this challenge. But transitioning the mining industry to a true net-zero system will be a complex undertaking that will require a systems-based approach with an assessment of infrastructure requirements, how that infrastructure utilises energy across the mines, and how energy used on the mines is ultimately generated and utilised.

Designing any power system for a mine (whether a new or existing mine) requires designing around the load profile of the specific mine. Given the variability of wind and solar resources, hybrid microgrids are de jour and the number of innovative projects being developed by and for mining companies is increasing exponentially. This does come with a price-tag.

Capital and operating expenditure attributed to the production of power for any mine are, relatively speaking, lower than the costs of the actual electricity consumption for a mine. This is not limited to any specific type of mining, although if a mine requires power for mineral processing (which requires heat), or is a deep mine, the electricity overhead cost is typically significantly higher. There is, though, a need to have sufficient life of mine to net off the upfront cost.

With renewable power plants, much of the cost is spent up-front on the development of those plants, and the ongoing operating cost is much lower (recognising that renewables have largely already achieved parity with fossil-fuels electricity). Traditional power solutions comprise lower up-front costs but high ongoing operating costs and increasingly volatile power prices. Costs will also be affected by the type of development structure selected by the project proponents; whether that be a single EPC for both the development of the mine and the development of the power plant (if for a new mine), or a split EPC that separates the two projects (albeit typically with a tripartite deed linking the two).

What's clear is that mining companies have an opportunity to use renewables to potentially lower costs and definitely improve sustainability. While accepting that there are several ways for mining companies to utilise clean energy in reaching their net-zero goals, what are some of the options available to mining companies looking to reduce their Scope 1 and 2 emissions?

TRADITIONAL OPTIONS

Although not the focus of this article, grid power has its obvious limitations, including when considering the remote locations of several mining operations and the impossibility of connecting to electricity grids. More than 50% of Australian mines that undertake mineral processing on site are not connected to primary electricity markets such as the NEM or SWIS. This requires self-sufficiency in power generation. Diesel and gas have traditionally solved the conundrum.

In Western Australia almost half of all electricity generated in the state is used outside of power grids. The harsh environmental conditions lend themselves perfectly to renewable energy generation.

RENEWABLE ONLY

Renewables constitute a compelling part of the business case for intelligent energy management for any mining company. Apart from ameliorating the carbon footprint, converting to renewable energy can have significant cost savings by:

+ Reducing reliance on fossil fuels that are vulnerable to market price fluctuations;
+ Improving investor confidence and consequential increased access to funding;
+ Stabilising the price of electricity across the mine;
+ Utilising carbon savings;
+ Increasing post mine-closure options to use the power plant in the local communities; and
+ Utilising tax and government funding incentives made available through ARENA and the Clean Energy Finance Corporation.

Mining titans including Gold Fields, Rio Tinto, BHP, Glencore, AngloGold Ashanti and Woodside have respectively identified opportunities and have announced plans to spend on renewable energy creation as they seek to go green in an effort to decarbonise. Many projects have already commenced, and others already completed.

Dependability of the power supply is, however, critical and has caused certain corners of the mining industry to lag in the adoption of clean energy goals. Renewable energy sources are by nature intermittent and less reliable than electricity from fossil fuels. Given the need for a consistent baseload, fossil fuels used in heavy generators may still be needed until greener technology catches up in order to smooth over the intermittency issues to a certain extent.

Renewable energy, meanwhile, is not constrained to the grid system as the plants that harness wind or solar energy are rarely located where traditional fossil-fuel based power plants have been located – generally closer to areas of higher demand. For renewables, historic networks of pipelines and heavy transport is replaced by the trading of clean energy on demand, and this requires a different approach to infrastructure.

HYBRID SYSTEMS

Technology is enabling the smoothing of intermittency risks for renewables, and many consulting engineering companies are benefiting from the demand for creative hybrid power generation systems that utilise power storage options such as battery technology, pumped storage hydroelectricity and fuel storage solutions such as ammonia.

The price of batteries is expected to halve over the next decade, making large scale battery energy storage systems (BESS) a sensible way to reduce the risks of inconsistent supply risks related to renewable sources. Those costs are generally not overwhelming, and more and more hybrid renewable projects are being adopted by mining companies to ensure a 100% renewable power supply to the mines.

There is also a symbiosis when looking at hybrid systems as renewables developers seek customers who can offer utility-scale opportunities and are prepared to share the value cost.

Technological collaboration is key to success in this area, and ARENA has already supported several ground-breaking projects to develop hybrid grids. An example of this is Sandfire's DeGrussa copper mine which transitioned early with a 7MW solar power project plus BESS.

Hybrid projects also allow the operator to control the power output more efficiently. Good examples of hybrid systems have been adopted by, amongst others:

+ Gold Fields at its Agnew mine in conjunction with EDL;
+ Rio Tinto at its Weipa Operations (a 4 MW solar and 4 MWh BESS) and its Gudai-Darri iron ore mine in Western Australia (where it relies on a 34MW solar plant with 12MWh BESS);
+ BHP at its Northern Goldfields Solar Project (being a 27.4 MW solar farm at Mt Keith and a 10.7MW solar farm and 10.1MW BESS at Leinster; and
+ Syrah Resources at its Balama graphite operation in Mozambique (a 11.23MWp PV 8.5MWh solar photovoltaic and storage power hybrid system to be operated alongside a diesel-fired power generation plant).

CORPORATE PPAS

Accepting that it may well not be viable for all mines to construct their own power plants, an alternative option is for mining companies to conclude power purchase agreements (PPAs) to purchase electricity directly from an independent renewable energy generator at an agreed price.

Concluding PPAs in this way can overcome numerous issues that may dissuade mining companies from developing sole-use renewable power projects, including regulatory obligations relating to the supply of electricity that needs to be carefully managed.

Examples of large mining companies that have opted for significant PPAs to power their mining operations in Australia are Newcrest, BHP and AngloGold Ashanti.

Of course, as demand for clean energy increases, so will overall demand for Large-Scale Generation certificates (LGCs) and the need for companies to be able to account for their efforts at decarbonising. Some renewable sources will create LGCs in vast quantities and it will be interesting to see how the market price of LGCs varies up until the legislated cut-off in 2030.

OPERATIONS AND SUPPLY CHAINS

It is not only energy use across the mines that affects a mine's carbon footprint; the wider business has a large carbon footprint and needs to be carefully looked at if a mining company wishes to reduce its Scope 3 emissions as well. Adopting carbon storage technologies would also be a key action that mining companies will need to adopt.

The CEO of Fortescue Metals Group, Elizabeth Gaines, recently stated that "Decarbonising our mining fleet is one of the biggest challenges facing our industry". Fortescue has recently announced its partnership with Liebherr Group to transition Fortescue's diesel mining fleet to a green mining fleet before 2030 and is powering toward its 2030 carbon neutrality goal of using hydrogen-powered rail freight, electric haul trucks and green iron ore.

Fortunately, the opportunities for mining companies to integrate renewable energy supply into their greenfield and brownfield operations are becoming clearer. There is not, however, a one-size-fits-all solution. What is clear though is that mines need renewable energy to drive their ESG targets and remain relevant and attractive to investors; energy needs mines to produce the metals and minerals needed to further the achievement of carbon-neutral goals. Miners may well be our "net-heroes".

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DEVELOPING AUSTRALIA'S SUPPLY CHAINS IS ESSENTIAL TO CAPITALISE ON THE CLEAN ENERGY TRANSITION

30/09/2022

Sustainable and efficient supply chains are the backbone of the energy and resources market. Key exporters, such as Australia, must grapple with the challenges associated with rapidly scaling up supply chains if they wish to capture market share in an increasingly decarbonised world. In this article we explore:

1. Australia's previous success as a global producer and exporter of energy and resources; and
2. various challenges Australia will face in replicating its success during the clean energy transition.

AUSTRALIA'S RISE AS A GLOBAL PRODUCER AND EXPORTER

Australia is globally renowned as a major producer of energy and resources, and the growth of its exports is undeniable. According to the Australian Department of Foreign Affairs and Trade (**DFAT**), Australia's top three exports for the past three years were iron ore, coal and natural gas. However, this has not always been the case. The immense growth of Australian exports, particularly from the resources sector, can be seen in that:

+ Australian exports of goods and services grew from $3.2 billion to $382 billion from 1963-64 to 2020-21; and
+ minerals and fuels (excluding gold) grew from approximately 16.9% to 52% of Australian exports from 1969-70 to 2019-20.

Trade relationships have also changed dramatically over this period. Australia's top three export markets in 1963-64 and 2020-21 were as follows:

- **1963-64**: United Kingdom (23.5%), Japan (22.4%) and the United States of America (12.9%); and
- **2021-21**: China (38.8%), Japan (10.0%) and the Republic of Korea (6.2%)

Australian industry's ability to establish and perfect supply chains involving substantial volumes has been a key component of its export success. The growth of Australia's iron ore and LNG industries are key examples of the rapid development of supply chains to globally significant scale.

The value of Australia's iron ore exports has increased dramatically since the start of the century. In 2000-01, Australia exported approximately $5.2 billion of iron ore and concentrates. This grew to $64.1 billion in 2010-11, and $153.0 billion in 2020-21. Throughout this period Australia comfortably solidified its position as the largest exporter of iron ore in the world and became an exporter of choice for key international partners including China, Japan, the Republic of Korea and Taiwan.

Australia has also grown to become a significant exporter of natural gas. The value of Australia's LNG exports in 2003-04 was $2.4 billion. This rose to $16.3 billion in 2013-14, and natural gas exports peaked at $49.7 billion in 2018-19. Australia became a top three global exporter of LNG during this period, and LNG was its third-largest commodity export by value in 2020-21. Similarly to iron ore exports, key export markets for Australian natural gas include China, Japan and the Republic of South Korea.

INTERNATIONAL DEMAND LEADING INTO THE CLEAN ENERGY TRANSITION

The global energy market is entering a new era. Resources used in emissions-intensive traditional energy generation processes, such as coal and LNG, must decline to reach global net zero targets. However, under-investment in these commodities may prove dangerous as the market struggles to scale up clean energy production. Further, unprecedented demand for key commodities and clean energy will require a significant scaling-up of existing supply chains.

LNG, critical minerals and green hydrogen each have an important role in achieving global decarbonisation. International demand during the clean energy transition is examined in more detail below.

LNG – a short term substitute?

The International Energy Agency considers that exports of natural gas will increase in the next five years. However, it also notes that demand projections vary greatly in the long-term. A key determinant of demand will be the extent to which countries substitute natural gas for existing coal-based electricity generation. The Grattan Institute also notes that Australia's share of global LNG exports is expected to decline between 2030 and 2050 as existing supplies diminish and the upfront costs of further expansion become prohibitive.

Critical minerals – urgent attention required

While different clean energy technologies utilise different critical minerals, an enormous increase in current production rates is required across the board. The International Energy Agency stated in its May 2021 report "The Role of Critical Minerals in Clean Energy Transitions" that global demand for critical minerals is expected to grow dramatically by 2040, and that "*clean energy technologies are becoming the fastest-growing segment of demand*" for critical minerals.

Green hydrogen – the key to a cleaner future?

Demand projections for green hydrogen vary dramatically. For example, Deloitte estimated in 2019 that the amount of green hydrogen generated globally by 2050 could range anywhere from 90 to 304 Mtpa. The International Renewable Energy Agency stated in 2022 that up to one third of green hydrogen production in 2050 would be traded across borders, which is a slight increase from the amount of natural gas traded globally in 2020 (approximately 24%). Overseas production will play a significant role in the green hydrogen market, and Australia has a clear opportunity to capture a position as a key exporter.

A NEW FOCUS

Australia is respected by international trading partners for its well-established and stable regulatory processes, environmental standards and taxation policies. Maintaining and enhancing Australia's regulatory and risk regimes and leveraging relationships with key trading partners will be essential to preserving its status as an attractive jurisdiction for energy and resource development during the clean energy transition.

The market is at a tipping point, and the composition of the global energy and resources trade is expected to rapidly change in the near future. Resources used in emissions-intensive traditional energy generation processes, such as LNG and coal, presently make up a significant portion of Australia's exports. However, Australia is able to leverage its rich mineral resources and its history and reputation as a global leader in the energy and resources market to transition towards clean energy exports more easily than other countries. As noted in Australia's National Hydrogen Strategy, this is a significant competitive advantage and will allow for a more measured approach to the scaling of clean energy supply chains.

The scale of investment required to facilitate the transition to net zero is immense. Commonwealth Bank of Australia chief executive Matt Comyn recently stated that Australia's transition to a net zero emissions economy will require $2.5 to $3 trillion in further investment, which is similar in scale to the investment in Australia's mining boom from 2005 to 2015. The good news is that

it's been done before, and it can be done again. The present scale of this challenge should not be a deterrent.

Replicating Australia's success as a globally respected energy and resources exporter during the clean energy transition will not be straightforward. Various key challenges are discussed in more detail below.

KEY CHALLENGES IN DEVELOPING CLEAN ENERGY SUPPLY CHAINS

Scaling up Australia's existing supply chains

The clean energy transition does not require the creation of entirely new supply chains – supply chains that are able to be utilised for clean energy already exist. For example, Yara already exports ammonia from its facilities on the Burrup Peninsula in the Pilbara region of Western Australia. In addition, there is an existing international market for zinc, lithium and other critical metals that are essential to clean energy technologies such as wind turbines and batteries. The major challenge will be to scale up these supply chains in the timeframe required for clean energy initiatives to meet global demand and to make a meaningful impact on the environment.

Legislative regimes and certification schemes will play a significant role in guiding the upstream production of clean energy, particularly in relation to green hydrogen. Certification schemes will define what is considered to be a "green" product and, importantly, they will determine how much of the supply chain is assessed when reporting on total greenhouse gas emissions. For example, the Green Hydrogen Organisation's Green Hydrogen Standard (**Standard**) mandates that upstream emissions will count towards its 1kg CO_2e/kg H_2 threshold, but only expects downstream emissions to be "measured". Projects seeking to become certified under the Standard will therefore need to minimise the emissions associated with processes such as construction, water production, and transporting components. On 16 September 2022 the Smart Energy Council announced that it provided pre-certification for Yara's ammonia plant in the Pilbara region of Western Australia, recognising that the Yuri project will provide it with green hydrogen. Dr Andrew Mortimore, Vice President – Pacific Region at Bureau Veritas, stated that independent certification is "a critical element for enabling offtake and provides assurance to stakeholders around the commitment organisations are making towards net zero targets".

The Australian regulatory environment in which the clean energy projects of the future will operate is currently being crafted. The precise impact that regulatory reforms will have on clean energy supply chains remains to be seen. Australia's National Hydrogen Strategy notes that a preliminary review identified approximately 730 pieces of legislation and 199 standards that are potentially relevant to the hydrogen industry and supply chain development. It is expected that key legislation such as the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and the various state-level Environmental Protection Acts will play an important role in developing clean energy projects of significant scale. Demand clearly exists for clean energy. The key question is how quickly the regulatory environment can facilitate necessary development.

Managing environmental considerations

Environmental considerations will have a major impact on the development of clean energy projects. It is well understood that the value and credibility of clean energy will be inherently tied to the "green" credentials of the projects that produce it. However, environmental considerations will also make a notable impact further along the supply chain. In recent years Boards have increasingly begun to treat environmental impacts and climate risk considerations as a critical part of their mandate, rather than as a "nice to have", and we expect this trend to only grow with time. Justin Mannolini, Corporate Advisory Partner at Gilbert + Tobin, noted at the recent Masterclass session on "Balancing decarbonisation opportunities and risks in the boardroom" hosted by Gilbert + Tobin, that environmental considerations and climate risk will begin to meaningfully affect the cost of capital in the near future.

Clean energy projects are broadly considered to be the pathway to a greener future. However, the development of these projects will be accompanied by an associated environmental cost. The Australian Industry Energy Transitions Initiative noted in its June 2022 report "Setting up industrial regions for net zero" that the decarbonisation of Australia's five most emissions intensive industrial regions will require an additional 68-126 TWh of electricity, which is equivalent to 26-47% of Australia's current electricity generation and 107-197% of its current electricity generation from renewable sources. Vast areas of land will be required for renewable energy generation on such an immense scale, especially where utilising land intensive technologies such as solar. As a result, project proponents must balance environmental risks such as biodiversity loss and interruptions to ecosystem balance against their project's potential future environmental benefit.

Unprecedented generation capacity from renewable sources is required to meet global decarbonisation targets, and the development and optimisation of new technologies at scale will be critical. However, industry must also grapple with the challenges of establishing circular economies in the clean energy space. For example, solar generation is often criticised for utilising components with relatively short lifespans, and because a significant proportion of solar panel waste currently ends up in landfills. The Clean Energy Council estimates that retired solar panels will generate over 1,500 kilo-tonnes of waste in Australia by 2050, and this wastage is even more concerning when factoring in the increasing difficulty in mining critical minerals. While it is not

clear whether reforms will be led by industry or regulators, a uniform approach to wastage created by renewable energy generation technologies (such as a solar panels) will likely develop in time. Reforms such as this will play a key role in ensuring future sustainability and efficiency.

Engaging with communities and capitalising on co-development opportunities

The concept of a "social licence to operate" has become increasingly important in recent years, especially for industrial companies that are critical to the clean energy transition. There is a growing expectation that proponents must engage with the communities in which they operate and seek to deliver transformational outcomes that produce lasting positive change. Companies must assess their impact across the entire supply chain in order to create enduring and self-sustaining benefits for all stakeholders.

Traditional Owners are key stakeholders who are rightfully recognised for their significant role in the future of clean energy. However, attitudes towards consultation and collaboration with Traditional Owners have fluctuated significantly in the past. The various Federal, State and Territory Energy Ministers recently stated that they will commence development of a co-designed First Nations Clean Energy Strategy, and we are hopeful this Strategy will stimulate positive engagement. As reflected in the July 2021 Final Report to the Australian Government on the Indigenous Voice Co-design Process, consultation with Traditional Owners will not impede industry's progression, but will serve to facilitate and accelerate development in a respectful and ethical manner.

Co-development with Traditional Owners also presents a unique opportunity for project proponents and the Australian clean energy industry. As discussed above, the certification and value of clean energy will be inherently tied to the ethical qualities of the supply chains involved in its production. Industry-wide collaboration with Traditional Owners would allow Australia to position itself as the exporter of the most ethical clean energy and would stimulate significant global demand.

MOVING FORWARD

The ongoing global energy crisis highlights that energy security is more important than ever. Australia has a significant advantage because of its stable geopolitical landscape and its strong ties with key trading partners. However, the opportunities presented by the clean energy transition are not unique to Australia, and there is clear evidence that other global players are attempting to craft attractive jurisdictions for capital investment. For example:

1. the Inflation Reduction Act, enacted in the United States of America in August this year, introduces tax credits that will reduce production costs for green hydrogen and stimulate local capital investment; and
2. the European Parliament's adopted position on revised amendments to the Renewable Energy Directive (Recast) 2018 (RED II) will reduce regulatory red tape in the hope of creating a more investment-friendly environment.

The clean energy landscape is shifting rapidly, and Australia's supply chains must develop quickly if it wishes to compete for global capital and maintain its position as a key exporter of energy and resources.

Gilbert + Tobin operates at the forefront of the energy and resources sector and interacts extensively with industry experts, Government, regulators and key industry stakeholders to provide a meaningful contribution to the clean energy and decarbonisation transition. For advice on how the transition may affect your firm or its existing or proposed projects, please contact our team of Clean Energy + Decarbonisation lawyers.

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Green Hydrogen's role in Australia's economic and low emissions future

Chain reactions – global demand for supply chain sustainability

HOW THE PILBARA IS CREATING THE MOST SUSTAINABLE AND SECURE CLEAN ENERGY

13/12/2022

The most recent City of Karratha Business Breakfast Briefing (Briefing) hosted by the Karratha & Districts Chamber of Commerce & Industry took place on the 30th of November at the Red Earth Arts Precinct in Karratha and brought together over 200 local industry representatives to discuss the future of Clean Energy in the Pilbara. The event focused on the opportunities that renewable energy will bring and the vital role that the Pilbara will play in realising that change.

Keynote speakers included Mayor Peter Long, Yara Clean Ammonia's Brian Howarth, Lucile Bourguet from Fortescue Future Industries and Gilbert + Tobin Partner Michael Blakiston, followed by a panel discussion with Murujuga Aboriginal Corporation CEO Peter Jeffries and BP's Kelly Lamperd. The Briefing highlighted the enormous prospects for clean energy projects in the Pilbara and gave corporations an opportunity to showcase their current and future projects and discuss how the community and Traditional Owners will be key stakeholders in unlocking the full potential of the land on which the projects of the future will be built and operated.

KEY TAKEAWAYS:

Climate change is an issue of international importance, and the world needs to act now in order to reach the goal of global net zero emissions by 2050. With the future of clean energy on our doorstep, the time for change is now. Although the renewable energy roadmap is largely untraveled, it is encouraging to see businesses and communities come together and contribute to achieving a common goal. Below is a summary of our key takeaways from the Briefing.

PILBARA LANDSCAPE IS WORLD-CLASS

The Pilbara region stands out for its vast access to land, solar, wind and water. With the ability to harness, store and transmit clean energy, and a strong profitable legacy of resource development, it is clear why Governments are excited about building a hydrogen hub and associated technology cluster in the Pilbara. The City of Karratha Mayor provided an insight into the opportunities that would come from the proposed hydrogen hub, which will seek to drive industry collaboration across the hydrogen value chain and contribute to several new businesses and new trades, as well as the creation of many new jobs.

The vision is to capitalise on the Pilbara's well-established mining and resources background to become the world's leading hydrogen producer. Companies such as Fortescue Future Industries, Yara Clean Ammonia and BP, are integral to achieving this goal in the region. In the case of Yara Clean Ammonia, given it is currently constructing a renewable hydrogen plant, they will be able to provide feedstock to its existing world scale ammonia production plant in Karratha. It was acknowledged that becoming a global leader and achieving carbon neutrality is a huge task, but that the benefits will be realized by many.

Michael Blakiston reminded us of the significant developments that the Pilbara has been home to over the last 60 years and highlighted the need for us to learn from our past to achieve greatness. The land mass that the future projects will require are unprecedented, adding further complexity to realising these projects. The importance of the proposed diversification lease tenure in allowing for more diversified uses of Crown Land, particularly in allowing activities associated with hydrogen and renewable energy projects, was emphasized as being a fundamental enabler of the transition in Western Australia. The *Land and Public Works Legislation Administration Bill 2022 (WA)* was introduced to Parliament in November and is key to unlocking the true economic potential of land assets.

TRAINING OPPORTUNITIES ARE ABUNDANT

A key element to ensure the success of future projects centers around training both new and existing workforces. The Pilbara Universities Centre and TAFE have been at the forefront of seeking out the necessary courses to upskill the workforce. Having access to local facilities with fit for purpose training and education is a huge benefit to the community and brings even more employment opportunities to the region.

Yara's Project Director, Brian Howarth believes that the Pilbara has an abundance of skills at its disposal and the key opportunities and challenges relate to Traditional Owner engagement, the efficient and rapid allocation of the State's strategic assets and resources and local workforce. With the demand for skilled workers increasing, the Government and industry leaders will play a major role in unlocking the potential that exists. Fortescue Future Industries' Lucile Bourguet provided some comfort in respect of the unknown "clean energy world", confirming that it is essentially the same science industry has worked with for years, only assembled for a different purpose. The key is to provide the necessary training to allow an existing workforce to develop and refine their skills, in addition to encouraging new workers into the industry.

Aside from building a highly skilled workforce, there needs to be a concerted effort around providing Traditional Owners with the opportunity to build their own knowledge around what is to come and placing them at the center of decision making. Peter Jeffries highlighted that, although the community are excited about the prospects of clean energy projects, it is a very complex industry requiring a deep level of understanding from all parties involved and Government and industry need to develop strategies to build capacity of the Traditional Owners. Building capabilities within Indigenous Corporations, such as the Murujuga Aboriginal Corporation, will empower Traditional Owners and allow for fair and respectful negotiations on both ends of the spectrum.

COLLABORATION WITH TRADITIONAL OWNERS

At the core of the Briefing was the importance of the Traditional Owners of the land. Yara bases their success on building meaningful relationships with Traditional Owners, focusing on listening, learning and engagement from the start. This simple, yet vital, methodology is what all companies coming to the Pilbara need to mirror.

As key stakeholders in all projects on native title land, Traditional Owners need to be engaged, consulted and included in the discussions from the outset. The benefits and opportunities of renewable energy developments are enormous, however the effect on Country is often overshadowed and ignored. It is essential that we continue to echo Brian Howarth's sentiment that "it's not our land, we're just borrowing it", to allow open, progressive and educated discussions.

Zeroing towards zero emissions - The Pilbara remains vital As the world embarks on a new adventure in the creation of clean energy and the race to net zero emissions continues, the Pilbara remains a standout as the ideal place to realise these aspirations. Although daunting and unknown, the past success stories emanating from the region are proof that the capability, skill, and appetite is in abundance, and provides the key ingredients for significant growth in the future. Amongst the many challenges that lie ahead, the impact of major developments on Country and the voices of our nation's Traditional Owners cannot be forgotten.

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2 CORPORATE RISKS

APRA ATTENTION TO CLIMATE RISKS HOTS UP

21/03/2022

In November 2021, the Australia Prudential Regulation Authority (**APRA**) released Prudential Practice Guide CPG 229 Climate Change Financial Risks (**CPG 229**). CPG 229 aims to assist registrable superannuation entity licensees, life companies and other APRA-regulated institutions to comply with existing prudential standards relating to risk management and governance. It sets out APRA's expectations regarding management of financial risks of climate change. On 2 March 2022, APRA announced that it would shortly commence a climate risk self-assessment survey using CPG 229 as a benchmark.

This article looks at the background to CPG 229, APRA's expectations regarding governance of climate risk and climate risk management, the upcoming APRA survey and next steps.

BACKGROUND TO CPG 229

Overseas, such as in the UK and New Zealand, regimes for mandatory climate-related financial disclosures have been enacted in line with the recommendations of the Task Force on Climate-related Financial Disclosures (TCFD). The US Securities and Exchange Commission is also expected to release proposed climate change disclosure rules which would affect publicly listed companies.

In Australia, mandatory climate-related disclosure rules have not yet been introduced, although APRA considers that it is better practice for any disclosures to be produced in line with the TCFD framework.

APRA released the final version of CPG 229 in November 2021 following a consultation period from April to July 2021. CPG 229 is a direct response to industry requests for greater clarity of regulatory expectations and is designed to assist APRA-regulated institutions with managing climate-related risks and opportunities within their existing risk management and governance practices. It reflects the framework for considering and managing climate risks developed by the TCFD and good practice observed by APRA.

APRA's view is that climate risks should be managed within an institution's overall business strategy and risk appetite and a board should be able to evidence its ongoing oversight of these risks.

WHAT ARE APRA'S EXPECTATIONS AROUND GOVERNANCE?

Prudential standards CPS 510 and SPS 510 set out the minimum governance requirements of an APRA-regulated institution. In APRA's view, board-level engagement is important to ensure that work on climate risks holds sufficient standing within an institution, and gives the board the requisite institution-wide insights to strategically respond to the risks.

CPG 229 states that, in fulfilling its obligations under CPS 510 and SPS 510 in overseeing the management of climate risks, a prudent board is likely to:

1. ensure the board and relevant sub-committees have an appropriate understanding of, and have the opportunity to discuss, the risks associated with climate change, which may include appropriate training for board members;
2. set clear roles and responsibilities of senior management in the management of climate risk, and hold senior management to account for these responsibilities;
3. re-evaluate the risks, opportunities and accountabilities arising from climate change on a periodic basis, and consider these risks and opportunities as part of approving the institution's strategies and business plans;
4. take both a shorter-term view (consistent with an institution's regular business planning cycle) and a longer-term view when assessing the impact of climate risks and opportunities; and
5. ensure that, where climate risks are found to be material, the institution's risk appetite framework incorporates the risk exposure limits and risk thresholds for the financial risks that the institution is willing to bear.

CPG 229 states that, in light of the board responsibilities, an institution's senior management would typically be responsible for:

1. applying an institution's risk management framework to assess and manage climate risk exposures on an ongoing basis, including developing and implementing appropriate policies;
2. regularly reviewing the effectiveness of the framework, policies, tools, and metrics and targets, and making appropriate revisions;
3. providing recommendations to the board on the institution's objectives, plans, strategic options and policies as they relate to climate risks that are assessed to be material. This may include the establishment and use of relevant tools, models, and metrics and targets to monitor exposures to climate risks so as to enable the board to make informed decisions in a timely manner; and
4. ensuring that adequate resources, skills and expertise are allocated to the management of climate risks, including thorough training and capacity building amongst relevant staff.

WHAT ARE APRA'S EXPECTATIONS AROUND RISK MANAGEMENT?

APRA considers it prudent for climate risks to be considered within an APRA-regulated institution's existing framework, including the board-approved risk appetite statement, risk management strategy and business plan.

CPG 229 states that APRA considers that prudent practice would be for an institution to evidence the management of climate risks within its written risk management policies, management information, and board risk reports. Where climate risks are material, this may require updating existing risk management policies and procedures.

CPG 229 states that as a matter of good practice, the policies and procedures developed under the risk management framework would include a clear articulation of the respective roles and responsibilities of business lines and risk functions (i.e. Line 1 and Line 2 activities) in relation to managing climate risks.

Regarding risk identification, CPG 229 states that a prudent institution would seek to understand climate risks and how they may affect its business model, including being able to identify material climate risks and assess their potential impact on the institution. APRA identifies scenario analysis, with both a shorter- and longer-term time horizon, as a useful tool for informing the risk identification process. APRA suggests that climate risks can be considered within the established risk categories in CPS 220 and SPS 220 and that a prudent institution would be able to demonstrate how it determines the materiality of climate risk within each of these categories.

CPG 229 states that better practice in monitoring climate risks includes both a qualitative and quantitative approach, including developing metrics to measure and monitor climate risks appropriate to an institution's size, business mix and complexity of business operations. APRA's view is that a prudent institution is likely to use data from both publicly available and proprietary sources, and potentially seek assistance from external experts where necessary (including academics, specialist consultants, and scientific bodies).

APRA considers that better practice in risk monitoring extends to monitoring the impacts that climate risks may have on outsourcing arrangements, service providers, supply chains and business continuity planning.

In relation to risk controls, APRA envisages that, in most cases, an institution would choose to work with customers, counterparties and organisations which face higher climate risks, to improve their risk profiles. However, where an institution considers this engagement will not result in the climate risks being adequately addressed, then standard risk mitigation options should be considered such as:

1. reflecting the cost of the additional risk through risk-based pricing measures;
2. applying limits on its exposure to such an entity or sector; or
3. where the risks cannot be adequately addressed through other measures, considering the institution's ability to continue the relationship.

In relation to risk reporting, CPG 229 states that APRA's expects that a prudent institution would establish procedures to routinely provide relevant information on its material climate risk exposures, including monitoring and mitigation actions, to the board and senior management. This is in order to allow the board and senior management to understand and review the activities, and to make decisions consistent with the institution's overall risk appetite and risk management approach. The extent and frequency of reporting will be tailored to the nature and magnitude of the risks to which the institution is exposed.

CLIMATE RISK SELF-ASSESSMENT SURVEY

On 2 March 2022, APRA announced its intention to shortly commence a voluntary survey of medium-to-large APRA-regulated institutions. The survey involves a self-assessment of current practices against APRA's expectations as set out in CPG 229 guidance and the framework of the TCFD, and is intended to gather insights on how APRA-regulated institutions are currently managing these risks, using CPG 229 as a benchmark.

The survey will also help to incorporate climate-related risks into APRA's supervisory assessments. APRA's view, as expressed in CPG 229, is that climate risks can and should be managed within an institution's overall business strategy and risk appetite, and a board of directors should be able to evidence its ongoing oversight of these risks.

Entities choosing to participate will have 6 weeks from receiving the questionnaire to provide responses.

Once the survey has closed, APRA will provide participating entities with de-identified peer-comparison results so as to enable them to understand how their approaches and practices compare to peers as well as publish information on industry-level insights and themes from the results. APRA will also incorporate insights from the survey into its ongoing supervisory approaches to addressing the financial risks of climate change.

APRA has flagged that it will consider the benefit of repeating the survey in future years, and potentially expanding it to all APRA-regulated entities.

NEXT STEPS

APRA has announced that its supervision priorities for 2022 include seeking to develop additional tools to evaluate climate-related financial risks and increasing its scrutiny of entities' progress in addressing the impact of climate risk. The climate risk self-assessment survey is a part of APRA increasing that scrutiny.

An APRA-regulated institution should carefully consider the guidance provided in CPG 229 because it will assist it to meet its obligations under the applicable prudential standards regarding risk management (CPS 220 or SPS 220) and governance (CPS 510 or SPS 510). CPG 229 suggests that best practice for an APRA-regulated institution would include it:

+ taking steps to understand the specific climate-related risks which may impact business operations;
+ reviewing existing governance and risk management procedures to determine whether these are appropriate for managing climate-related financial risks;
+ considering incorporating climate change scenario analysis and stress testing and determine an appropriate level of capital adequacy; and
+ disclosing climate risk information to interested stakeholders.

APRA-regulated institutions may face challenges in seeking to meet the guidance, including:

+ inherent difficulties in formulating acceptable guidelines which deal with modelling several decades into the future, given the uncertainties in climate modelling;
+ the lack of prescription in the scenario testing guidance sections of CPG 229; and
+ the lack of prescription over disclosure, including no requirement for disclosures to be made in line with actions taken by peer jurisdictions.

During the consultation phase numerous submissions noted increased prescription would improve comparability between institutions. However, APRA declined to prescribe key design features for scenario testing with a view that an overly prescriptive approach would make CPG 229 less flexible.

While APRA highlighted that best practice would be to make disclosures in line with the TCFD recommendations, APRA noted that requiring disclosure is beyond the scope of CPG 229.

Subject to meeting the requirements of the prudential standards, an APRA-regulated institution has flexibility to configure its approach to climate risk management in a way that best suits achieving its business objectives.

G+T has the knowledge and expertise required to assist with updating risk management documentation, to assist with providing training for directors and staff and to advise regarding compliance with the prudential standards.

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SUMMARY OF ASIC GUIDANCE ON 'HOW TO AVOID GREENWASHING WHEN OFFERING OR PROMOTING SUSTAINABILITY-RELATED PRODUCTS'

23/06/2022

On 14 June 2022, ASIC published guidance in relation to claims about sustainability-related products (Guidance). The Guidance:

+ defines greenwashing and the issues it creates;
+ current regulation in relation to claims about sustainability-related products; and
+ key issues to consider when offering or promoting sustainability-related products.

The Guidance is directed towards funds, however its principles apply more broadly to entities who offer or promote financial products, such as companies listed on a securities exchange.

KEY TERMS

What is 'ESG matters'?

ESG matters refer to environmental, social and governance matters.

What is 'Greenwashing'?

Greenwashing, in relation to investments, is defined by the Guidance as 'the practice of misrepresenting the extent to which a financial product or investment strategy is environmentally friendly, sustainable or ethical.'

What is a 'sustainability-related product'?

A sustainability-related product is a 'financial product where the issuer has incorporated sustainability-related considerations – such as [ESG] matters – into its investment strategies and decision making.'

AUSTRALIA'S REGULATION OF SUSTAINABILITY-RELATED PRODUCTS

With focus on the clean energy transition increasing, companies are eager to promote their operations and products as clean and green. Environmentally friendly products are more attractive to customers and investors and making green claims can improve a company's market position relative to competitors that are making weaker or no comparable environmental claims. In this environment, regulators are alive to the risk of parties engaging in "greenwashing", which is the practice of providing misleading information about a product or an entity's ESG credentials, which may influence the market and thereby impact upon an investor's ability to make informed investment decisions. Greenwashing can result in decreased investor confidence and undermine the financial system working fairly and efficiently.

In addition to the Guidance from ASIC, the Australian Competition and Consumer Commission (**ACCC**) announced earlier this year that potentially misleading claims relating to environmental claims and sustainability are its top consumer protection priority for 2022/23. The ACCC has emphasised that it will look to take a pro-active approach in enforcing consumer laws relating to greenwashing, with Commissioner Delia Rickard recently reported as saying

"We're really going to proactively say 'well, what are the problem sectors', and go looking for the best cases to bring. And where we see the greatest harm, the greatest detriment, we will be looking at going to court."

Interestingly, this approach contrasts somewhat with the approach of ASIC in relation to the Guidance. ASIC Commissioner Sean Hughes has been reported as saying that it is still in the process of "educating" the market in the context of big shifts in the investment landscape rather than pro-actively enforcing the rules, at least at this stage.

Regardless of any potential difference in the approach of the ACCC in relation to enforcing consumer protection laws more broadly or the ASIC in relation to financial laws. In the current regulatory environment, it is more important than ever that all companies ensure that that claims relating to the green characteristics of their investment or other products are well backed up. Current regulation in Australia in relation to claims about sustainability-related products.

The Australian market is experiencing increased demand for sustainability-related financial products, which gives rise to an enhanced risk of greenwashing.

Issuers are subject to certain requirements when promoting or offering sustainability-related products, such as prohibitions against misleading and / or deceptive conduct under the *Corporations Act 2001 (*Cth) and *Australian Securities and Investments Commission Act 2001* (Cth), as well as disclosure obligations under the *Corporations Act 2001* (Cth), ASIC Regulatory Guide 65 and the Corporations Regulations 2001 (Cth).

In relation specifically to climate change and clean energy, ASIC expressly recognises the recommendations by the Financial Stability Board's Task Force on Climate-related Financial Disclosures (TCFD) in relation to climate-related disclosures. However, compliance is, for the time being, voluntary. ASIC suggests that entities who report voluntarily under the TCFD framework will be well-placed to transition to any future standards which may be imposed.

Overall, ASIC notes that regulatory developments in this area are developing; entities should remain up-to-date and consider how disclosure may be improved in light of these developments.

9 KEY ISSUES TO CONSIDER WHEN OFFERING OR PROMOTING SUSTAINABILITY-RELATED PRODUCTS

In order to avoid or reduce the risk of greenwashing, ASIC has provided some key questions that entities should consider prior to disclosing information around sustainability-related products. The questions are designed to facilitate 'truth in promotion' and 'clarity in communication'.

Is your product true to label?

Labels play an important role in guiding investors about what they will be investing in and as such, investors expect that the label will align with the product's underlying investment strategy. There is currently no standardised labelling for sustainability-related products. Entities should therefore ensure that their label is not misleading and accurately reflects the substance of the product itself.

Have you used vague terminology?

Broad, unsubstantiated sustainability-related statements without clarifying information should be avoided. Examples include terms such as 'socially responsible', 'ethical investing' and 'impact investing'. Such statements can be subjective, and therefore entities should explain the terminology if used in product disclosure statements or other promotional material.

Are your headline claims potentially misleading?

Headline sustainability-related claims should not of themselves be misleading, and exceptions or qualifications should not be used to clarify the claim. If exceptions or qualifications are required, they should be placed in a way that draws obvious attention to them and they should be consistent with other disclosure content, including the headline claims.

Have you explained how sustainability-related factors are incorporated into investment decisions and stewardship activities?

Methodology or policy informing sustainability-related considerations and investment decisions should be clearly

disclosed and explained. The minimum expectation is that investors are made aware of the relevant considerations and how they are incorporated into investment decisions. If sustainability-related factors are given a weight in relation to decision-making, an explanation of this weighting approach may be beneficial.

Have you explained your investment screening criteria? Are any of the screening criteria subject to any exceptions or qualifications?

Disclosure should be sufficient to enable investors to fully understand the product's sustainability-related screening criteria and process. It should be clear whether the screen applies to all products offered by the issuer or, if only some are covered, the percentage of the portfolio covered should be disclosed. Screening exceptions and qualifications should also be clear to investors and displayed prominently alongside all references to investment screens.

Do you have any influence over the benchmark index for your sustainability-related product? If you do, is your level of influence accurately described?

Any influence over the composition of an index against which portfolio composition is determined should be disclosed. Where an issuer actively manages an investment decision-making process to any degree, it should not state that the process is passively managed.

Have you explained how you use metrics related to sustainability?

To the extent sustainability-related metrics (for instance, ESG factor scores) are used to evaluate whether an investment fits with a product's investment strategy, the following should be disclosed:

+ the extent to which the metrics are used to evaluate new and existing investments in implementing the investment strategy;
+ the sources of the sustainability-related metrics, including whether they are based on proprietary methodologies or from third-party providers;
+ a description of the underlying data used to calculate the metrics, as well as the calculation methodologies; and
+ any risks or limitations arising from reliance on the metrics.

Do you have reasonable grounds for a stated sustainability target? Have you explained how this target will be measured and achieved?

If the product has set a certain sustainability target, the target should be explained, including what it is, how it will be met and by when, the method for measuring progress towards the target and any assumptions underpinning this information.

If a stewardship investment approach is adopted, investors should be informed of the rationale for engaging with certain companies to influence their corporate behaviour and also be provided with regular updates on progress with the companies.

Is it easy for investors to locate and access relevant information?

Information provided to investors should be clear and concise to allow investors to understand the sustainability-related considerations informing the product being offered. All published information should be relevant to an investor's decision-making and should be easy to locate and access. Information should be consistent across all platforms with which an entity engages, from regulatory documentation to social media platforms.

GLOBALLY REGULATORY ACTION IS BEING TAKEN TO PREVENT GREENWASHING

There is no doubt that regulators in multiple domains consider investor and consumer risks arising from greenwashing to be very serious.

In late May, 50 German police officers raided the Frankfurt offices of Deutsche Bank's asset management arm, DWS Group (**DWS**) in response to allegations made by a former executive at DWS that the funds arm was engaging in greenwashing. In 2020, DWS claimed that half of the US$900 billion worth of assets it managed were invested under ESG criteria. The former executive claimed that this was false and misleading. The police raid marked the first major milestone in the investigation into DWS and made global news. The CEO of DWS resigned in response to the allegations and public pressure.

Meanwhile, in the USA, the Securities Exchange Commission (**SEC**) has initiated an investigation into Goldman Sachs Group Inc's asset-management division, and particularly its funds which are claimed to meet particular ESG standards. The firm manages at least four funds which have ESG or clean-energy claims in their names and the SEC is seeking to get to the heart of whether these claims are true. This is the latest major investigation carried out by the SEC following a US$1 million settlement being paid last month by the investment advisory arm of Bank of New York Mellon to settle an investigation by the SEC into allegations it had engaged in greenwashing and misled about the relevance of ESG criteria when assessing investments. The prevention of greenwashing has been identified as a top priority by the SEC under the guidance of Chair Gary Gensler and similar investigations can be expected in the coming months.

We can expect to see continued growth in the frequency and seriousness of actions taken by global regulators to prevent greenwashing, as the gains to be made by promoting 'clean' and 'green' products continues to increase. This represents a heightened risk to fund and asset managers, who must ensure they are not misrepresenting the importance of sustainability-related factors in decision-making relating to financial products. Notwithstanding the legal consequences that may arise should

any negative finding result from such investigations, asset and fund managers should be aware of the reputational damage they may sustain if their name becomes headline news around the world on the basis of ESG and greenwashing concerns. Investors are demanding investments that are ethical, sustainable and environmentally friendly, and mere rumours of misleading and deceptive conduct can create a sceptical and cautious market.

Partner Jeremy Jose discusses electricity regulation and environmental claims with Moya Dodd on The Competitive Edge podcast:

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KNOWLEDGE ARTICLES YOU MAY BE INTERESTED IN:

Greenwashing: Clean Energy's Dirty Laundry

"It's not easy being green" – Sustainability Linked Loans and avoiding the "Greenwash"

GOVERNMENT CONSULTS ON MANDATORY CLIMATE RISK DISCLOSURE FRAMEWORK

21/12/2022

On 12 December 2022, The Australian Department of the Treasury (**Treasury**) released a Consultation Paper regarding the introduction of mandatory climate-related financial risk disclosure in Australia (**Consultation Paper**), that could require companies to reveal more of the financial risks they face due to climate change in an attempt to provide more certainty to investors.

The release of the Consultation Paper comes amid growing pressure from investors for Australia to introduce mandatory reporting requirements in line with similar developments occurring in New Zealand, the United Kingdom and the European Union. Whilst not yet mandatory, a large number of Australian Securities Exchange (**ASX**)-listed companies have been disclosing climate-related financial risks and opportunities in line with the recommendations of the Taskforce on Climate-Related Financial Disclosures (**TCFD**). Recent data set out in a research report published by the Australian Accounting Standards Board (**AASB**) and the Auditing and Assurance Standards Board (**AUASB**) noted that 96.8% of the ASX 100 reported climate-related disclosures in 2021.

In addition, Australian regulators have released guidance that incorporates climate-related disclosures:

+ Australian Securities and Investments Commission (**ASIC**) has published the Regulatory Guide 228 Prospectuses: Effective disclosure for retail investors, and Regulatory Guide 247: Effective disclosure in an operating and financial review. This ASIC guidance incorporates physical and transitional climate-related risks, as identified by the TCFD, into the list of examples of common risks that may need to be disclosed in a prospectus, and highlighted climate change as a systemic risk that could

impact an entity's financial prospects for future years and that may need to be disclosed in an operating and financial review.

+ The ASX Corporate Governance Principles and Recommendations provide that ASX-listed entities should consider whether they have a material exposure to climate change risk by reference to the TCFD, and if they do, to consider making climate-risk related disclosures in line with TCFD recommendations.
+ Australian Prudential Regulation Authority has released the Prudential Practice Guide: CPG 229 Climate Change Financial Risks, which outlines prudent practices in relation to climate change financial risk management. Specifically, the guide provides guidance, sets out examples of better practice and aims to assist institutions in managing climate-related risks and opportunities.

2022 has also seen the release of the International Sustainability Standards Board's (**ISSB**) draft global standards for climate and sustainability-related financial disclosures. There is an expectation that Australia will look to align Australian corporations' obligations in respect of climate risk disclosure with these.

PURPOSE OF THE CLIMATE-RELATED FINANCIAL DISCLOSURE CONSULTATION PAPER

The purpose of the Consultation Paper is two-fold: it is intended to canvas initial views on requirements for the design and implementation of "standardised, internationally-aligned requirements for climate-related financial risks and opportunities" across Australia; it also seeks input on other matters relevant to climate disclosure, including changes to allow Australia's financial reporting bodies to stay abreast of international standards and priorities.

The proposed climate-related financial reforms and final design requirements will be guided by the following principles:

+ Support Australia's net zero emissions goal, adaptation to climate change and broader efforts to promote sustainable finance nationally and globally.
+ Improve the quality and quantity, as well as comparability, of disclosure.
+ Ensure climate-related financial risk disclosure is clearly understood.
+ Align with international reporting practices.
+ Ability to scale up disclosure requirements as well as allowing flexibility in order to accommodate future developments.
+ Ensure climate disclosure requirements are proportionate to the risks they address.

Notably, the Consultation Paper forms one part of a broader sustainable finance framework being developed by Treasury. Public consultation on the broader framework and its measures will open in 2023.

KEY PROPOSALS IN THE CONSULTATION PAPER AND QUESTIONS FOR FEEDBACK

The Consultation Paper seeks submissions on the costs and benefits of Australia aligning with international practice on climate-related financial risk disclosure, including mandatory reporting for certain entities. It also seeks inputs on a number of more specific policy and technical questions, with inputs to be considered against the reform principles. Below, we consider some of the key proposals and areas of feedback set out in the Consultation Paper.

A phased approach to mandatory reporting

A fundamental question is whether Australia should take a phased approach to mandatory climate-related financial disclosure requirements (similar to other jurisdictions including New Zealand and the United Kingdom), with first reports for initially covered entities due for financial year 2024-25.

The Government proposes a phased approach, with disclosure requirements to initially apply to:

+ large, listed entities covered by the *Corporations Act 2001* (**Corporations Act**), and
+ large financial institutions (such as banks, insurers, credit unions and superannuation funds).

The Government has proposed that reporting requirements gradually expand to smaller listed entities, which could include both companies and schemes.

Feedback is sought on which entities should be subject to initial reporting obligations, including whether large entities which are unlisted and are not financial institutions should also be initially covered, and what size thresholds should be used to determine whether an entity is 'large'.

We expect that the Government's proposed phased approach to mandatory climate-related reporting with an initial focus on large entities will be favoured by a number of stakeholders, particularly given that smaller entities may take more time to comply with reporting requirements and will benefit from an opportunity to observe how larger entities approach reporting obligations.

What will the regulatory framework for required disclosures look like?

Another fundamental question is the appropriate design of the regulatory framework for mandatory climate-related financial risk reporting. The Consultation Paper envisages that the framework for climate-related financial risk reporting should be consistent with the existing regulatory framework for financial reporting, under which, the Corporations Act and regulations

made under that Act establish reporting rules, and covered entities report to ASIC and the ASX (as relevant).

It is proposed that legislation will likely set out (at a minimum) the details of covered entities; the location for any reporting requirements (for example, in annual reports); and requirements to follow prescribed standards when making climate-related financial disclosures. The Consultation Paper proposes that more prescriptive details about the content of disclosures will be set out in climate standards (for example, TCFD), and notes that there are at least two possible options for the position of overarching obligations within the regulatory framework, as follows:

+ overarching obligations for climate disclosure (governance, strategy, risk management, targets and metrics) could be incorporated in legislation (for example, the Corporations Act), with more specific obligations contained in standards and guidance; or
+ current requirements to disclose any material risks as part of an operating and financial review could be expanded, with overarching obligations for climate disclosures set through regulatory guidance or standards (for example, by adjusting ASIC regulatory guidance so that it directs affected entities to apply ISSB standards once finalised).

The Consultation Paper seeks feedback on key considerations that should inform the design of the new framework. In our view, while both proposed options for overarching climate-related financial disclosure obligations would work, incorporating new requirements into legislation, such as the Corporations Act, may be a preferable approach, particularly as it would allow reporting obligations to be consolidated in one location. This could make any future amendments to the regulatory framework for mandatory climate-related financial risk reporting more efficient.

Approaches to assessing materiality and assuring climate risk

The Consultation Paper asks for inputs about what considerations should apply to judging whether a risk is sufficiently 'material' to require disclosure, in circumstances where assessing materiality of climate and sustainability risks is an evolving area. The TCFD and AASB currently provide guidance on how to judge the materiality of climate risks, and materiality guidance will be included in ISSB standards when finalised. The Consultation Paper asks for input on the appropriate reference point for materiality (for instance, whether it should align with ISSB guidance).

Views are also sought on what level of assurance should be required for climate disclosures, who should provide assurance (for instance, financial report auditors), and whether assurance providers should be required to comply with independence and quality management standards.

In our view, it will be important for a high level of assurance to be required for climate disclosures, so as to safeguard the integrity of the reporting scheme.

Requirements for reporting emissions, transition plans, and use of offsets, and how these obligations should interact with other reporting obligations

(a) Emissions reporting

With respect to emissions reporting, the Consultation Paper seeks inputs on the appropriate requirements for requiring scope 1, 2 and 3 emissions reporting, and the potential interaction between any new disclosure obligations and existing national emissions reporting frameworks such as the National Greenhouse and Energy Reporting Scheme under the *National Greenhouse & Energy Reporting Act 2007* (Cth), Corporate Emission Reporting Transparency Initiative (**CERT**) and the Climate Active Carbon Neutral Standard, noting the need to ensure consistency and minimise duplication for entities that also report emissions under these schemes.

We expect that avoiding duplication of emissions reporting obligations will be an important aspect of the reforms, particularly for entities who are already subject to reporting obligations under the National Greenhouse and Energy Reporting Scheme.

(b) Corporate transition plans and use of offsets

Importantly, with respect to disclosure of corporate transition plans, the Consultation Paper acknowledges the growing international focus on the need for transparency and comparability in how businesses report on their decarbonisation commitments. It seeks inputs on how to ensure covered entities provide transparent information about how they are managing climate-related risks, including what transition plans they have in place, and any use of offsets to meet their published targets.

It also notes the need to consider how the regime for mandatory climate risk reporting should interact with the misleading or deceptive conduct prohibitions and civil penalties in the Corporations Act, to ensure that entities have appropriate incentives to provide accurate, comprehensive, and timely disclosures without taking on disproportionate liability risk.

The Corporations Act provides that representations about future matters are deemed to be misleading if made without reasonable grounds. This is echoed in ASIC's disclosure guidance (in Regulatory Guide 247), and was recently emphasised in ASIC's Information Sheet 271 on avoiding greenwashing risk. The Consultation Paper seeks views on the appropriateness of these 'reasonable grounds' requirements in the context of climate reporting, and whether there are other tests or measures that could be considered to ensure liability is proportionate to

inherent uncertainty within some required climate disclosures.

There is already a high level of expectation on Australian businesses to disclose their approaches to decarbonising and managing climate-related risks, from regulators and investors alike. Further, given recent attention of Australian regulators on greenwashing claims, with ASIC announcing its first formal greenwashing enforcement action in October, we expect that a number of submissions will be made on these points. Read more about recent developments in this space in our article: 'And so it begins … ASIC takes its first enforcement action for 'greenwashing''.

In our view, it will be prudent in the lead up to the reforms for entities who are not already disclosing their approaches to managing climate-related risks, including their corporation transition plans, as part of their annual reporting requirements to consider strategies for doing so.

Structures for ensuring that reporting is fit for purpose

Given international developments in climate and sustainability risk disclosure standards, Australia's financial disclosure framework needs to be capable of implementing and supporting climate risk disclosure, in a way that ensures high integrity of the system and enables Australia to remain attractive for investment. The Consultation Paper recognises the need for Australia's financial reporting framework to be able to respond flexibly to issues as and when they emerge, by reducing structural barriers and resultant operational inefficiencies. It proposes three possible structures for the implementation of climate risk disclosure standards and ensuring the ongoing efficiency of the financial reporting system:

(a) AASB responsible for climate-related financial disclosure standards

The first proposed structure is to confirm the AASB as the entity responsible for developing and monitoring the standards for climate and sustainability-related risk disclosure, under Financial Reporting Council (**FRC**) oversight. AUASB would be tasked with developing and maintaining relevant assurance requirements.

The reason for nominating the AASB comes down to the AASB's existing experience in taking preparatory steps towards introducing climate and sustainability-related risk disclosure standards, while capitalising on the AASB's general standard-setting experience and credibility. Additionally, the AASB has strong relationships with international standard-setting bodies.

(b) Separate sustainability standards board

Alternatively, a separate sustainability standards board could be established, which would have the power to develop and monitor standards for climate and sustainability-related risk disclosure, again under FRC oversight.

This approach would clearly delineate the functions and powers of the various standard-setting boards and would also reflect the creation of the International Sustainability Standards Board. Consequently, this structure would be easily understood by national and international entities. However, this could also lead to further fragmentation of Australia's financial reporting framework and thereby lead to inefficiencies. In order to minimise such issues, the operational requirements of the proposed board would be merged with those of the AASB and AUASB to the greatest extent possible.

(c) Combine powers of various entities into one

Finally, Commonwealth legislation could be amended to combine the functions and powers of the FRC, AASB and AUASB into one entity that is responsible for oversight of the entire financial reporting system. This body would have the power to make climate and sustainability-related risk disclosure standards, with a government-appointed governing board as well as independent resourcing and the power to create technical expert sub-committees.

This would provide independence and flexibility to respond to future developments, thereby allowing the Australian financial reporting system to adapt over time, while also removing operational inefficiencies in the current system. However, this approach may lead to uncertainty for some stakeholders and could also impact timely implementation of disclosure standards.

In our view, establishing a separate sustainability standards board under FRC oversight, may enable a more effective and timelier implementation of climate disclosure standards, however, this will of course depend on the mandate of the board.

NEXT STEPS

Submissions on the Climate-related Financial Disclosure Consultation Paper are open until 17 February 2023 and will be used to inform a specific design proposal for further consultation in 2023. At that time, views will be sought on more detailed proposals for the new reporting requirements, their implementation and sequencing.

This consultation follows a year of proposed regulatory and legislative overhaul due to the change in Federal Government. This month alone saw legislation introduced into Parliament that will form part of changes to the Safeguard Mechanism under the National Greenhouse & Energy Reporting Act 2007 (Cth), and an announcement of planned major reforms to the Environment Protection and Biodiversity Conservation Act 1999 (Cth). In addition, the outcomes of the Independent Review of Australian Carbon Credit Units led by Professor Ian Chubb are expected by the end of the year. Read more about the review in our article: Movements in Australia's climate and energy policy.

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KNOWLEDGE ARTICLES YOU MAY BE INTERESTED IN:

'Climate litigation' on ice for governments, but industry to feel the heat

Corporate risk: Net zero the new normal as climate risks realised by regulators and boardrooms

Climate litigation in Australia - A half yearly review

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3 CLIMATE LITIGATION

‘WINDJUNCTION’ GRANTED AGAINST WIND FARM CAUSING NOISE NUISANCE TO NEIGHBOURS

13/04/2022

The Supreme Court of Victoria has recently ordered that the operators of Bald Hills Wind Farm (**Bald Hills**) be restrained from generating excessive noise in the operation of the wind farm and required them to take steps to reduce that noise. The operators were also required to pay the successful plaintiffs, Mr. Uren and Mr. Zakula, over $250,000 in damages including for the loss of amenity of their land, primarily due to the impact of the wind farm on their ability to get a good night’s sleep (*Uren v Bald Hills Wind Farm Pty Ltd* [2022] VSC 145).

The decision confirms that operators of clean energy infrastructure do not have an immunity from common law actions in nuisance just because they may meet the standards imposed in applicable planning and environmental approvals. This will require an important shift in the mindset of operators – and a review of the adequacy of systems and measures they have in place to deal with complaints – and any broader statutory general environmental duties.

In addition, Justice Richards observed that while wind farming contributed to the reduction of Australia’s reliance on fossil fuels and that it was a socially valuable activity, which is in the public interest, he also stated that, in effect, those social benefits should not be prioritised over existing social norms – such as allowing neighbours to have “a good night’s sleep”.

Whilst the decision was predicated on the Victorian planning regime under the *Planning and Environment Act 1987* (Vic) (**PEA**) and the associated regulations and permit conditions, the central and broader issues of compliance with noise standards, the relevance of statutory regimes to private legal action, and relationship management, provide lessons for all Australian jurisdictions and the renewable energy proponents which operate therein.

UREN AND ZAKULA V BALD HILLS WIND FARM PTY LTD: THE DECISION

In February 2020, Mr. Uren and Mr. Zakula, each of whom lived on properties neighbouring Bald Hills, commenced proceedings against the operators of Bald Hills in the Supreme Court of Victoria, alleging it had committed the tort of nuisance by emitting excessive noise, disturbing their sleep and reducing the value of their properties. The plaintiffs sought an injunction to prevent the continued emission of the noise and an order for damages.

Richards J found that the noise emissions constituted nuisance, as they were a substantial and unreasonable interference with the plaintiffs' right to use and enjoy their land.

As part of its consideration in relation to whether the noise is causing an unreasonable interference, the Court found that Bald Hills was not operating in compliance with the noise emission conditions in its planning permit (largely because the operator hadn't adequately proven that it had complied). But the Court noted that even if Bald Hills had complied with those conditions, that would not necessarily have resulted in a finding that the noise emissions were reasonable because (among other matters) the applicable noise standard imposed by the conditions was 'not directed to intermittent loud noise from wind turbines, and does not provide a way of assessing whether a wind farm produces unreasonably annoying noise in certain weather conditions, or on a particular night'.

Importantly, Richards J confirmed that it was ultimately for the Court to determine whether a particular party had complied with the conditions of a relevant planning permit, and not the the acoustics industry, or indeed, the Minister who may have previously confirmed compliance in writing.

Other matters considered by the Court in determining whether the noise was unreasonable include:

- the nature and extent of the interference;
- the social and public interest value in operating the turbines to generate renewable energy;
- whether the plaintiffs were hypersensitive to noise from the turbines;
- the character of and the nature of established uses in the locality of plaintiffs' land;
- precautions that the operator has taken to avoid or minimise the interference; and
- whether the operator could reasonably have taken any other precautions.

Notably, the injunction ordered by the Court was deferred for three months to avoid requiring a complete shutdown of Bald Hills' operations and to provide it with an opportunity to reduce noise emissions in another manner.

LESSONS TO BE LEARNED BY RENEWABLE ENERGY SECTOR

The decision shows the importance for wind farm operators and those in the renewable energy sector more broadly to be proactive rather than reactive in respect of the following:

1. Implementing and maintaining a comprehensive system of compliance monitoring: A distinct issue for Bald Hills was the manner and methods by which its compliance with noise requirements were measured. The Court found that the relevant monitoring was being conducted intermittently and only at certain parts of the wind farm, such that the results did not accurately reflect the farm's actual noise emissions.

   Importantly, Richards J noted that compliance (if proven) was not a complete defence to a nuisance claim (which needed to be determined on a case-by-case basis by the Court) but it would go some way to establishing that the noise emitted was reasonable. Further, her Honour held that because the plaintiffs established the noise interference caused by the wind farm was substantial, it was up to Bald Hills to prove that the noise was reasonable because it complied with the conditions of the planning permit.

   Therefore, an operator that maintains rigorous compliance controls and can produce evidence of that compliance is better placed to defend any claims in nuisance for unreasonable interference. An approach conceptually akin to systems for managing occupational health and safety hazards is likely the best.

2. Shifting the compliance mindset: In addition it will be necessary for operators to shift their mindset from the established practice that compliance with planning permit conditions is in itself sufficient to deal with noise complaints (or complaints in relation to any other alleged adverse impacts). It may require a case-by-case analysis of the other factors relevant to an assessment of 'reasonableness' set out above.
3. Securing 'breezements' with private land holders: Properly drafted agreements between landholders and operators may prevent legal action. Such agreements were expressly contemplated by the conditions of the Bald Hills permit. The permit provided that the operator did not have to comply with the applicable standard if it had already entered into an agreement with a landholder that set out alternative parameters.

   This concept has been implemented successfully in other jurisdictions with differing regimes. Such agreements tend to provide compensation to a landholder in return for both an easement over the property allowing the operator to generate noise and a covenant from the landholder that it will not commence proceedings in relation to such noise.

4. Ensuring third-party agreements are airtight: Where a third party is responsible for managing a project, a principal may be exposed to risk depending on the applicable suite of agreements. Ensuring an effective, practical and enforceable indemnity clause in respect of compliance with any relevant permits or approvals can at least provide financial protection should an operator be subject to an adverse finding.
5. Location, location, location: The specific location of a wind farm can act as both a sword and shield in the event of litigation. The Bald Hills decision reveals that wind farm operators cannot ignore the pre-existing acoustic amenity of the relevant area, as the impact of any interference will be measured against that background. On this occasion, the impact of the noise emissions was measured against the acoustic amenity of a quiet rural area. Further, this decision suggests that courts are unlikely to accept existing permits as evidence that the permit-holder's operations constitute an existing land use if its terms have not been complied with.
6. Maintaining social licence: Genuine engagement and undertaking reasonable remedial action to reduce noise levels (or other adverse environmental impacts) are not only useful for cultivating the social licence to operate, but will also be critical to the Court's consideration of whether the noise interference is unreasonable and the amount of any damages to be awarded. Richards J characterised the operator as adopting a 'high-handed' method of dealing with complaints that itself at least doubled the loss of amenity. Had the operator engaged with the plaintiffs and taken reasonable steps to mitigate the noise impacts when the issue first arose, it may not have found itself on the unsuccessful side of Court proceedings, or at least may not have faced a damages award as high as was ordered by the Court.

IMPLICATIONS FOR RENEWABLE ENERGY SECTOR

In circumstances where compliance with existing regulations and permit conditions may be insufficient to ward off private legal action, operators of renewable energy projects may need to shift their mindset from the adopted position that 'we comply with our conditions, and therefore the impacts are reasonable'.

Companies need to have systems and measures in place to mitigate the risks arising from this decision – and have the capability to take a deeper dive into complaints (particularly any systemic complaints) which involve a broader consideration of 'reasonableness' as set out by the Court. Those systems and measures will also need to deal with the changing landscape of broader statutory environmental duties – such as the new general environmental duty in Victoria which requires operators to minimise risks of harm to human health or the environment from noise so far as reasonably practicable.

While Bald Hills is an example of litigation risks faced by the sector – we don't see the decision as fatal to the ability of large scale renewable projects to operate in compliance with applicable environmental laws (provided appropriate changes are made to mitigate the risks flowing from the decision) – or long-term investment in renewables.

For advice on the adequacy of systems and measures to mitigate the risks arising from the decision and other statutory environmental duties (such as the general environmental duty in Victoria), implementing robust and effective compliance monitoring, interpretation of relevant standards, drafting of indemnity or liability causes or compensation agreements, contact our Clean Energy + Decarbonisation experts.

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NSW COURT OF APPEAL CONFIRMS SCOPE OF STEP-IN POWER UNDER AN OPERATIONS AND MANAGEMENT CONTRACT

25/07/2022

EXECUTIVE SUMMARY

- A recent NSW Court of Appeal case, *MP Water Pty Ltd* in its capacity as Trustee for the *MP Water Trust v Veolia Australia Pty Ltd* [2022] NSWCA 127, concerned the proper construction of a 'step-in' clause of a long term O&M contract for a water treatment facility near Lithgow, NSW.
- At first instance, the Supreme Court of NSW in *MP Water Pty Ltd v Veolia Water Australia Pty Ltd* (No 3) [2021] NSWSC 1023, construed the principal's rights under the step-in clause narrowly, finding that the principal could not exercise its step-in rights by merely directing the service provider to continue operating the facility (albeit at the ultimate instruction of the principal) and to cure the default giving rise to the step in right. The consequence being that the principal, to exercise a step in right, would have to itself take operational management and control of the facility without the ongoing assistance of the service provider.
- The Court of Appeal overturned the Supreme Court's decision and found that the step-in clause should not be interpreted narrowly and that the principal could exercise its step-in rights by simply directing the service provider to continue operating the facility (albeit at the ultimate instruction of the principal) and to cure the default giving rise to the step-in right.
- The Court of Appeal's decision represents a victory for principals considering exercising a step-in right in an O&M contract, especially in circumstances where the principal is not itself in a position to operate the asset or facility once 'stepped-in' and must rely on the service provider's ongoing operational support and provision of the O&M services.

BACKGROUND

In November 2017, MP Water, as Project Co, and Veolia, as Services Provider, entered into the Services Provider Agreement (**SPA**) for Veolia to perform certain 'Services', namely to operate and maintain a water treatment facility located in NSW (**Facility**). The Facility is located adjacent to two coal mines and treats the water generated at the mines for the use at a nearby power station.

In May 2021, there was an outage at the Facility which MP Water contended was a 'Major Services Failure' under the SPA, prompting MP Water to issue Veolia with a 'step-in notice' under clause 44(a) of the SPA. Clause 44(a) of the SPA relevantly provided:

(a) If at any time during the Operations Phase:

(1) a Services Provider Default Termination Event occurs;

(2) a Services Provider Default occurs and the Services Provider has failed to diligently pursue the relevant Services Provider Default Notice; or

(3) it is necessary for Project Co to take immediate action to discharge its statutory duties or powers, or comply with its obligations under applicable Laws and Approvals,

(4) a "Project Co Default Termination Event" occurs under and as defined in the WTSC;

(5) a "Project Co Default" occurs under and as defined in the WTSC and Project Co has failed to diligently pursue the relevant "Project Co Default Notice" under and as defined in the WTSC; or

(6) it is necessary for the Customer to take immediate action to discharge its statutory duties or powers, or comply with its obligations under applicable Laws and Approvals

Project Co (in the case of paragraphs (1) to (3)) or the Customer (in the case of paragraphs (4) to (6) and in accordance with clause 44 of the WTSC) may elect, and if it so elects the Services Provider will assist Project Co or the Customer wherever and however possible to ensure that Project Co or the Customer is able, to:

(7) temporarily take or assume total or partial possession, management and control of the Facility (or any part of the Facility) and the provision of the Services (or any of them);

(8) take such other steps as are necessary or desirable to continue the provision of the Services as required by this Contract or to minimise the risk to the Environment, to other members of the general public or of material damage to the Facility, as applicable; and

(9) do anything which the Services Provider is entitled to do under an O&M Project Contract or with respect to the Project,

(each a **Step-in Right***).*

By way of MP Water's step-in notice, and in purported exercise of its step-in rights, MP Water directed Veolia to operate the Facility and provide the Services under the SPA so as to remedy the Major Services Failure. The relevant text of MP Water's step-in notice was as follows:

This is a Step-in Notice under clause 44.1(a) and (b) of the SPA. Pursuant to clause 44(c) of the SPA, Project Co hereby notifies the Services Provider of its intention to exercise Step-in Rights for the sole purpose of remedying the Services Provider Default described in the Services Provider Default Notice.

The extent of the Step-in Right being exercised will be limited to the matters below.

With immediate effect, pursuant to clause 44.1 of the SPA, Project Co elects and the Services Provider, must assist Project Co wherever and however possible to ensure Project Co is able to exercise its Step-in Rights to:

(a) to commence treatment of Mine Water by providing the Services as set out in clause 19.1 of the SPA, and including treatment of Mine Water at the Facility delivered to the Services Provider pursuant to clause 20.1 (which includes all Mine Water currently in the Mine Water Buffer Pond, and Mine Water which has been placed or directed into that pond by the Services Provider) and specifically to accept and treat at the Facility:

(i) Mine Water at the rate of between 19ML per Day and 25ML per Day from the Mine Water Transfer Pipeline,

blended with

(ii) Mine Water at the rate of 1ML per Day from the Mine Water Buffer Pond or such greater amount that can be safely and effectively treated at the Facility so as to reduce the level in the Mine Water Buffer Pond to less than 80ML,

(b) take such other steps as are necessary or desirable to continue the provision of the Services as required by the SPA or to minimise the risk to the Environment, to other members of the general public or of material damage to the Facility, as applicable,

(the **Step-in Direction***).*

Project Co will Step-in only to the limited extent and duration described above. Except to the extent and direction of that Step-in, the Services Provider's obligations under the SPA are not and will not be suspended.

Project Co's Representative will attend site for the purposes of the Step-in on Friday, 14 May 2021 at 9am and requires the Services Provider to make itself available for the purpose of implementing the Step-in Direction described above.

Once the Step-in Direction has been given [and], in Project Co's opinion, the necessary steps to commence Mine Water Treatment

> *as described in the Step-in Direction has occurred, Project Co will, by written notice to the Services Provider cease to exercise its Step-in Rights pursuant to clause 44(f) of the SPA (Project Co Step-out), unless Project Co gives a further notice. Upon the occurrence of the Project Co Step-out and, pursuant to clause 44(i)(1), the Services Provider must immediately recommence performance of those Services Provider's obligations suspended pursuant to clause 44(d) of the SPA.*

In essence, MP Water was exercising its step-in right by directing Veolia to cure the Major Services Failure by recommencing water treatment at the Facility but otherwise Veolia was to continue its provision of the Services and operational management of the Facility.

Veolia disputed validity of the step-in notice and the entitlement of MP Water to step-in to direct Veolia to perform the Services.

In April 2021, MP Water successfully obtained an interim injunction in the Supreme Court of NSW requiring Veolia to comply with the step-in notice and perform the Services as directed by MP Water: see *MP Water Pty Ltd v Veolia Water Australia Pty Ltd* [2021] NSWSC 582.

DECISION OF THE SUPREME COURT OF NSW

At first instance Justice Williams of the Supreme Court of NSW, construing clause 44 narrowly, held that the Step-in Notice was invalid and MP Water was not entitled under clause 44 of the SPA to step-in and direct Veolia as to how Veolia was to operate the Facility and perform the Services.

Justice Williams construed clause 44(a) of the SPA such that the requirement of Veolia to "assist" MP Water was limited to Veolia enabling MP Water to take possession, management and control of the Facility and the Services, i.e. where MP Water was to physically 'step-in' and take over operation control of the Facility and perform the Services itself. Relevantly, at paragraph 380 of her judgment, Justice Williams found:

> *…sub-clause 44(a)(7) does not require Veolia to assist MP Water to take total or partial management of some or all of the Services (by issuing directions or instructions or instructions to Veolia) whilst Veolia remains in possession and control of the whole Facility and performs the Services under MP Water's instructions.*

The consequence of this construction of clause 44(a) was that MP Water, to exercise a step in right, would have to itself take over the possession, management and control of the Facility from Veolia, in circumstances where MP Water did not have the personnel or expertise to undertake such a task.

DECISION OF THE NSW COURT OF APPEAL

MP Water appealed Justice Williams' decision on clause 44(a) of the SPA to the NSW Court of Appeal. The NSW Court of Appeal unanimously found in favour of MP Water on all points of appeal.

Most relevantly, the Court of Appeal found that MP Water's step-in notice, and exercise of its step-in right, was valid. At paragraph 90 to 93 of the judgment, the Court of Appeal held:

> *The focus of the dispute in the present case is paragraph (7), pursuant to which MP Water may take or assume total, or partial, "possession, management and control" of the Facility and provision of the Services, or any part thereof. The composite phrase "possession, management and control" accommodates a broad range of action that MP Water may elect to take in response to the occurrence of one of the circumstances in paragraphs (1) to (3). MP Water may, for example, take or assume total possession, management and control of the Facility and provision of the Services; it may take or assume total possession, management and control of any part of the Facility and provision of any part of the Services; or it may take partial possession, management and control in either respect.*
>
> *I agree with MP Water that, as a matter of language, the taking or assumption of total or partial possession, management and control of all or any part of the Facility and provision of all or any part of the Services accommodates MP Water giving a direction to Veolia. One can readily envisage a need for directions, for example where, by reason of MP Water's election, Veolia remains in partial control of the whole Facility and provision of the Services, or in total or partial control of part of the Facility and part of the Services…*
>
> *As a matter of language, the paragraph would also accommodate MP Water giving Veolia a direction as to the operation of part of the Facility, or the provision of some or all of the Services, of which MP Water takes or assumes possession, management and control pursuant to subclause 44(a). Such a direction would be an incident of MP Water's taking or assumption of control of the Facility or part thereof, and/or provision of the Services or part thereof, in response to the occurrence of the circumstances in one of paragraphs (1) to (3)….*
>
> *If MP Water "so elects" to take action pursuant to paragraph (7), Veolia "will assist wherever and however possible to ensure that [MP Water] is able to" take the action the subject of its election. Consistently with Veolia's correlative function, the terms in which its obligation to assist is formulated are capable of expanding or contracting to meet the extent of such "possession management and control" that MP Water elects to take (total or partial; as to the whole or any part of the Facility and/or any part of the Services). The ultimate end of that assistance, however, is to ensure that MP Water is able to achieve its elected level of control over the Facility and the Services.*

In reaching its decision, the Court of Appeal considered remedial purpose and the commerciality of the clause 44.

KEY TAKEAWAYS

- Parties should take care when drafting step-in clauses to ensure that the scope of the step in rights are clear and, if desired, that a step-in allows for the principal to give directions to a service provider without itself taking operational control of the asset or facility.
- Before exercising a step-in right, or responding to a purported exercise of a step-in right, parties should give careful consideration to the specific terms of their contractual step in regime and seek prompt legal advice where appropriate.

As the outcome of these proceedings turned on the specific language of the SPA, care should be taken in generalising the outcome of these proceedings to step-in clauses that have different drafting.

MP Water Pty Ltd was represented by Gilbert + Tobin.

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CLIMATE LITIGATION IN AUSTRALIA – A HALF YEARLY REVIEW

03/08/2022

If 2021 was 'the year that was' for climate litigation in Australia, then 2022 is 'the year that remains to be seen'. The slowdown of new claims is not unexpected – there have been no real legislative developments encouraging new causes of action and the overturning of Justice Bromberg's sensational first instance decision in Sharma (discussed below) has dented the confidence of litigants seeking redress through the courts. It may be that potential litigants are adopting a 'wait and see' approach, awaiting the substantive resolution of the trailblazing claims of 2021. But it is unlikely that society's environmental conscience is calmed, and the coming years are set to deliver some landmark decisions as new and continuing cases trundle towards hearings.

CASE DEVELOPMENTS

Protection of Torres Strait Islanders – *Pabai Pabai & Anor v Commonwealth of Australia* (VID622/2021)

Background: In this class action brought on behalf of all persons of Torres Strait Islander descent, Mr Pabai and Mr Kabai of Gudamalulgal in the Torres Strait claim that the Commonwealth Government has breached a duty of care allegedly owed to Torres Strait Islanders to take reasonable steps to protect them, their traditional way of life and the land and marine environment in and around the Torres Strait from the current and projected impacts of climate change.

Progress: The trial of this matter is currently planned to take place in two parts, with the first (dealing with the "lay" evidence) due to commence in June 2023, with expert evidence expected to address the current and projected impacts of climate change to follow. The applicants are currently in the process of preparing amended documents to clarify the "novel" allegations that they are making.

Notably, the Court has recognised the public interest surrounding this proceeding, and has made the Court documents publicly available. The Court has also recognised at this relatively early stage of the proceeding the very real and proximate threat of climate change. Justice Mortimer observed that "there is no denying the unremitting march of the sea onto the islands of the Torres Strait. The reality for the people of the Torres Strait is that they risk losing their way of life, their homes, their gardens, the resources of the sea on which they have always depended and the graves of their ancestors."

Implication: This case raises interesting points about the vulnerability of First Nations people to the impact of climate change, particularly in respect of the loss of cultural practice through environmental degradation, which has not been previously considered by an Australian court.

Whilst Mr Pabai and Mr Kabai's claim relies on similar duty of care principles that were asserted in Sharma (which we discuss further below), the alleged source of that duty in this case is different and so could result in a different outcome.

If a duty of care is established, governments could become more cautious about new project approvals, particularly in carbon-intensive industries. Whatever the result, judicial analysis of Australia's treaty and international agreement obligations will be a useful guide to climate risk management for both policy makers and business.

Blade and shield – *Uren v Bald Hills Wind Farm Pty Ltd* [2022] VSC 145

Background: Two landholders claimed the neighbouring Bald Hills wind farm committed the tort of nuisance by emitting excessive noise, which disturbed their sleep and reduced the value of their properties. The plaintiffs sought orders to restrain the operators of Bald Hills from emitting excessive noise and claimed damages for the loss of amenity and enjoyment of their land.

Outcome: The plaintiffs were awarded over $250,000 in damages and secured an injunction restraining Bald Hills from emitting excessive noise. The Court deferred the injunction for three months to avoid a complete shutdown of Bald Hills' operations and to provide it with an opportunity to reduce noise emissions in another manner.

Implication: While limited to the regime under the *Victorian Planning and Environment Act 1987* (Vic), this decision demonstrates that courts are concerned to balance the environmental benefits of wind farms (and other clean energy infrastructure) against private rights. Whilst it was found that Bald Hills failed to comply with its planning permit conditions, the Court found that even if it had, the noise emissions produced could still have been excessive – confirming that strict legislative compliance might not be a complete defence for wind farm operators.

Injunctions are undoubtedly commercially inconvenient and very costly, so private renewable energy operators ought to consider more than strict compliance with planning conditions, including relationship management with neighbours, and their social licenses to operate.

For a more detailed review of the decision, read our discussion and analysis in "'Windjunction' granted against wind farm causing noise nuisance to neighbours".

***Minister for the Environment v Sharma* [2022] FCAFC 35**

Background: A group of eight Australian children, by a litigation representative, brought a claim of negligence against the Federal Minister for the Environment in relation to the approval of a proposed expansion of a coal mine. The children alleged the Minister owed a duty of care to take reasonable steps to protect them from personal injury and death caused by climate change.

Outcome: Justice Bromberg initially found that a duty of care was owed, and unsurprisingly the Minister appealed. The Full Court of the Federal Court upheld the appeal, finding that no duty of care was owed. The time for an appeal to the High Court of Australia has lapsed, and the plaintiffs have confirmed that they were not going to proceed with any special leave application, such that the case goes no further.

Implication: While no duty of care was established, this case might prove to be only the first in a line of litigation dealing with obligations owed by decision-makers and business entities. Most importantly, the decision shows judicial acceptance of climate change science. None of the evidence of climate change, or its harms, led by the plaintiff children was challenged by the Minister. Further, the Minister's assertions of error on science-based risk in the primary judgment were rejected on appeal and so the plaintiff children could have cleared the first hurdle: agreement that climate change is real and harmful.

For a more detailed review of the primary and appeal decisions, read our discussion and analysis articles:

+ "Climate litigation in Australia"
+ "No 'Duty of Care' but risks of climate litigation continue to grow - insights from the Sharma decision"

Overcharging on EVs? – *Vanderstock & Davies v State of Victoria* (M61/2021)

Background: Two electric vehicle (EV) owners have challenged the constitutional validity of a Victorian tax on electric vehicles. The tax (now 2.6c per kilometre) is recorded based on odometer readings submitted by vehicle owners. The EV owners claim that section 90 of the Constitution (which prevents States charging customs and excise duties) disentitles Victoria from levying such a charge.

Implication: The legal question of whether it is the States or the Commonwealth who are entitled to impose a "tax" of this nature is

unlikely to generate broad community interest (although unsurprisingly, the states which have imposed a similar tax on EVs have intervened in support of Victoria, whereas the Commonwealth Attorney General has intervened in support of EV owners (and its revenue coffers)).

However, this case also raises an interesting discourse regarding governments' need to balance the uptake of EV and other decarbonising initiatives, against replacing diminishing revenue streams from more carbon-intensive sectors (such as fossil fuels). That is particularly so in the face of a perceived hesitancy of the Australian community to fully embrace EVs due to financial disincentives to ownership and operation of those vehicles as compared to traditional combustion engine vehicles.

Coal mine challenge runs out of steam – *KEPCO Bylong Australia v Independent Planning Commission & Anor* [2021] NSWCA 216

Background: In 2019, the NSW Independent Planning Commission rejected KEPCO's application to construct a coal mine based on inadequate plans for managing Scope 3 emissions and that the benefits and costs of a coal mine (where the coal would be exported) violated the principle of "intergenerational equity" – where the environmental cost that would be felt by future generations is considered against the immediate financial benefit of the proposal. In 2020, KEPCO unsuccessfully appealed to the NSW Land and Environment Court which found that the proposed development would be contrary to ecologically sustainable development. In 2021, the NSW Court of Appeal dismissed a further appeal commenced by KEPCO, finding the conditions attached to its original project would not satisfy the State Climate Change Policy.

Implications: While this decision is limited to projects in NSW, the Court of Appeal's decision confirms that there is a positive requirement to address Scope 3 emissions in applications related to the Mining State Environmental Planning Policy.

LOOKING AHEAD

ACF v Woodside

In late June 2022, the Australian Conservation Foundation applied for an injunction to prevent the development of the Scarborough gas project operated by Woodside Energy on the basis that it had not obtained all necessary approvals from the Federal Minister for the Environment. The claim alleges that the Scarborough gas project also needs to be assessed according to the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) EPBC Act due to its potential impact on the world heritage listed Great Barrier Reef and is not entitled to the exemptions that would allow it to rely on the approval process under the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA).

The Environmental Defender's Office claims the Court will be asked for the first time to consider objective scientific evidence about the impact of offshore gas projects and their emissions on the Great Barrier Reef.

Greenwashing

There has been little progress in Australia's first 'greenwashing' case and the first case globally to challenge the veracity of a company's net zero targets – the Australasian Centre for Corporate Responsibility v Santos Limited.

However, Australia's corporate regulator, ASIC, has recently issued guidance in relation to claims about sustainability-related products and the ACCC has taken a similar interest in climate related disclosures, naming consumer and fair-trading issues in relation to environmental claims and sustainability in its compliance and enforcement priorities for 2022/23.

For a more detailed review of ASIC's guidance, read our discussion and analysis in "Summary of ASIC Guidance on 'How to avoid greenwashing when offering or promoting sustainability-related products".

WHERE TO NEXT FOR CLIMATE LITIGATION IN AUSTRALIA?

It is unclear whether individuals, activists and shareholders alike will continue to seek redress through the courts with the same vigour as in recent years, particularly in circumstances where the new Federal Government has promised to take swift action on climate change. It is possible that a portion of the litigation commenced in the last 18 months was in response to, and in protest over, the Morrison Government's position on climate change. However, it is unlikely that society's evolving environmental conscience will sit and wait, and should the new Federal Government be slow to implement its climate policies, one can expect "climate activists" to pursue climate litigation with the same vigour as we have seen in the past.

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MINING LEASES REJECTED DUE TO HUMAN RIGHTS AND EMISSIONS IMPACTS IN WARATAH COAL V YOUTH VERDICT & ORS

13/12/2022

CASE: Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6) [2022] QLC 21

In the recent decision of Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6) [2022] QLC 21, President Kingham of the Land Court of Queensland (**Land Court**) recommended refusal of applications by Waratah Coal Pty Ltd (**Waratah**) for a mining lease and an environmental authority in relation to a proposed thermal coal mine in the Galilee Basin (the **Project**). The Project entailed both open cut and underground thermal coal mining, with the coal to be exported to Southeast Asian markets for use in energy production. These proceedings arose after various parties objected to the granting of both applications.

The decision analyses various factors that can inform the Court's assessment as to whether approving such applications is in the "public interest". These factors included the material contribution to climate change that would be caused by the scope 3 emissions produced from the downstream combustion of coal mined from the Project, the impact of the proposed mining operations on Bimblebox Nature Refuge (**Bimblebox**), located above the proposed underground mine area, and the impact upon human rights if the Project were to proceed.

Notably, President Kingham stated that the same conclusion would have been reached, regardless of whether the human rights impacts had been sufficiently made out, given the loss of Bimblebox and the climate change implications from the scope 3 emissions arising from combustion of the coal mined throughout the Project.

KEY TAKEAWAYS IN WARATAH COAL V YOUTH VERDICT & ORS

+ The human rights of individuals and neighbouring landowners, and the impact that a proposed project may have on those persons, is a relevant consideration when determining applications for mining projects at least in Australian jurisdictions which have enacted human rights legislation.
+ Projects which may have a significant impact on climate change need to be considered in light of the emission reduction targets that Australia has committed to.
+ The Court took into account scope 3 emissions that would arise from the Project and considered this a relevant factor in determining whether or not the Project should be approved.

HUMAN RIGHTS

Queensland is one of three Australian jurisdictions (as well as Victoria and the Australian Capital Territory) that has enacted human rights legislation – the *Human Rights Act 2019* (Qld) (**Queensland HRA**). This was an important factor in the Court reaching its decision.

In relation to broader individual rights, the Court found that the Project would interfere with the right to life of people in Queensland, the cultural rights of First Nations People, the rights of children, the right to property, the right to privacy and home, and the right to enjoy human rights without discrimination. The Court found that the Project's "*material contribution to the life-threatening conditions of climate change (and associated economic and social costs) is not proportionate to the economic benefit [to Waratah and the local community] and the supply of thermal coal to Southeast Asia*." Significant weight was placed on expert evidence from climate change experts regarding the urgency of reducing emissions, the various impacts of climate change and the importance of meeting the targets set by the Paris Agreement. President Kingham also noted the adverse effects of climate change experienced by First Nations people and the negative impact it was having on their right to enjoy, maintain and develop their culture. Further, the rights of children were deemed to be paramount and the Court considered that intergenerational climate change risks were therefore a relevant consideration.

In relation to the rights of neighbouring landowners, the Court found that the Project would interfere with the right to property and the right to privacy and home. President Kingham considered that the applications should not proceed due to the unjustifiable limitation on rights arising from the likely nuisance and environmental damage of the proposed mine on nearby properties, including noise, dust and subsidence impacts. The Court held the Project would unjustifiably limit these rights, however emphasised the fact that the factors leading to such a conclusion were specific to the case at hand. These factors included the unlikelihood that the mine would comply with operating conditions set by the regulator intended to minimise nuisance impacts and the fact that the impact on nearby landowners' rights could not be adequately compensated for.

It is therefore unclear whether courts may find that the impact of another project on neighbouring landowners is too great to allow the project to progress in circumstances where the mine would likely meet the operating conditions set by the environmental regulator and/or the landowners can be adequately compensated for any nuisance caused.

Whilst international jurisprudence played a significant part in informing President Kingham's analysis in relation to human rights, President Kingham added a "*strong caveat*" that using international jurisprudence to interpret and apply domestic human rights legislation must be approached with caution.

DISTINCTION BETWEEN WARATAH AND SHARMA

The Court distinguished this case from *Minister for Environment v Sharma (2022) 400 ALR 203* (Sharma). Whilst in *Sharma* Bromberg J at first instance found a real risk of harm to the represented children from climate hazards, and consequentially held that the Minister for the Environment had a duty to take reasonable care to avoid injury resulting from those risk, this was overturned by the full Federal Court, which found that no such duty was owed. President Kingham noted that the Waratah Coal proceedings were administrative proceedings that concerned "*whether the State, as the owner of the resource, should authorise Waratah to mine and sell the coal for combustion*." Conversely, *Sharma* was a civil court proceeding "*about [the defendant's] responsibility for harm attributable to combustion emissions*". There was also a clear difference in that, as noted above, the Queensland HRA provided a legal basis for claims on human rights grounds, whereas at the Commonwealth level no such basis exists (see our analysis of the Sharma case in *No 'Duty of Care' but risks of climate litigation continue to grow - insights from the Sharma decision* and *Climate litigation around the world and potential risks for corporate Australia)*.

PROJECTS TO BE CONSIDERED IN LIGHT OF EMISSION REDUCTION TARGETS

Climate change is a global issue and requires global collaborative action in order to mitigate its effects. The Court emphasised the importance of considering State, national and global impacts of a proposed project, noting that "*in making a recommendation, the Court should consider whether approving the mine would make it harder to achieve the goal to which Australia and Queensland is committed*", and going further to consider whether the proposed project would undermine the carbon budgets developed to meet the Paris Agreement targets.

There is a growing recognition among the judiciary that global, and indeed national, carbon budgets need to be considered when

determining cases related to climate change, which view is reflected in President Kingham's judgment.

SCOPE 3 EMISSIONS

The Court was called upon to consider the relevance of scope 3 emissions when deciding whether or not to recommend the approval of applications pertaining to a proposed mining project. There have been a number of previous cases that have considered whether scope 3 emissions from developments are relevant considerations for decision makers and whether proponents should include environmental assessment of those emissions in applications. In this instance, the Court found that granting permission to Waratah to extract coal under the Project could not logically be separated from its inevitable combustion, "*that being the whole point of the exercise*". Therefore, the scope 3 emissions that would be produced were a relevant consideration in determining whether or not the applications should be approved.

Given the general terms in which these views are expressed, this reinforces the position that scope 3 emissions are likely to be a relevant factor when considering applications pertaining to proposed mining projects. In particular, if the scope 3 emissions are sufficiently certain (e.g. if the extraction of minerals will certainly lead to mineral processing emissions by third parties), then this judgment suggests that such emissions may be a valid consideration in the determination of whether or not a mining proposal should be approved in the first place.

IMPACT UPON CURRENT PROCEEDINGS

As a result of the Land Court being a state-based, lower level court, it is uncertain the extent to which this decision will have a significant impact on other climate litigation proceedings that are on foot in Australia. It will be a matter for the Minister to consider the Land Court's findings and ultimately make a decision about the application at hand. There is also a right to appeal decisions at first instance in the Land Court to the Queensland Land Court of Appeal, which in turn is subject to appeal to the Queensland Supreme Court (Court of Appeal), and it is anticipated that Waratah will pursue all available options to challenge these findings.

The impact of President Kingham's findings on current and future climate litigation proceedings will also depend on the nature of those proceedings. This decision is potentially relevant to proceedings involving judicial review of administrative decisions relating to project approvals. For example, elements of the decision in respect of scope 3 emissions may support the plaintiffs in *Australian Conservation Foundation Inc v Woodside Energy Ltd & Anor VID345/2022*. In those proceedings, the plaintiff is contending that Woodside's Scarborough gas project should be subject to approval under the *Environment Protection and Biodiversity Act 1999* (Cth) due to the impact that the project's scope 3 emissions will have on the Great Barrier Reef. In other cases, it may be arguable that an administrative decision-maker ignored a relevant consideration if that decision-maker does not consider scope 3 emissions when determining whether to approve or recommend the approval of a project. Conversely, the impact on climate litigation proceedings that do not involve judicial review of such decisions (such as *Pabai Pabai and Guy Paul Kabai v Commonwealth VID622/2021*) is unclear, as President Kingham drew a clear distinction between administrative decisions and cases like Sharma, which concern liability for tortious action.

Co-authored by Tom Penglis

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‘CLIMATE LITIGATION’ ON ICE FOR GOVERNMENTS, BUT INDUSTRY TO FEEL THE HEAT

14/12/2022

In the last two years, climate litigation has emerged as a diverse and popular tool for individuals, activists and shareholders alike to effect change in the behaviour of government and private enterprise directed to the reduction of carbon emissions. However, the Full Federal Court’s decision to overturn Sharma earlier this year highlighted the legal and policy barriers to establishing a duty of care owed by government departments in respect of climate change risks and harm. The Full Federal Court’s decision made it abundantly clear that such a duty of care will likely only arise after legislative reform imposing such a duty on Parliament and the Executive. See our previous article on the Sharma case - No ‘Duty of Care’ but risks of climate litigation continue to grow - insights from the Sharma decision.

Although the claim in Pabai Pabai relies on similar duty of care principles as were asserted in Sharma, the source of the alleged duty in Pabai Pabai is grounded in Native Title and cultural heritage rights, so could result in a different outcome. However, the resolution of that matter, and any further clarity on the potential imposition of a duty of care is some way off - with the hearing of expert evidence in that proceeding currently scheduled to take place over three weeks commencing on 30 October 2023.

Whilst a change in government has heralded a more pro-active climate change response by government, there is no apparent indication that the Albanese government will put a target on its, or any successive government’s back, by proposing such legislative reform.

Accordingly, we expect litigants will necessarily turn their focus to industry, where the existing legal framework is far more accommodating to climate litigation, through avenues such as shareholder activism and misleading and deceptive conduct claims. On that note, the greenwashing claim against Santos, which commenced late last year, has been delayed after the Australian Centre for Corporate Responsibility (**ACCR**) added

additional grounds to its complaint against Santos, purportedly arising from documents produced by Santos during the discovery process in that proceeding.

RECENT CLIMATE LITIGATION CASES IN AUSTRALIA

A number of other cases are also awaiting finalisation, including Australian *Conservation Foundation Incorporated* (**ACF**) *v Woodside Energy Ltd & Anor* in which ACF seeks to establish climate change impacts as a relevant consideration for the WA EPA exercising its approval rights. However, there were two notable decisions handed down in recent weeks, being:

+ *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193: the rejection of Santos' appeal of a decision of Justice Bromberg which found that Santos had failed to adequately consult with all traditional owners of the Tiwi Islands in respect of its offshore petroleum development in the Barossa gas field. The Full Federal Court concluded that Santos was required to consult with Mr Tipakalipppa (who commenced the primary proceedings) and the Munupi clan of which he is an elder in respect of its proposed development and that the regulator, NOPSEMA, could not be reasonably satisfied that Santos had carried out consultations with all relevant persons under the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Cth) as to the environmental impacts of its activities; and
+ *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* (No 6) [2022] QLC 21: the judicial recommendation to the Queensland Minister for Resources that Waratah Coal's application for a mining lease be refused. The objections to Waratah Coal's application were heard by the Queensland Land Court, which application was challenged on the basis that the proposed mine would (amongst other things) impact the human rights of First Nations peoples by contributing to climate change. In her concluding remarks, President Kingham of the Queensland Land Court found that "*approving the application would risk disproportionate burdens for future generations, which does not give effect to the goal of intergenerational equity*" and "*while there would be substantial economic benefit if the application is approved, other factors must be considered. The impact on Bimblebox, the contribution of combustion emissions to climate change and the limitations on human rights cannot be reduced to a common quantitative unit of measurement, such as money*." See our article discussing this case "Mining leases rejected due to human rights and emissions impacts in Waratah Coal v Youth Verdict & Ors"

These decisions are a telling reminder to project proponents in carbon intensive industries such as mining, oil and gas that the level of public scrutiny in respect of their activities has reached an unprecedented intensity and companies must be proactive and genuine in their climate targets, policies and consultations with affected persons.

Government agencies seem also to be coming to the party and represent another risk for firms, noting Australia's corporate regulator ASIC obtained its first enforcement outcome for 'greenwashing' in October. Whilst that outcome was modest, it was a telling shot across the bow for all market participants that any statements as to carbon neutrality or climate impacts must be thoroughly vetted.

Turning to 2023, in addition to increased activist litigation domestically, reforms are progressing in international law, the effect of which could have significant implications for entities with offshore interests. International laws are largely only a reference point for legislators and do not take effect as Australian law unless they are legislated. But many other countries incorporate international law into their existing legal framework. Of particular note is a member-led push for the UN International Court of Justice to provide an advisory opinion on climate change laws, the effect of which is highly persuasive, but not binding. A more pressing development is the increasing support for a new international crime – 'ecocide' which reframes environmental and climate harm from a business and regulatory issue to a global crime and threat to survival. These developments are very much in their infancy but are indicative of changing societal expectations of governments and private enterprise alike.

We will continue to monitor climate litigation developments at home and abroad and will update CE+D subscribers as new developments arise.

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KNOWLEDGE ARTICLES YOU MAY BE INTERESTED IN:

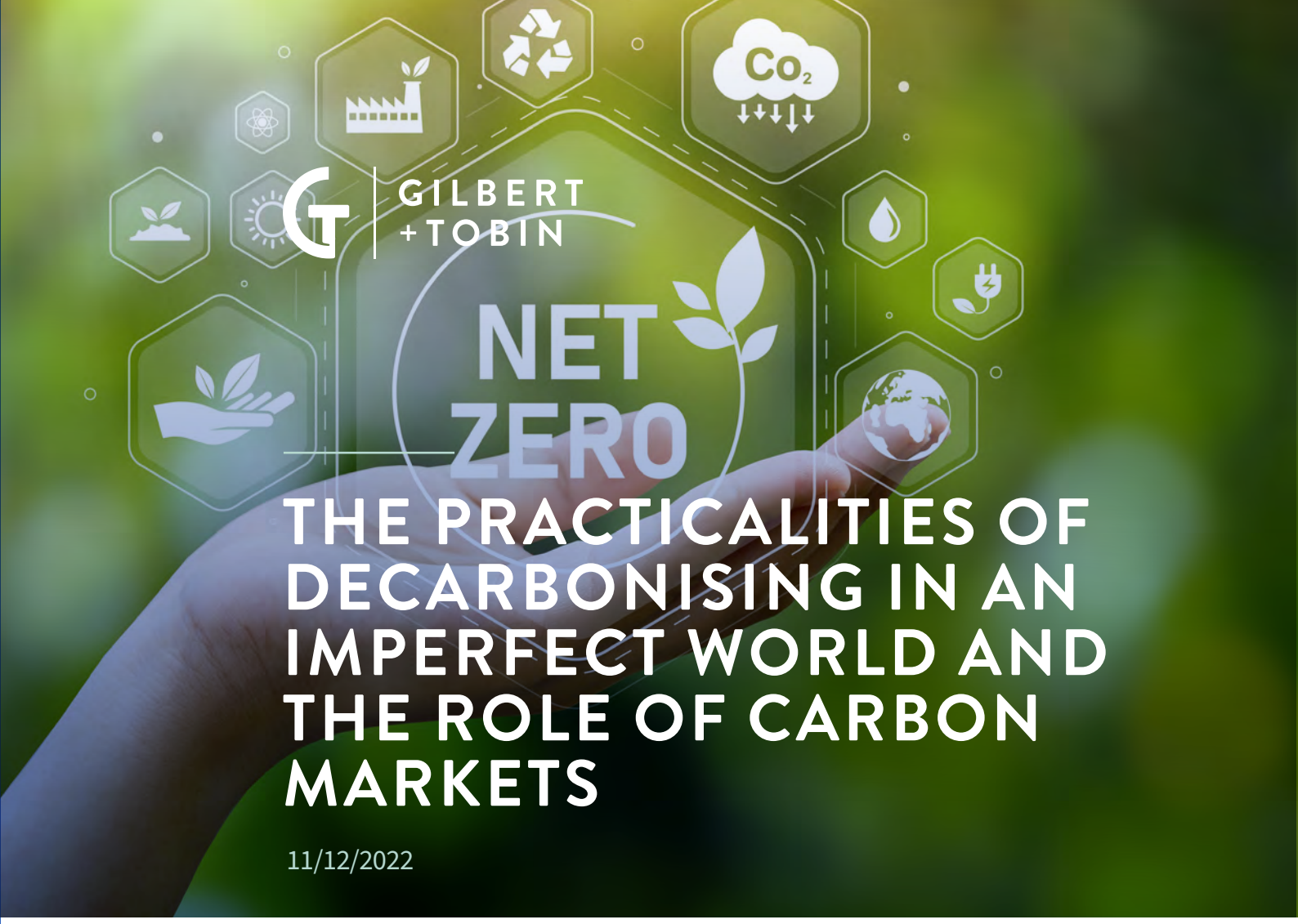
Climate litigation in Australia - A half yearly review

Mining leases rejected due to human rights and emissions impacts in Waratah Coal v Youth Verdict & Ors

No 'Duty of Care' but risks of climate litigation continue to grow - insights from the Sharma decision

GILBERT +TOBIN

4 CLEAN ENERGY + DECARBONISATION MASTERCLASS SERIES (VIDEO RECORDINGS INCLUDED)



THE PRACTICALITIES OF DECARBONISING IN AN IMPERFECT WORLD AND THE ROLE OF CARBON MARKETS

11/12/2022

MASTERCLASS SESSION 1

With countries and companies around the world setting ambitious net zero targets, and with technological developments yet to keep pace and scale up, decarbonising operations – particularly in hard to abate sectors – is no walk in the park. In this Masterclass session, the panel discusses the practicalities of decarbonising mining and other emissions intensive operations, as well as the role of carbon markets in both incentivising decarbonisation projects and providing emissions reduction support as clean energy alternatives are scaled up.

Speakers:

+ Ilona Millar, Climate Change + Sustainability Partner at Gilbert + Tobin
+ Professor Peter Klinken AC, Chief Scientist of Western Australia at Department of Jobs, Tourism, Science and Innovation

Moderator:

+ Michael Blakiston, Energy + Resources Partner at Gilbert + Tobin

The global momentum towards the clean energy and decarbonisation transition is moving at a staggering speed. Public and private sectors have pivoted to align with a transformation like an industrial revolution. There has been a significant shift in expectations regarding net zero and other decarbonisation commitments, and Australia's own transition remains under the spotlight with measurable action and government intervention at the centre of the debate.

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The six-part series explored the crucial considerations for business and community including, the practicalities of decarbonisation, governance and risk, financing challenges, land acquisition and assembly, stakeholder engagement and environmental issues.

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NEXT CHAPTER

Balancing decarbonisation opportunities and risks in the boardroom

BALANCING DECARBONISATION OPPORTUNITIES AND RISKS IN THE BOARDROOM

17/08/2022

MASTERCLASS SESSION 2

On Friday 12 August, Gilbert + Tobin hosted the second session of its clean energy masterclass series. The session was conducted by a panel consisting of Justin Mannolini (Corporate Advisory Partner, Gilbert + Tobin), James Mecca (Head of Energy and Decarbonisation, Mainsheet Capital) and Bill Beament (Managing Director, Develop Global Limited), and moderated by Simon Rear (Corporate Advisory Partner, Gilbert + Tobin).

The panel considered how directors of Australian companies can best balance the conflicting opportunities and risks presented by the global trend towards decarbonisation of industrial production, and in particular, how to navigate their duty to consider climate risks while simultaneously maximising shareholder returns and operating within the evolving boundaries of regulation in this area.

Speakers:

+ Bill Beament, Managing Director of DEVELOP Global Limited
+ James Mecca, Head of Energy and Decarbonisation at Mainsheet Capital
+ Justin Mannolini, Corporate Advisory Partner at Gilbert + Tobin

Moderator:

+ Simon Rear, Corporate Advisory Partner at Gilbert + Tobin

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KEY TAKEAWAYS

Key takeaways arising from the session are:

1. While once little more than a 'corporate social responsibility' consideration, climate change and decarbonisation are increasingly becoming core considerations for Boards when considering the strategic direction of the company.
2. Directors are unlikely to discharge their duties simply by adopting a 'risk disclosure' mindset towards climate change and decarbonisation. What is required is a balance of both risks and opportunities.
3. A decade of policy inaction has led to a 'regulatory deficit' in Australia in relation to climate change and decarbonisation, creating a challenging environment for directors. However, there are steps that Boards can take now to ensure their climate governance processes and structures are robust and able to respond to a rapidly evolving environment.
4. Net zero commitments are a potent source of risks for directors in Australia compared to other countries, given the reversed onus of proof in relation to forward-looking statements and the absence of a 'safe harbour' defence.
5. There is an inherent tension between capturing opportunities from the downstream processing of minerals in Australia, and achieving the country's commitment to net zero emissions by 2050.

CLIMATE CHANGE AND DECARBONISATION – A KEY STRATEGIC CONSIDERATION FOR BOARDS

While climate change was once little more than a 'corporate social responsibility' issue, it is now a key business driver, mobilising a fundamental shift towards the decarbonisation of industrial production. This creates both opportunities and risks for Boards as they seek to navigate new social and regulatory expectations.

Justin highlighted that Boards are confronted by two main forces: (1) stakeholders who are increasingly demanding that Boards commit to a decarbonisation pathway, and (2) decisions made by regulators and courts which increase legal accountability for those commitments.

THE REGULATORY PUZZLE

The regulatory framework remains fragmented and uncertain in this space, while the expectations of consumers and investors on climate change issues are increasing. This has left regulators scrambling to repurpose existing elements of the regulatory regime to address greenwashing, while Boards attempt to navigate through uncertain waters and the public watches closely and, it seems, unforgivingly.

Justin noted that the Task Force on Climate-related Financial Disclosures (TCFD) Framework is emerging as a cornerstone document, helping bridge the gap between physical greenhouse gas emissions data and the demands of financial decision-makers. In the absence of more prescriptive rules in Australia, the TCFD's recommendations are the most useful model for directors considering 'climate governance'. Boards should reflect on their policies and strategy and, where possible, align themselves with the TCFD framework to ensure they are prepared for the future.

Justin also mentioned the International Sustainability Standards Board (ISSB) exposure draft sustainability standards, released earlier in 2022. Consultation on the draft standards recently closed, with the ISSB receiving over 500 submissions. Although responses were largely positive, several common concerns were raised by Australian commentators in relation to domestic implementation capability (who will prepare the information?), assurance issues (who will audit the information?) and exposure to legal risks on the part of the preparers and providers of financial statements.

EXPOSURE TO LEGAL RISKS AND NET ZERO COMMITMENTS

While net zero commitments, targets and strategies have emerged as a focal point for market participants in assessing board-level climate governance, commitments have often been vague and immeasurable, amplifying greenwashing risks. It is clear that Boards need to ensure that disclosures made are reflective of the true position of the company and provide sufficient information so as to allow stakeholders to make an accurate assessment of the achievability of the target.

Net zero commitments are, by nature, forward-looking statements as they are based on numerous levels of assumptions, predictions and 'if's'. Under Australian law, such statements are deemed to be misleading unless the maker can point to 'reasonable grounds' for the statement. Justin reflected on the fact that compared to their counterparts in certain other jurisdictions, reporting entities and officers in Australia are particularly exposed to legal risk. This is because Australia has no 'safe harbour' exemption which allows for the exclusion of liability by identifying a statement as a forward-looking statement and including a proximate cautionary statement. In this respect, James noted that directors should have extra regard to their obligations and risks in light of the legal position and conduct comprehensive due diligence both to minimise risk and ensure that commitments are tangible and credible.

James also discussed the risks inherent in making commitments to decarbonisation goals. In James' view, a net zero commitment is not a licence to 'burn now, pay later', but should include two components: (1) an appropriate absolute reduction component and a downward trajectory of a company's absolute emissions, and (2) an accelerated downward trajectory towards the same target or a net reduction in global emissions. That is, a credible commitment requires a defined reduction in emissions with a clear roadmap to achieve and validate outcomes.

Further, to ensure that net zero commitments are 'future proof', Boards should have regard to the practical reality of the commitment and its implementation including considering:

+ long term partner selection;
+ offset procurement strategy;
+ capacity, capability and compatibility in relation to implementing proposed initiatives; and
+ quantity and quality of offsets required in a measurable way.

KEY OPPORTUNITIES

Bill made clear the scale of the opportunity provided by the global trend towards decarbonisation for those involved in the extraction of the minerals required to enable that process. In this context, it was noted that the Commonwealth Bank of Australia has projected that between $2.5 trillion and $3 trillion of investment will be required in Australia for the national target of net zero by 2050 to be met.

Bill reflected on Australia's current reliance on fossil fuels for power generation: in Western Australia, 75% of the power grid is fuelled by gas, and in the Eastern States, 75% of the power grid is fuelled by coal. The staggering amount of investment needed reflects the amount of work required to reduce reliance on non-renewable power sources. Bill emphasised that stronger actions will be necessary to counter the upward pressure on emissions from mineral production, but the climate advantages of clean energy technologies remain clear. Further, mineral demand for clean energy technologies is projected to rise by at least four times by 2040 to meet climate goals, particularly in relation to EV-related minerals, representing significant opportunity – copper, nickel, chromium and aluminium for example, are major components of clean energy technologies.

James also highlighted that Boards could reap significant benefits if they remain at the forefront of the decarbonisation movement and should look beyond the net profit value of initiatives. Instead, Boards should balance costs against the opportunity loss suffered as a result of delay in action.

Bill noted that if initiatives are focussed in the right areas to target meaningful and significant emissions reductions, and are realistic and practical in their design, national emissions targets will become more achievable. Decarbonisation of the economy will require a fundamental shift in mindset, but once that occurs, there will be no limiting the possibilities of where the clean energy movement will go – and companies definitely do not want to be left behind.

KEY CHALLENGES

Of course, there remain important physical constraints to decarbonisation which directors need to consider. As an example, James presented an overview of renewable energy and mobile fleet transition economics in mining, which demonstrated that the cost increase and savings from decarbonisation is not linear. For example, although global investment in solar and wind has delivered a 70% to 90% cost decrease over the past 10 years, there is still only limited data regarding productivity impacts in the case of mobile fleet decarbonisation (compounded by high capital premiums).

James also noted that there is a growing trend amongst large market players to consider the onshore processing of minerals instead of exporting raw materials for processing offshore (as Australia has traditionally done). While this presents the opportunity to reap additional supply chain value, it is potentially inconsistent with Australia's domestic emission reduction goals. Effectively, downstream processing involves exchanging 'Scope 3' emissions for 'Scope 2' emissions, and this may have greater regulatory implications in the future. On this point, Bill

highlighted the share of the top three producing countries in the production certain minerals and fossil fuels. China, for example, is the largest producer of copper, nickel, cobalt, lithium and rare earths in terms of mineral processing. In this respect, we must remember that climate change is a global issue and will require a global response. So, although keeping mineral processing offshore may help Australia to achieve its net zero goals, emissions are not reduced from a global perspective, which is an outcome we want to avoid.

CONCLUSION

The global trend towards decarbonisation of industrial production is just beginning, but is expected to grow exponentially. While Australia suffers from a regulatory deficit at the moment, regulators are expected to begin taking enforcement action in the near future. This, coupled with the outcome of private litigation, will begin to produce more tangible guidance to Boards.

Until then, there are steps that Boards can take to mitigate legal risks. These include conducting a review of their processes and policies for disclosing the risks and opportunities arising from climate change to investors to align their disclosure processes with accepted frameworks (such as the TCFD's recommendations), and revisiting the robustness of their net zero commitments.

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PREVIOUS CHAPTER

The practicalities of decarbonising in an imperfect world and the role of carbon markets

NEXT CHAPTER

Financing challenges associated with clean energy projects and their implications

GILBERT +TOBIN

FINANCING CHALLENGES ASSOCIATED WITH CLEAN ENERGY PROJECTS AND THEIR IMPLICATIONS

12/12/2022

MASTERCLASS SESSION 3

With the global trend towards renewable energy and decarbonisation, investors globally and in Australia have made significant investments into renewable energy projects. Government, equity and debt have all stepped up to expand the sector to unprecedent scale – further opportunities are now emerging with Australia's push into the green hydrogen industry and recent developments in the off-shore wind sector in particular.

In this Masterclass, the speakers examine:

+ the challenges of financing renewable energy projects in the current environment – including regulatory risks, transmission constraints and supply chain disruption
+ what typical capital structures look like – debt/equity mix
+ what financiers look for in order to make a project or acquisition bankable – PPAs versus merchant risk
+ sources of finance – commercial banks and CEFC
+ future opportunities – green hydrogen projects, alternative models and their challenges

Speakers:

+ Stephen Gauld, Managing Director & CEO at Infinite Green Energy
+ Samantha Tough, Pro Vice Chancellor at The University of WA, Chair of Horizon Power, Director of Clean Energy Finance Corporation
+ Adela Smith Energy + Infrastructure Partner at Gilbert + Tobin

Moderator:

+ Peter Doyle Energy + Infrastructure Partner at Gilbert + Tobin

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PREVIOUS CHAPTER

Balancing decarbonisation opportunities and risks in the boardroom

NEXT CHAPTER

Laying the foundations for a successful clean energy project: land acquisition and assembly

LAYING THE FOUNDATIONS FOR A SUCCESSFUL CLEAN ENERGY PROJECT: LAND ACQUISITION AND ASSEMBLY

12/12/2022

MASTERCLASS SESSION 4

The Western Australian Government has announced a suite of land tenure reforms headlined by a new form of tenure – the diversification lease. The new diversification lease will provide a form of tenure that can support the establishment of clean energy projects and the expansion of carbon farming in Western Australia.

The Masterclass panel in this session focusses on key considerations in obtaining the right land tenure, including the need for broad stakeholder engagement and other issues that arise under the proposed legislative and policy reforms associated with the diversification lease (including rent and valuation considerations).

Speakers:

+ Brendon Grylls, Managing Director at BGG Former Member of the Legislative Assembly of WA
+ Gavin Chapman, Managing Director at Property Valuation & Advisory
+ Claire Boyd, Energy + Resources Partner at Gilbert + Tobin

Moderator:

+ Christopher Marchesi, Energy + Resources Special Counsel at Gilbert + Tobin

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PREVIOUS CHAPTER

Financing challenges associated with clean energy projects and their implications

NEXT CHAPTER

Native Title and Aboriginal Cultural Heritage

NATIVE TITLE AND ABORIGINAL CULTURAL HERITAGE

12/12/2022

MASTERCLASS SESSION 5

Over 62.8% of Australia's land mass is subject to native title claims or determinations – covering a large portion of Australia's richest renewable resources. Renewable energy projects impose a cost on country that is often overlooked in the well-intentioned race to net zero.

This masterclass provides a unique insight from the perspective of First Nations people, that project developers should consider when looking to formalise their relationship with those whose country on which renewable energy projects will be built.

The presenters discuss the complexities surrounding adopting best practice approaches to future projects and how First Nations people can participate in the opportunity that the renewable energy revolution will provide.

Speakers:

+ Peter Jeffries, CEO at Murujuga Aboriginal Corporation
+ Marshall McKenna, Native Title Partner at Gilbert + Tobin
+ Mike Hollett, Director at The Right Water Company Pty Ltd and Former Director and Chair of the Water Corporation

Moderator:

+ Lauren Shave, Native Title Special Counsel at Gilbert + Tobin

The global momentum towards the clean energy and decarbonisation transition is moving at a staggering speed. Public and private sectors have pivoted to align with a transformation like an industrial revolution. There has been a significant shift in expectations regarding net zero and other decarbonisation commitments, and Australia's own transition remains under the spotlight with measurable action and government intervention at the centre of the debate.

It's for this reason that this year, Gilbert + Tobin presented the Clean Energy + Decarbonisation Masterclass series, a multi-part series featuring leading industry experts focusing on key topics relating to investments in the clean energy and decarbonisation sector. The Masterclass series provided a rare and unique opportunity to hear from professionals at the forefront of industry, clean energy developments, and decarbonising opportunities. The sessions also included a panel discussion facilitated by Gilbert + Tobin and involving industry experts.

The six-part series explored the crucial considerations for business and community including, the practicalities of decarbonisation, governance and risk, financing challenges, land acquisition and assembly, stakeholder engagement and environmental issues.

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PREVIOUS CHAPTER

Laying the foundations for a successful clean energy project: land acquisition and assembly

NEXT CHAPTER

Balancing the impact of renewable energy projects: Environmental and stakeholder engagement

GILBERT +TOBIN

BALANCING THE IMPACT OF RENEWABLE ENERGY PROJECTS: ENVIRONMENTAL AND STAKEHOLDER ENGAGEMENT

12/12/2022

MASTERCLASS SESSION 6

Despite the clear benefits in aiding the clean energy transition, renewable energy and emissions offset projects still give rise to potential environmental impacts and associated risk of objections and third party appeals.

The panel discuss navigating key environmental pitfalls and meaningful engagement with stakeholders – including First Nations custodians of the land upon which Australia's renewable legacy will be built.

Speakers:

+ Professor Stephen van Leeuwen, BHP Curtin Indigenous Chair of Biodiversity and Environmental Science
+ Ben Fuller, Environment, Planning + Climate Change Partner at Gilbert + Tobin

Moderator:

+ Christopher Marchesi, Energy + Resources Special Counsel at Gilbert + Tobin

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PREVIOUS CHAPTER

Native Title and Aboriginal Cultural Heritage

NEXT CHAPTER

The practicalities of decarbonising in an imperfect world and the role of carbon markets

GILBERT +TOBIN

5 OFFSHORE WIND

‘SPEARHEADING’ AUSTRALIAN OFFSHORE WIND: VICTORIA UNVEILS ITS OFFSHORE WIND POLICY DIRECTIONS PAPER

07/03/2022

THE VICTORIAN OFFSHORE WIND POLICY DIRECTIONS PAPER

The race to become Australia’s first offshore wind powerhouse has intensified. On Friday 4 March 2022, the Victorian State Government unveiled its vision for a renewable future and its plans to “spearhead” wholesale energy reform with its support for an enormous 13 GW of offshore wind. The *Victorian Offshore Wind Policy Directions Paper* (**Directions Paper**) signposts the government’s ambitions to accelerate the development of Australia’s first offshore wind industry, support its 2050 net-zero goals and create jobs and economic value in Victoria. At the centre sits Australia’s first offshore wind farm, to be located in Victoria.

A STAGED APPROACH

The Directions Paper comes on the back of significant regulatory activity in the Australian offshore wind space, with the passing of the Commonwealth’s Offshore Electricity Infrastructure legislation in November last year, and an intensified discussion on how to capitalise on the country’s rich coastal wind resources, both of which were explored in our comprehensive article on the offshore wind industry: *Unfurling the sails - the future of offshore electricity investment in Australia*.

Anchoring Victoria’s vision for a sustainable future built on offshore wind are 3 staged targets:

+ 2GW by 2032;
+ 4GW by 2035; and
+ 9GW by 2040.

In support of these targets, Victoria has pledged $40 million through Round 1 of the Energy Innovation Fund to fund feasibility studies and pre-construction activities for three major offshore wind projects, namely the Star of the South, Macquarie's Great Southern Offshore Wind Farm and Flotation Energy's Seadragon Offshore Wind Farm. The three projects sit in the "Gippsland Zone" which, together with the coastal areas off Portland in the State's west, will form the foundation of Victoria's initial "13GW opportunity".

These regions present unique opportunities both from a natural resource and human capital perspective. Close to existing grid infrastructure and experienced workers in established coal and offshore oil and gas industries, the proposed offshore wind zones are primed to meet the energy transition head on.

Proposed offshore wind farms

1. Cliff Head, Cliff Head Break, WA
2. WA Offshore Windfarm Project, Binningup , WA
3. Bunbury Offshore Winsfarm, WA
4. SA Offshore Wind Project, Great Australian Bight, SA
5. Bass, Burnie Port, Burnie, TAS
6. Victoria Offshore Windfarm Project, VIC
7. Spinifex, Portland, VIC
8. Great Southern, Bass Coast, VIC
9. Star of the South, Woodside Beach, VIC
10. Greater Gippsland, VIC
11. Seadragon, Ninety Mile Beach, VIC
12. Eden Offshore, Eden NSW
13. Ulladulla, NSW
14. Illawarra, Port Kembla, NSW
15. Wollongong, NSW
16. Novocastrian, Port of Newcastle, NSW
17. Hunter Coast, NSW

The initial tranche of offshore wind energy, aiming to deliver 2GW by 2032, will be procured in the mid-2020s, with the first power to be produced by 2028. The Directions Paper notes that this will allow both Government and sponsors to complete the necessary development activities, which include:

+ Planning and approvals;
+ Procurement, supply chain and workforce development;
+ Stakeholder impacts;
+ The Commonwealth's regulatory framework (the Offshore Electricity Infrastructure framework); and
+ Enabling infrastructure such as ports and transmission.

DETAILS TO COME

Whilst the Directions Paper outlines Victoria's vision and throws down the gauntlet for other States to follow, much like the Offshore Electricity Infrastructure legislative framework - the detail is yet to be unveiled. In particular, we will be interested to see how Victoria's policy interacts with the Commonwealth's framework and whether Victoria will prioritise near-shore projects in coastal waters (and therefore outside the Commonwealth's framework) or give equal treatment to Commonwealth regulated projects in territorial waters and which merely traverse coastal waters to connect to Victoria's onshore grid.

Further information on the target for Victoria's first offshore wind tranche will be announced later this year, with future offshore wind tranches to be planned, integrated and announced as part of the State's broader renewables program. Part of this will be the publication of an "Offshore Wind Implementation Statement" that will provide further details on:

+ The expected scale and timing for the first offshore wind procurement;
+ Victoria's approach to developing the transmission network to provide offshore wind farms with access to the grid; and
+ Victoria's approach to facilitate port upgrades to support wind farm construction and operation.

A LOOK TO THE FUTURE

Ultimately, Victoria sees offshore wind as an uncapped opportunity to produce up to "33GW and beyond" depending on the rate of technological advancement in floating turbine technology, with studies suggesting the Bass Strait alone is home to approximately 60GW of floating offshore wind capacity.

The Victorian Government will be administering a consultation process regarding the Directions Paper and its broader approach to establishing an offshore wind industry. This is expected to commence in April 2022.

As Australia's offshore wind industry begins to take shape, Gilbert + Tobin will continue to monitor and analyse the commercial and regulatory environment.

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KNOWLEDGE ARTICLES YOU MAY BE INTERESTED IN:

Unfurling the sails: the future of offshore electricity investment in Australia

SETTING SAIL: AUSTRALIA LAUNCHES DRAFT OFFSHORE RENEWABLE ENERGY REGULATIONS

23/03/2022

THE OFFSHORE RENEWABLE ENERGY INFRASTRUCTURE REGULATIONS

In November 2021, the Australian Federal Government unveiled its legislative framework for offshore renewable energy generation and transmission infrastructure (see our article *Unfurling the sails - the future of offshore electricity investment in Australia for further discussion*). This legislative framework included the *Offshore Electricity Infrastructure Act 2021* (**OEI Act**) and *Offshore Electricity Infrastructure (Regulatory Levies) Act 2021* which were passed on 25 November 2021 and received royal assent on 2 December 2021. While this legislation laid the foundations for a regulatory regime for offshore electricity infrastructure, specifics were deferred to the associated regulations.

On 22 March 2022, exposure drafts of the *Offshore Electricity Infrastructure Regulations* (**Draft Regulations**) and Offshore Electricity Infrastructure Licensing Scheme Guidelines (**Draft Guidelines**), and the accompanying explanatory statements (including a Cost Recovery Implementation Statement), were released on the Department of Industry, Science, Energy and Resources' (**DISER**) website. These documents are currently open for public consultation until 22 April 2022.

THE OFFSHORE RENEWABLES INDUSTRY TAKES SHAPE – THE KEY TAKEAWAYS

Whilst the Draft Regulations, Draft Guidelines and Cost Recovery Implementation Statement will the be the subject of detailed analysis and comment over the coming months, G+T's initial review of these documents identifies a number of aspects that will be of key interest to sponsors, financiers and stakeholders of offshore renewable energy infrastructure projects.

Merits criteria

The Draft Regulations elaborate on how the Minister may assess the 3 merits criteria in the OEI Act, as well as introducing a 4th criteria – national interest. The merits criteria are:

+ Technical and financial capability: the availability of technical expertise and financial resources of the applicant. This includes an assessment of the employees, consultants and parent company. In demonstrating technical capability, the applicant's past experience in electricity infrastructure projects will be considered (onshore, offshore or outside Australia).
+ Viability: the applicant's commercial assumptions (including project costs and returns) as well as commercial arrangements such as the applicant's route-to-market channels and key upstream / downstream supply chain participants.
+ Suitability of the applicant: the applicant's corporate governance (such as policies, leadership and other related factors) and compliance history (within and outside Australia).
+ National interest: the impacts on the Australian economy and community (such as job creation, emissions reduction and international relations), as well as national security and the existing relationships with other users of the licence area.

These 4 merits criteria would apply to all licence types. It is important to note that the factors described above are not prescriptive (that is, the Minister is not bound to consider each of them, and may consider any other factors that the Minister considers relevant).

Overlapping licence applications

One area of key interest when the OEI Act was passed, was the mechanism for dealing with licence overlap between applicants and areas. The Draft Regulations provide that where multiple feasibility licence applications overlap, the Minister will assess the merits of each application. If the applications are equal in merit and the overlap cannot be reconciled (for example, neither party is willing to amend their application), the Minister may invite financial offers to determine the successful applicant. When coupled with the merits criteria, it seems likely that the higher offer will be awarded the licence.

In the context of budgeting, DISER made a prediction that it would receive 2-3 applications per year across the next 3 financial years. However, it remains to be seen how often overlaps will arise in reality and how many of these will be resolved through the bidding process.

Form of licence application

The Draft Guidelines describe that each application will need to include location information (maps, coordinates and area) as well as certain specifics of the planned project (type, capacity, life span and construction costs).

Ultimately, licence applications will need to take the form that is published on the National Offshore Petroleum Titles Administrator's (NOPTA) website – a draft of which has not yet been released.

Fees

Licence applicants will be subject to 2 fees, and 3 annual levies, a summary of which is tabled below. The final quantum of each charge has not yet been set.

What?	To who?	How is it calculated?
Licence application fee	NOPSEMA	Per licence application
Application fee per specific action (e.g. lodging a Management Plan)	NOPTA	Per action
Annual Licence Levy	NOPSEMA	The base fee varies according to the type of licence. The base fee applies for the 1st 100km2, and increases the larger the licence area is
Annual Commonwealth Levy	DISER	The fee varies according to the type of licence
Annual Compliance Levy	NOPTA	The base fee varies according to the type of licence. The base fee applies for the 1st 100km2, and increases the larger the licence area is

As can be seen, there will be a number of regulatory costs incurred when making submissions, and eventually constructing and operating an offshore project.

WHAT'S NEXT?

There seems to be no deceleration for the Australian offshore electricity sector, as the release of the Draft Regulations comes hot on the heels of Victoria's Offshore Wind Policy Directions Paper on 4 March 2022, in which the Victorian State Government unveiled its vision for a renewable future and its plan to "spearhead" wholesale energy reform with an enormous 13 GW of offshore wind.

For now, industry has its chance to respond. The Draft Regulations will be subject to public consultation via a submissions process until **22 April 2022**.

Gilbert + Tobin will continue to monitor the commercial and regulatory environment, sharing our perspectives on regulatory and approval pathways, financing and project structuring. If you have any questions in relation to offshore renewable energy in Australia or the Draft Guidelines, we would be delighted to assist.

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HOISTING THE SAILS: CHARTING AUSTRALIA'S OFFSHORE WIND LEGISLATION

08/12/2022

AUSTRALIA'S OFFSHORE ELECTRICITY INFRASTRUCTURE REGULATIONS IN 2022

The Offshore Electricity Infrastructure Regulations 2022 (Cth) and Offshore Electricity Infrastructure (Regulatory Levies) Regulations 2022 (Cth) (the **Regulations**) came into force on 2 November 2022. This followed the release of draft Regulations in March 2022 and a public consultation process. Gilbert + Tobin was the only law firm to make a public submission on the draft Regulations. Gilbert + Tobin's submission can be found here: Offshore electricity infrastructure framework: regulations and cost recovery.

This document provides an overview of Australia's offshore wind regulatory framework and compares the final Regulations with the draft Regulations. Whilst the final Regulations incorporate some feedback from the public consultation process, there remain some issues that will need to be closely monitored by Government, industry participants, investors and stakeholders so that the offshore wind industry can be successfully developed in Australia.

BACKGROUND

The Offshore Electricity Infrastructure Act 2021 (Cth) (**OEI Act**) establishes a legal framework to enable the construction, installation, commissioning, operation, maintenance, and decommissioning of offshore renewable energy generation and transmission infrastructure (**OREI**) in the Commonwealth offshore area. The OEI Act commenced on 2 June 2022 and has resulted in the announcement of several new offshore wind projects. The OEI Act provides for the making of regulations for the OREI licencing scheme, spatial datum provisions, arrangements for pre-existing infrastructure and the application of fees and levies.

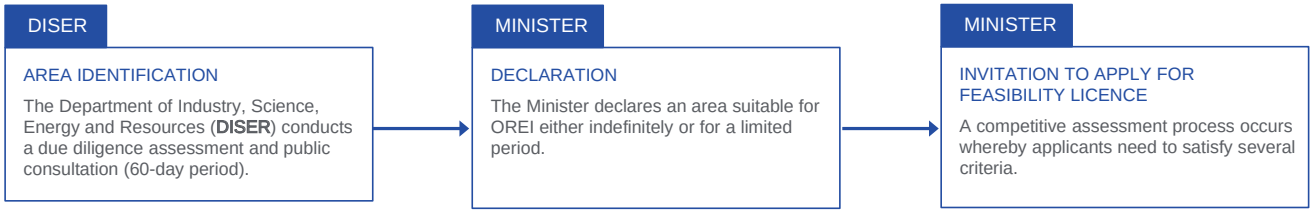
The Government has said that the aim of the OEI Act and Regulations is to provide a consistent and transparent regulatory regime for the full lifecycle of OREI developments, and ultimately a pathway to de-risking investments and reassuring sponsors, financiers, and broader stakeholders alike. The need for this consistency and transparency was emphasised by a number of key speakers at the recent Informa Offshore Wind Conference held in Melbourne on 15 and 16 November 2022, which we attended.

LICENCING REGIME

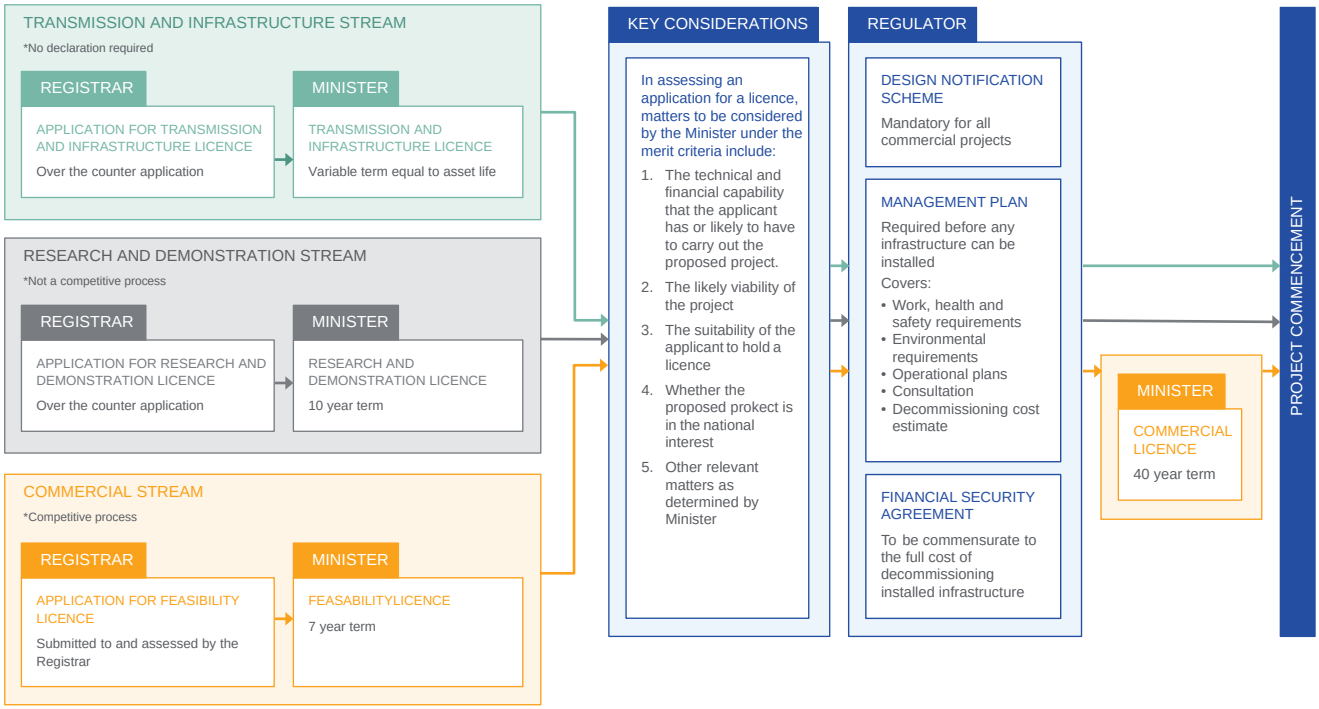
The OEI Act prohibits the construction and operation of OREI in the Commonwealth offshore area without a licence. The OEI Act sets out three pathways for licensing to accommodate a range of potential types of development (For further discussion, see our article Unfurling the sails - the future of offshore electricity investment in Australia for further discussion).

The Regulations set out the details of the licensing scheme for OREI. This licensing scheme establishes a system for licence applications, offering and granting of licences, variations to licences, extension of licences, transfers of licences, and changes in control of licence holders. The licensing scheme is administered by the Offshore Infrastructure Registrar, who maintains a register of licences and manages the licence application process.

Before a licence can be granted, an area must first be declared appropriate for OREI. This process includes a thorough due diligence and a 60-day consultation period in which the Minister is required to consider the submissions put forward. Once the Minister is satisfied an area is suitable for OREI, the Minister may declare an area indefinitely or for a limited period. Following the declaration, the Minister will invite applicants to either apply for a Research or Demonstration Licence or a Feasibility Licence as illustrated below.



There are three pathways to grant of a licence. The diagram below sets out these pathways. The applications are assessed against a broad merit criterion, allowing the Minister to consider a range of factors (as set out below).



Source: NOPSEMA's Offshore Electricity Infrastructure Framework Regulatory Process Map

PUBLIC CONSULTATION FEEDBACK OF DRAFT REGULATIONS AND THE GOVERNMENT'S RESPONSE

Generally, submissions were supportive of the Regulations. However, they highlighted a number of gaps and omissions. At a high level, industry participants felt that the Regulations in some areas did not provide the requisite certainty and comfort needed to invest in and develop OREI projects. Much of the feedback was around developing more defined and clear processes for the granting of licences, financial offers, overlapping applications and the declaration process. The key issues raised and how the Government responded are set out below.

1. Merits criteria - Matters to be considered by the Minister when considering a licence application

Generally, it was submitted that the Regulations required further detail as to the specific factors that would be assessed and considered by the Minister when evaluating an application for a grant of a licence, and the form the application should take. In particular, stakeholders were concerned with the requirement to demonstrate an OREI project's 'route to market' viability. It was submitted that the draft criteria did not give enough guidance in this regard, especially in view of the presently uncharted interplay between State and Commonwealth regulation regarding OREI approvals and grid connection.

The Regulations provide additional guidance on criteria that may be taken into account by the Minister when considering a licence application. For example, the Minster may take into account past performance in other large infrastructure projects in Australia or internationally, or past financial performance. Additionally, under the limb of National Interest, the Minister may consider the project's impact on and contribution to the Australian economy and local communities, whether the project is likely to be delivered within a reasonable time, and whether project is likely to make efficient use of the licence area. However, the Minister retains broad discretions in relation to grant of a licence. Therefore the pathway to approval remains unclear.

2. Procedure for declaration of an offshore renewable energy area

A number of stakeholders expressing a desire for more guidance concerning the Minister's declaration process. However, the final Regulations did not include any additional information around how potential applicants can participate more actively in identifying areas for declaration.

We consider this to be a lost opportunity for both Government and proponents alike, particularly given the potential to maximise industry and Government data and analysis regarding the suitability of a potential OREI area. In practice, we still see potential benefits for proponents proactively engaging with regulators early in their assessment process – in our experience, such processes typically result in better outcomes for stakeholders.

3. Overlapping licences and revision of applications

One of the more substantive changes to the Regulations deals with overlapping licences and how such a conflict would be resolved. The Regulations clarify how an overlap is determined and the matters the Minister must have regard to when assessing overlapping applications. This is a step in the right direction. However, the limbs are broad and leave much to the discretion of the Minister. They include:

+ technical and financial capability that the applicant is likely to have, or to be able to arrange to have, to carry out the proposed commercial offshore infrastructure project;
+ likely viability of the proposed project;
+ suitability of the applicant to hold the licence;
+ national interest; and
+ any other matter the Minister considers relevant.

Additionally, the Regulations include a revision mechanism whereby proponents of overlapping licenses are given the opportunity to revise the boundaries of their proposed OREI development and resubmit their application. The Government has noted that allowing project developers the option of revising boundaries so projects can co-exist, promotes industry collaboration and can potentially result in achieving more cost-efficient projects. We consider this a pragmatic change, providing a measure of flexibility to the application process and allowing overlaps to be resolved before triggering the financial offer process. While flexibility can be beneficial to the private sector in this sense, the potential overlapping of boundaries does, in itself, create the risk and issue of wake impacts between projects. That can be a material source of both technical and performance difficulties, as well we controversy between competing projects. It may have been better for the Regulator to have taken more proactive steps to simply avoid the possibility of these impacts arising in the first place. In our experience, wake impact management and analysis will likely slow delivery of neighbouring or adjacent projects.

4. Financial offers

One aspect of the Regulations that received significant feedback during the public consultation process was in relation to how bids are conducted and valued in respect of overlapping applications which cannot be otherwise resolved.

The Regulations now include a new section, "Procedure for dealing with financial offers". This section sets out how bids will be valued, ranked and considered. Interestingly, the Regulations have not followed the price-capped bidding model which has been recently utilised in the successful ScotWind auctions in the United Kingdom. Instead, unless specified otherwise, the

Minster's invitation will require financial offers to be made by secret auction with a single round of uncapped bids. In our view, the revised financial offers procedure is designed to reward those who are confident in their development and the commercial viability of the particular project (noting the project will be in the pre-feasibility stage of development at the time of auction).

Given the uncapped bidding model, we expect stakeholders will be concerned with the possibility any follow-on pricing regulation dealing with the effect of high bids on future electricity prices, which has been of key concern in the recent auctions for offshore wind capacity in the United States. The final Regulations and explanatory materials are silent on this point.

5. Change in Control (CiC)

Again, feedback on the draft Regulations was that they required more clarification regarding how the regulator will approach CiC issues. Industry noted the opportunity to nominate potential CiC within a few months of a licence application but recommend the Regulations go a step further to enable potential CiC to be carved out including where the licence moves from one fund to another within the same corporate group or where a party's share of ownership in a project changes when certain milestones are reached. The Government did not make any substantive changes to the CiC / transfer of licences provisions.

Fees and levies under the OEI Act

Finally, the Regulations provide the amount of fees for dealing with certain applications made under the OEI Act.

Application and Levy fees			
Item	Kind of application	Fee	Levies (paid for each period of 12 months for which licence is held)
1	Application for a feasibility licence	$300,000	+ Annual licence levy - $120,000 + $1,000 per 10 km2 of licence area over 100 km2; + Annual compliance levy - $100,000 + $5,000 per 10 km2 of licence area over 100 km2; and + Annual Commonwealth levy - $513,342.
2	Application for a commercial licence	$350,000	+ Annual licence levy - $150,000 + $2,000 per 10 km2 of licence area over 100 km2; + Annual compliance levy - $300,000 + $10,000 per 10 km2 of licence area over 100 km2; and + Annual Commonwealth levy - $295,186.
3	Application for a research and demonstration licence	$300,000	+ Annual licence levy - $120,000 + $1,000 per 10 km2 of licence area over 100 km2; + Annual compliance levy - $100,000 + $5,000 per 10 km2 of licence area over 100 km2; and + Annual Commonwealth levy - $295,186
4	Application for a transmission and infrastructure licence	$300,000	+ Annual licence levy - $120,000 + Annual Compliance levy - $100,000 + Annual Commonwealth levy - $295,186
5	Application to extend the term of a licence	$36,500	-
6	Application to vary a licence	$36,500	-
7	Application to transfer a licence	$35,500	-
8	Application for approval of change in control of licence holder	$35,500	-
9	Application to surrender a licence	$22,500	-

Gilbert + Tobin will continue to monitor the regulatory environment, sharing our perspectives on regulatory and approval pathways, financing and project structuring. If you have any questions, we would be delighted to assist.

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KNOWLEDGE ARTICLES YOU MAY BE INTERESTED IN:

Unfurling the sails: the future of offshore electricity investment in Australia

GILBERT +TOBIN

OFFSHORE WIND FEASIBILITY LICENCES: THE NEW GUIDELINE

19/12/2022

On 19 December 2022, the Australian Government formally declared Bass Strait off Gippsland, Victoria as Australia's first offshore wind zone and announced that feasibility licence applications for offshore wind projects in the Gippsland area will open soon. This note provides an overview of how the Minister will approach assessing applications for feasibility licences. For more information, please see our previous article, Hoisting the Sails: Charting Australia's offshore wind legislation.

EXECUTIVE SUMMARY AND KEY TAKEAWAYS

On 8 December 2022, the Department of Climate Change, Energy, the Environment and Water (**DCCEEW**) released the Guideline: Offshore Electricity Infrastructure Licence Administration – Feasibility Licences (**Guideline**). The Guideline provides further detail on the requirements and processes relating to feasibility licences under the *Offshore Electricity Infrastructure Act 2021* (Cth) (**OEI Act**) and the *Offshore Electricity Infrastructure Regulations 2022* (Cth) (**OEI Regulations**). In the future the DCCEEW intends to release further guidance on the other licence types (commercial, research and demonstrated, and transmission and infrastructure).

The Guideline provides a helpful level of detail to the merit criteria that was lacking from the OEI Act and the OEI Regulations. Key takeaways include:

+ **Comprehensive application** - the more specific and comprehensive the application, the better (eg. specificity on plans, schedules, risks, uncertainties, funding, forecasts, stakeholders);
+ **Comprehensive PDP** - the project development plan should be detailed and comprehensive, including details on the key risks and uncertainties for the proposed

offshore infrastructure project (**Project**) and activities to be undertaken during the feasibility licence term and how they will support a timely final investment decision (**FID**);

+ **Indifference to certain factors** - "indifference" (from a merits perspective) of various factors such as taking early steps to meet environmental approval requirements as well as whether the Applicant's expertise is in-house or sourced from external advisers / consultants; and
+ **Demonstrated experience** - emphasis is placed on "demonstrated experience" (both in Australia and internationally) when assessing expertise.

The Guideline also provides helpful commentary on other aspects of the feasibility licence such as financial offers, conditions and change in control (discussed further below).

The Guideline goes some way to addressing industry feedback on merit criteria for feasibility licences applications. However, certain other matters remain uncertain for proponents.

INITIAL ASSESSMENT

After receiving an application, the Offshore Infrastructure Registrar's (**Registrar**) initial screening assesses the following requirements in respect of an applicant for a feasibility licence (**Applicant**):

+ **Eligible person** - the Applicant is an "eligible person";
+ **Application fee** - the Applicant has paid the application fee;
+ **Approved form** - the application is made using the approved Feasibility Licence application form;
+ **Timeframe** - the application is made within the timeframe specified in the invitation to apply; and
+ **Project** - the application describes the Project to be assessed under the licence, and contains any other information or documents required by the application form or specified in the invitation.

MERIT CRITERIA FOR OEI LICENSE APPLICATION

In deciding whether to grant a feasibility licence the Minister must be satisfied that:

+ granting the licence would be consistent with any conditions that apply to the declared area; and
+ the application meets the merit criteria.

The table below provides a high level summary of the guidance provided in the Guidance on the merit criteria.

	Statutory factors the Minister may consider	Factors affecting merit of the application	Other guidance
1.	**Technical and financial capability**		
(a)	**Technical advice available to Applicant to: (i) assess the feasibility of the Project; and (ii) carry out the Project as proposed**	+ Demonstrating quality and availability of expertise. + Demonstrating (either the Applicant's or its external advisers') experience in: – similar projects (in Australia or offshore) or, failing that, experience in large-scale infrastructure projects; and – delivering preferred technology. + Holding other licences (in Australia or internationally).	+ Fields of expertise considered include: – engineering (civil, mechanical, project, electrical / electronic and instrumentation, aerospace / aeronautical); – construction, manufacturing, logistics and procurement; – commercial, project management, governance and planning / scheduling, stakeholder engagement; – environment and work health and safety; and – risk assessment / management and audit, inspection and quality assurance. + No preference for expertise that is internal to the Applicant or externally sourced (via advisers / consultants).

(b)	**Financial resources available to Applicant**	+ Having funds in place (in the Applicant's own account) for at least 150% of the estimated cost of the Project for the next 12 months. + Having a detailed funding plan on how the Project's remaining funding needs will be met.	+ Funds should be in cash, cash equivalents or undrawn debt facilities. Failing that, other forms of funds can be considered (eg. guarantees).
(c)	**Applicant's ability to carry out the project**	+ If the Applicant has other project interests / licences, it has sufficient resources to meet competing demands.	-
(d)	**Applicant's ability to discharge its obligations relating to the licence**	+ Defined team structure and responsibilities.	-

2.	**Project viability**		
(a)	**Complexity of the Project**	+ Feasibility activities are designed to address key risks and uncertainties leading towards the FID. + Applicant is able to address the conditions of the declared area. + The application is specific and comprehensive in detailing key risks and uncertainties. + The PDP is robust, comprehensive and specific.	+ Key risks and uncertainties include: – site / resource considerations (geotechnical and geophysical uncertainties, soil / seabed matters etc.); – technology and infrastructure considerations (engineering, installation etc.); and – supply chain assumptions. + This criterion is assessed on a phase-by-phase basis.
(b)	**Route-to-market for the Project**	+ The Applicant's preferred option for supply / transmission is likely to be viable. + Specific offtake / supply options are identified for further investigation, and the Applicant has detailed plans / schedules for such investigation. + The application comprehensively covers route-to-market options and associated risks.	-
(c)	**Estimated commercial return on the Project**	+ The Project's financing methods, construction schedules, commercial assumptions, production forecasts and cashflow forecasts are reasonable. + Cost and price estimates are reasonable in light of industry standards. + Uncertainty ranges are refined and appropriate, and the PDP contains plans to address key uncertainties. + The application demonstrates a clear path to finalising requisite commercial agreements.	+ The Minister considers this criterion more holistically, relying heavily on its assessment of "reasonableness" (ie. the Minister does not take a bright-line approach). + The Minister considers base, low and high case scenarios.
(d)	**Any other matters relevant**	+ The application specifies plans and schedules to address any other issues relating to the Applicant's: + identified environmental, State / Territory and energy regulator consent requirements; and + impacts on relevant stakeholders and users of the area.	+ There is no benefit to commencing the *Environment Protection and Biodiversity Conversation Act 1999* (Cth) referral processes early.

3.	**Sustainability**		
(a)	**Past performance in other infrastructure projects**	+ The Applicant has a history of compliance and positive financial performance in other projects.	-

<table>
<tr><td>(b)</td><td>Applicant's past financial performance</td><td>+ The Applicant meets at least one of the following criteria:<table><tr><th>Criteria</th><th>Previous 3-year average (USD million)</th></tr><tr><td>Annual turnover</td><td>>300</td></tr><tr><td>Net assets</td><td>>100</td></tr><tr><td>Cash at bank</td><td>>300</td></tr><tr><td>Assets / funds under management</td><td>>500</td></tr><tr><td>Undrawn debt facilities</td><td>>300</td></tr></table></td><td>-</td></tr>
<tr><td>(c)</td><td>Applicant's corporate governance</td><td>+ The Applicant's Board has an appropriate size, and the Applicant can demonstrate appropriate experiences, skills, commitment and knowledge of the entity / industry within its Board.
+ The Applicant implements principles of a recognised corporate governance code that provides for:
– clearly defined roles and responsibilities with a regular review process; and
– a sound risk management framework.
+ The Applicant has appropriate audit processes to verify the integrity of corporate reports.</td><td>-</td></tr>
<tr><td>(d)</td><td>Other matters relevant</td><td>+ The Applicant does not have any history of bankruptcy, insolvency, administration, disqualification (from managing a company) or criminal offence.</td><td>+ Past offences are assessed in the context of the application and Project (ie. certain offences with no relevance to the Project may have limited bearing on the application).</td></tr>
<tr><td>4.</td><td colspan="3">Other criteria</td></tr>
<tr><td>(a)</td><td>National interest factors</td><td>+ The Project has a positive impact on Australia's economy and / or local communities (ie. socio-economic benefits), including a combination of:
– broader economic impact;
– Australian job creation;
– regional development;
– Australian content;
– contribution to grid supply;
– energy security;
– emissions reduction; and
– benefitting international relations.</td><td>+ The application should provide preliminary forecasts of its anticipated socio-economic benefits.</td></tr>
<tr><td>(b)</td><td>National security</td><td>+ The Project does not pose any national security issues.</td><td>+ This is a separate assessment to the Foreign Investment Review Board (FIRB).</td></tr>
<tr><td>(c)</td><td>Timing of the Project</td><td>+ The Project can be delivered within a reasonable time.
+ The application can demonstrate capacity to achieve its timing despite other project interests / licences held.</td><td>+ The timing of the Project should be supported by a robust and comprehensive PDP.
+ This criterion is assessed on a phase-by-phase basis.</td></tr>
<tr><td>(d)</td><td>Efficient use of the Commonwealth seabed area</td><td>+ The Applicant demonstrates good utilisation of the area (ie. high GW output) in light of the proposed infrastructure layout, spacing and operational area.
+ The proposed infrastructure layout is specific and considered.</td><td>-</td></tr>
<tr><td>(e)</td><td>Conflicts with other users of the area</td><td>+ The application considers potential conflicts with other users of the area and proposes means to investigate / mitigate the conflicts.</td><td>Other users include: defence; shipping; aviation; fishing; native title; local communities; oil and gas or greenhouse gas users; and other licence holders.</td></tr>
</table>

OVERLAPPING AREAS AND FINANCIAL OFFERS

If there are two or more overlapping applications that could be offered licences if not for the overlap (and each of the applications meets the merit criteria), Applicants will be invited to revise and resubmit their applications to remove the overlap. Each Applicant will be told the other Applicant's (i) identity; (ii) type of Project; and (iii) any other detail that the Registrar considers reasonable.

If the resubmitted applications do not resolve the overlap, the Applicants will be invited to submit a financial offer. Financial offers are received on an invite-only basis (unsolicited offers will be rejected).

If financial offers are invited, the Minister may only offer a licence to the Applicant with the highest financial offer. The merits of the application will not be considered (ie. the Minister's consideration is strictly monetary). In the event of equal financial offers, the Minister may either:

+ offer the licence to an Applicant who has no other overlap other than the one in question; or
+ invite further rounds of financial offers (failing that, offering the licence at the Minister's discretion).

LICENSE CONDITIONS IN OEI ACT AND OEI REGULATIONS

The licence holder must comply with the conditions under the OEI Act, including paying the applicable levy, reporting requirements, complying with the management plan and complying with conditions on the declared area and under the licensing scheme.

Additionally, the Minister has discretion to impose such licence conditions as they see fit, including:

+ compliance with the OEI Act, OEI Regulations, and Offshore Electricity Infrastructure (Regulatory Levies) Regulations 2022 (Cth);
+ compliance with the type of Project proposed in the application (e.g. a requirement to assess the feasibility of a 1 GW fixed offshore wind farm project in the licence area); and
+ further reporting obligations.

CHANGE IN CONTROL

As noted in our analysis of the draft Regulations, a number of stakeholders expressed a desire for further clarity on change in control (**CiC**) issues. The Guideline has provided further colour on the Regulator's approach towards dealing with CiC transactions.

The DCCEEW has provided the approved application form required for a CiC. Importantly, CiC applications are assessed against the merit criteria above, subjecting future owners of licence holders to the same requirements as the original Applicant.

The Guideline does not address industry feedback on intergroup restructures being potentially captured by the CiC regime. This may impede common funding activities for offshore electricity infrastructure projects. It remains to be seen if the Australian Government will address this issue.

OTHER MATTERS

The Guideline: Offshore Electricity Infrastructure Licence Administration – Feasibility Licences provides further information on extensions, variations, cancellations and surrenders of licences. Further details regarding these matters can be found in the Guideline.

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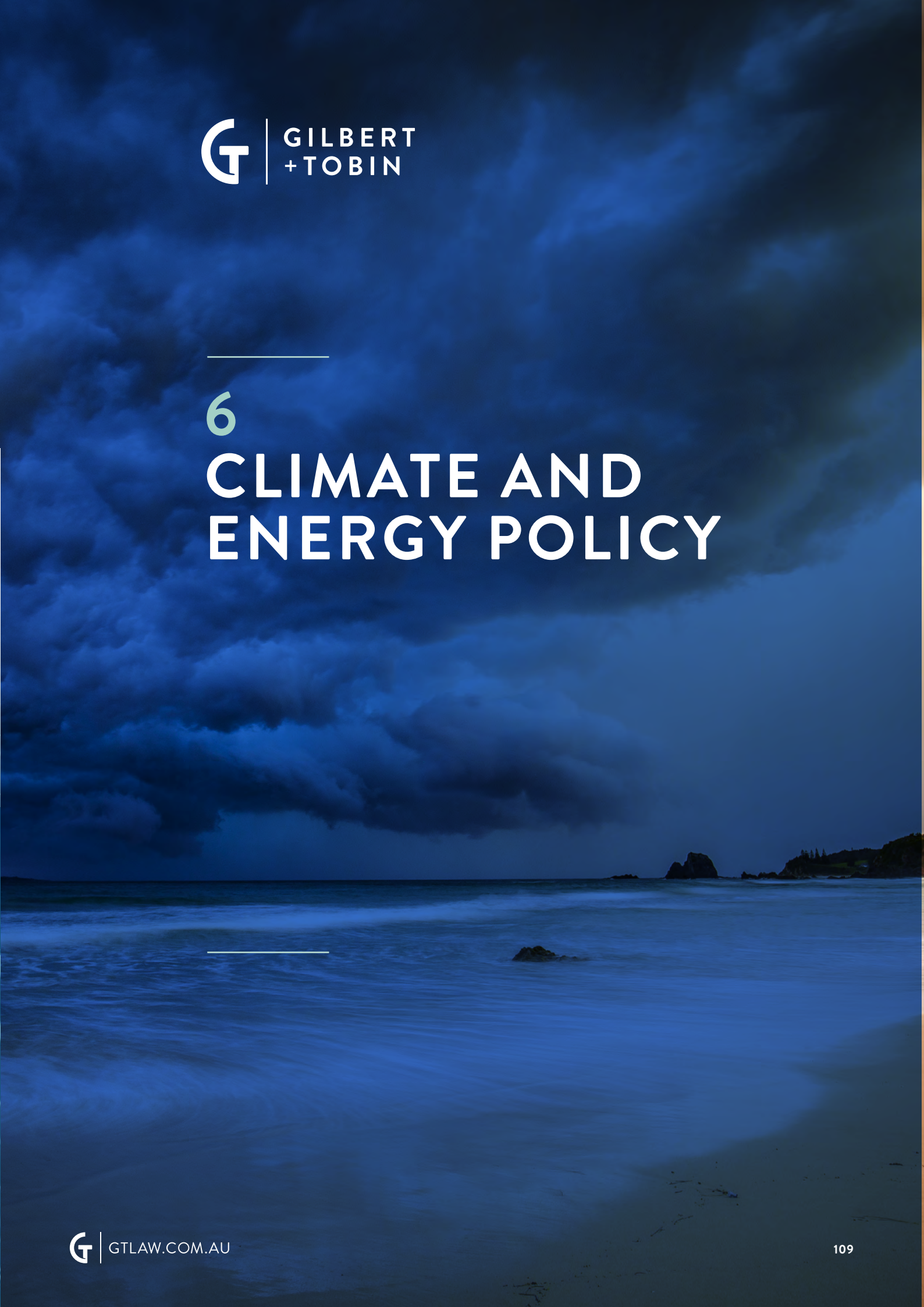
PREVIOUS CHAPTER

Hoisting the Sails: Charting Australia's offshore wind legislation

GILBERT +TOBIN

6 CLIMATE AND ENERGY POLICY



AUSTRALIA TO MOVE ON CLIMATE AND ENERGY POLICY

24/05/2022

The election of a Labor government (whether majority or minority) is likely to herald a suite of changes to Australia's climate change laws and policies and significant investment in renewable energy and the energy transition. Labor will be seeking to implement its Powering Australia plan, but may be required to go further and faster in terms of ambition and transition, given the likely influence of the Greens and Independents on the cross-bench in both the House of Representatives and the Senate.

Below we provide an overview of the key policy positions included in the Powering Australia plan and provide our analysis on how negotiating its implementation may impact upon business.

EMISSION REDUCTION TARGETS

Following last year's bipartisan announcement committing Australia to net zero by 2050, Labor has committed to enhance Australia's medium term climate ambition with a target of achieving emissions reductions of 43% on 2005 levels by 2030, with net zero in the Australian Public Service (excluding security agencies) by 2030. These targets are below those proposed by the Greens, who are pressing for emissions reductions of 75% on 2005 levels by 2030 and net zero by 2035 and a number of the 'Teal' Independents who have campaigned on at least 50% and in some cases 60% emissions reductions by 2030.

Labor will look to legislate its mid-term target, if possible. This raises the question of what other elements might be included in a Climate Change Bill. In 2021, Zali Steggall introduced a private member's bill the *Climate Change (National Framework for Adaptation and Mitigation) Bill* (**Steggall Climate Bill**) which provided a framework for

legislating climate change targets and emissions budgets, based on independent advice from a new Climate Change Commission. The framework proposed in the Steggall Climate Bill was based upon similar approaches adopted in the UK and Victoria, with a clear identification of guiding principles for decision making, informed by periodic climate change risk assessment. A number of the Teal Independents have expressed their support for the Climate Bill, which may be reintroduced by Ms Steggall again this year. We would expect Labor would seek to bring forward its own legislation as part of a wider package addressing other measures outlined below, but elements of the Steggall Climate Bill may be influential in shaping that position.

SAFEGUARD MECHANISM

The Safeguard Mechanism established under the *National Greenhouse and Energy Reporting Act 2007* (Cth) (**NGER Act**) had sought to regulate the direct / scope 1 GHG emissions of approximately 210 large greenhouse gas (GHG) emitting facilities. The Mechanism operates by setting a baseline for each facility (originally linked to historical reported emissions but more recently transitioned to reflect prescribed production variables and default emissions intensities) and requiring the facility to keep GHG emissions within that baseline number. If the baseline number is exceeded, the facility is required to surrender Australian Carbon Credit Units (**ACCUs**).

The Safeguard Mechanism has been criticised in that, because of the relatively generous levels that baselines are set at, it does not incentivise emissions reductions or otherwise provide carbon pricing signals to high emitting industries. Labor has indicated that it will adopt the Business Council of Australia's (**BCA**) recommendation that 'emission baselines be reduced predictably and gradually over time'. To do so, Labor will ask the Department of Industry, Science, Energy & Resources (**DISER**) and the Clean Energy Regulator (**CER**) to determine revised baselines for each facility in close consultation with industry. Of note, it is not proposed that the threshold for the application of the Safeguard Mechanism, currently set at 100,000 t CO2-e direct emissions will be altered, which would mean that no additional facilities would be covered.

The baseline setting process will be challenging as facilities in different sectors need to manage a range of factors which impact upon their GHG emissions and the ability to decarbonise without significant changes to operations and/or capital investment. Applying a 'one size fits all' approach is unlikely to work and DISER/CER will need to sensitively negotiate the variances within and between facilities.

In reviewing and setting new baselines for facilities, consideration will also need to be given to those industries that are energy-intensive and trade-exposed (EITE). Historically, concessions have been given to sectors such as steel, aluminium, cement, glass and natural gas to manage the constraints they face in passing through carbon costs. However, the likely introduction of carbon border adjustment measures (CBAM) in Europe and other developed economies, may impact upon the scope to push for EITE protections domestically.

In 2020, the Report of the Expert Panel examining additional sources of low cost abatement (King Report) recommended the piloting of a new 'below-baseline crediting arrangement' that would provide credits to facilities who reduce their emissions below their Safeguard baselines by undertaking 'transformative' abatement projects. DISER released a consultation paper on the proposed crediting approach in August 2021, (see our previous analysis here - Australia's proposed Safeguard Crediting Mechanism: An incentive for emissions reduction) but updated details following that consultation are yet to be released. Labor has indicated its general support to include tradeable credits for companies that stay below their baselines. However, we expect further consideration to be given to how a safeguard crediting mechanism would operate with the existing Emissions Reduction Fund (**ERF**).

EMISSIONS REDUCTION FUND

Over the past 9 years, the ERF has operated as the main scheme to incentivise emissions abatement and sequestration in Australia. Underpinned by the *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) (**CFI Act**), the ERF has operated primarily as a purchasing fund to procure ACCUs by the Commonwealth, but in the past 12-18 months has also seen an increase in purchases by companies looking to retire ACCUs against their own corporate emission reduction targets.

The integrity of the ERF has been the subject of close scrutiny this year, with the former Chair of the Emission Reduction Assurance committee (**ERAC**) and the Australia Institute raising concerns about the validity of abatement generated by certain methodologies and the governance role played by the CER. Wider concerns have also been raised by industry participants about the decision of the CER to allow for the exiting of fixed price contracts, a move which saw the ACCU price fall significantly in March 2022.

Responding to these concerns about the integrity of the ERF, Labor has committed to 'undertake a short review into ACCUs to ensure their integrity, consistency with agricultural and other objectives, and contribution to environmental, economic and other benefits like biodiversity'. The Greens have also referred concerns about the ERF to the Auditor General. Given the importance of providing stability and certainty for the carbon market, we would anticipate an ERF Review to be initiated fairly quickly, with terms of reference that will likely look at governance arrangements for the ERF and processes related to method development. Depending upon the outcomes of such a review, we could see some structural change to the administration of the CFI Act.

There does, however, remain bipartisan support for a domestic offsets scheme underpinned by the CFI Act and Labor has indicated that it will continue to purchase ACCUs through its new Powering the Regions Fund (see below). If more ambitious 2030 emission reduction targets are legislated, and the Safeguard Mechanism baselines tightened, we would anticipate increased demand for ACCUs for both compliance and voluntary purposes.

A particular focus of new project development will, we expect, be linked to projects that deliver multiple co-benefits in terms of resilience and biodiversity and also those projects that support the deployment of new technologies. In the regard, we note that some Teal Independents have called for an expansion of agricultural methodologies for the ERF to further support low emissions agricultural practices and technologies and the establishment of a 'Commonwealth Sequestration Scheme' offering concessional loans and grants to landowners to support the roll out of native species plantings.

CLIMATE RISK DISCLOSURE

There has been much discussion amongst corporate Australia about the expectations of regulators such as ASIC and APRA with respect to climate-related risk disclosure. Whilst both regulators have provided guidance on reporting and disclosure, the application of frameworks such as the recommendations of the Taskforce on Climate-related Financial Disclosures (**TCFD**) remains voluntary. With a number of countries introducing mandatory climate-related risk disclosure, aligned with TCFD, such as the EU, UK, New Zealand, Singapore and Hong Kong – and the US poised to follow suit with a recent proposal from the SEC (see our article - *The effect of the SEC's proposed climate-related disclosures on Australian companies*), not to mention the International Sustainability Standards Board (ISSB) developing a global baseline of climate and sustainability disclosure standards, it is likely this will be a key area of policy development this year.

Labour has stated that it will 'take a whole of government approach to climate risk disclosure in the public sector, as well as working with regulatory agencies, businesses, unions and investor groups to ensure climate risk disclosure and management are at the centre of the modernisation of the economy.' This type of approach aligns with the position advocated for in the Steggall Climate Bill. We note the Greens have also proposed a transition to mandatory climate risk reporting for ASX300 companies, heavily exposed companies, large private companies, super funds, banks, insurers and multinationals operating in Australia from 2021-22 onwards. Whilst that timeframe is unlikely to be met, mandatory reporting may well form a part of disclosure regimes in the near term. Some of the key issues that will be open for discussion are, the extent to which disclosures may extend to value chain / scope 3 emissions, and whether safe harbour provisions may apply in respect of those disclosures (as proposed by the SEC in the US).

RENEWABLE ENERGY

Labor has proposed significant investment into new renewable energy projects and technologies. Labor will be looking to invest $20 billion for the upgrade of the electricity grid so it can handle more renewable power through a new 'Rewiring the Nation Corporation' (**RNC**). The objective of RNC would be to provide a centrally coordinated process and low-cost financing for new electricity infrastructure – enabling the construction of high voltage infrastructure to be brought forward, for example in support of renewable energy zones. With the proposed unlocking of infrastructure, Labor has modelled that the Powering Australia plan would achieve 82% renewable energy penetration in the National Energy Market by 2030 (up from 68% under business as usual). This level of investment will be significant for industry, enabling a number of major transmission and interconnector projects off the ground, along with associated generation projects.

Other funding announcements for renewable energy made during the campaign included up to $3 billion from the National Reconstruction Fund to support renewables manufacturing and the deployment of low-emissions technologies and co-investment of up to $100 million for 85 solar banks and the installation of 400 community batteries across Australia. This investment is coupled with funding for apprenticeships and skills programs to assist with a transitioning workforce.

The Labor renewable energy policy is broadly consistent with that advocated for by the Greens and Independents, although not unexpectedly the Greens are seeking a more rapid transition to 100% renewable energy.

Where policy positions diverge is in respect of the continued role of fossil fuels during the transition. Labor has been silent on future coal and gas development, whereas the Greens and some Independents are calling for an immediate ban the construction of new coal and gas infrastructure; the phase out of mining, burning and export of thermal coal by 2030 and the removal of subsidies to coal, oil and gas corporations. These issues will remain vexed, particularly in States such as Queensland and Western Australia, where a number of large-scale coal and gas projects are in the pipeline.

POWERING THE REGIONS AND THE NATIONAL RECONSTRUCTION FUND

In addition to the RNC, Labor has proposed the repurposing and establishment of two new funds. The Powering the Regions Fund (**PRF**) is intended to deploy uncommitted funding from the ERF, with a focus on regional development. The PRF would provide grant funding and would continue to purchase ACCUs. However, it is intended that the PRF be expanded to focus on an additional three priorities:

+ supporting industry with its decarbonisation priorities;
+ the development of new clean energy industries, such as green hydrogen production and export; and
+ workforce development.

Noting some of the existing challenges with the ERF (described above), if the Federal government steps back from purchasing ACCUs over time, carbon project developers will need to see clear demand signals from other sources (either corporate or linked to compliance regimes) in order to continue to invest in project development. In addition to the proposed changes to the Safeguard Mechanism, it may well be the State and Territory governments that drive demand for ACCUs, particularly if offsetting requirements are introduced by their environmental regulators in connection with new large emitting projects.

Labor has also proposed the establishment of a $15 billion National Reconstruction Fund (**NRF**) to be modelled on the Clean Energy Finance Corporation (**CEFC**). The NRF would provide investment through a combination of loans, equity, co-investment and guarantees – with a view to achieve a return on borrowing costs and a positive underlying cash impact. The NRF is intended to drive investment into Australia's industrial base across a range of sectors, promoting resilience for the economy. With respect to energy, Labor has committed to deploy up to $3 billion of the NRF on clean and green technologies such as green metals, hydrogen electrolysers and fuel switching, clean energy component manufacturing and agricultural methane reduction.

The CEFC has been very successful in supporting investment in a range of renewable energy, energy efficiency and green hydrogen projects. Adopting a similar model for the NRF has the potential to leverage significant private sector investment into priority areas of energy transition and technology development.

EVS / TRANSPORT

Electric vehicles were prominent during the election campaign and form a key part of Labor's Powering Australia plan. Labor has indicated that it will develop a National Electric Vehicle Strategy. That strategy will encourage Australian manufacturing of electric car components (especially batteries); maximise EV charging infrastructure; and electrify 75% of the Commonwealth's fleet by 2025. Labor will also look at removing inefficient taxes from low-emissions vehicles to lower EV costs. These policies are broadly in line with proposals from the Greens and Independents, however, the Greens are also seeking to end the sale of new petrol and diesel cars from 2030 and have offered more prescription in respect to the tax rebates and incentives required to achieve higher penetration of EVs by 2030.

ADAPTATION AND RESILIENCE

A critical component of climate change policy is building resilience and planning for adaptation – both for communities and vulnerable ecosystems. Following years of unprecedented bushfires and flooding, it is imperative that sound decisions are taken to develop infrastructure that can withstand the climate related risks of the future, building upon recommendations of recent Royal Commissions and Inquiries at both the federal and State levels.

Labor has committed to conduct a climate change and security risk assessment which we anticipate would involve a full review of the vulnerability of Commonwealth assets, as well as risks to the economy more generally flowing from physical climate change risk. Labor will also implement a Disaster Readiness Plan that will provide $200 million per year on disaster prevention and resilience with a view to fully funding disaster recovery costs.

The introduction of a climate change and security risk assessment is not dissimilar to the process proposed in the Steggall Climate Bill. However, the Climate Bill also proposes that a national adaptation plan be developed specifically in response to that assessment.

Australia has prepared a National Climate Resilience and Adaptation Strategy 2021-2025, consistent with its obligations under the Paris Agreement. That strategy speaks to collaboration with different levels of government and communities in respect to improved climate information, with examples of adaptation measures being implemented. It also contemplates national level climate risk assessment. Providing sufficient resources to undertake this type of assessment and evaluation, as well as developing resources that can be accessed by the general public, will be an important part of Australia's climate response.

INTERNATIONAL COLLABORATION

Taking steps to increase Australia's climate ambition will change the dynamic for Australia's international relationships, in particular in the Pacific region, where the country has long been held out as a laggard on climate action. The Australian government has been quietly progressing areas for regional climate change collaboration, including providing capacity building and support to improve adaptation and resilience among Pacific countries, and more recently on carbon markets, with the launch of the Indo-Pacific Carbon Offset Scheme (**IPCOS**). We would expect these areas to collaboration to grow under a Labor government. There has also been talk of Australia offering to host the climate change negotiations when they are next held in the Asia-Pacific region in 2024 (COP29). Based on the initiatives driven by other COP Presidencies such as Fiji and the UK, the international attention drawn from hosting such an event could provide opportunities for significantly enhanced climate action and innovation for both governments and the private sector.

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MOVEMENTS IN AUSTRALIA'S CLIMATE AND ENERGY POLICY

03/08/2022

It has been a momentous last two months in climate and energy law, culminating last week in the Federal Government introducing the Climate Change Bill 2022 (**Climate Bill**) and Climate Change (Consequential Amendments) Bill 2022 (**Consequential Amendments Bill**) into Parliament in the first sitting week since Labor came to power. The new Government has also made its climate priorities known on the international stage, communicating Australia's updated Nationally Determined Contribution under the Paris Agreement to the UNFCCC and signing the 'Australia – United States Net Zero Technology Acceleration Partnership' at the Sydney Energy Forum.

In this insight, we recap on key developments and what we expect to see over the coming months as the new Government seeks to implement its legislative agenda.

We also provide an update on proposed amendments to the WA Environmental Protection Authority's (**EPA**) Greenhouse Gas Emissions guidelines for project proposals, which continues the EPA's progressive approach to project emissions reduction conditions, which we first commented on in our article WA EPA is turning net zero ambitions and policies into project reality.

KEY TAKEAWAYS - CLIMATE AND ENERGY POLICY IN AUSTRALIA

+ The Climate Bill, if passed, will legislate Australia's commitment to cutting emissions by a minimum of 43% by 2030 and reaching net zero by 2050, with potential to provide greater regulatory certainty for businesses and investors across all sectors. Australia's targets will be integrated into the functions of key Federal entities and schemes, including the Clean Energy Regulator and National Greenhouse and Energy Reporting (**NGER**) scheme, through amending legislation.

- Changes to the Australian Renewable Energy Agency's (**ARENA**) financial assistance functions and funding strategy have refocused ARENA's mandate on funding renewable energy technologies, clean hydrogen, low emissions metals and decarbonising land transport.
- Consultation on amendments to the NGER Safeguard Mechanism is due to commence shortly. In advance of this, the Department is consulting on default emissions intensity values for the remaining production variables covered by the NGER scheme.
- A review into the integrity of Australian Carbon Credit Units (**ACCUs**) led by Professor Ian Chubb was announced last month, with the outcomes certain to have important implications for the future governance of Australia's carbon credit scheme and methodologies for generating credits. The outcome of the review is expected by the end of the year.
- Proposed changes to the WA EPA guidelines continue the EPA's previous progressive approach to emissions, with the guidelines proposed to include scope 1 and 2 emissions exceeding the relevant threshold in any year. This will likely lead to more project proposals being captured by EPA review requirements.
- The Net Zero Technology Acceleration Partnership between Australia and the United States will aim to stimulate development and deployment of zero-emissions technology solutions, including through collaborating with industry and unlocking private sector co-investment opportunities. Initial focus areas for cooperation include long duration energy storage technology, digital electricity grids, hydrogen and carbon dioxide removal.

THE CLIMATE BILL IS INTRODUCED TO PARLIAMENT

On 16 June 2022, consistent with its election promise, the new Federal Government communicated Australia's updated Nationally Determined Contribution (NDC) under the Paris Agreement to the UNFCCC, with a commitment to achieving net zero emissions by 2050 and a new, more ambitious 2030 target of 43% below 2005 levels. Subsequently, last week, the Minister for Climate Change and Energy (Minister) Chris Bowen, introduced the Climate Bill to Parliament, which, if passed, will embed Australia's updated NDC in legislation and pave the way for subsequent NDCs to have the same legal force.

Legislating Australia's 2030 and 2050 targets

Consistent with Australia's updated NDC, the Climate Bill provides that Australia's greenhouse gas emissions reduction targets are to:

- reduce Australia's net greenhouse gas emissions to 43% below 2005 levels by 2030, implemented as both:
  - a point-in-time target for 2030; and
  - an emissions budget for the period 2021 to 2030; and
- reduce Australia's net greenhouse gas emissions to zero by 2050.

With respect to any future changes to Australia's NDC, or its submission of a new NDC (as it is required to do every 5 years under the Paris Agreement), the Climate Bill specifies that these legislated targets do not prevent Australia from communicating a new or adjusted NDC in future. The Climate Bill also reiterates the requirement in the Paris Agreement for any new or adjusted NDC to be more ambitious than its predecessor. The Explanatory Memorandum to the Climate Bill encourages any new or adjusted NDC to be introduced into the Climate Change Act (once passed) through legislative amendment.

The Climate Bill allocates the Climate Change Authority – an independent expert advisory body established under the *Climate Change Authority Act 2011* (Cth) – the role of advising the Minister on the targets to be included in any new or adjusted NDC. The Minister will be required to table their response to the Authority's advice in Parliament.

The instability that has plagued Australian climate policy over the past decade has been cited as an impediment to investment, and industry and investor groups indicate that embedding Australia's targets in legislation will provide the regulatory certainty needed to secure the planning, investment and innovation necessary for Australia's transition to renewables. If passed, the Climate Bill will not only signal Australia's commitment to achieving the temperature goals of the Paris Agreement, but may also provide a signal that Labor policy supports climate action more broadly. This may generate fresh investment in renewables and hydrogen, with the potential for exploring other forms of energy generation and storage.

Annual Climate Change Statement

The Climate Bill requires the Minister – on the advice of the Climate Change Authority – to deliver an 'annual climate change statement' to Parliament, which describes Australia's progress towards achieving its emissions reduction targets and the effectiveness of the Federal Government's climate change policies. The statement will also contain information relating to general climate change policy, with the intent of this requirement to enable the statement to cover climate mitigation and adaptation policy challenges and opportunities. Additionally, the statement will contain information that relates to international developments during the relevant year, so that Australia's progress can be considered in the broader global context of climate action.

This mechanism, properly applied, has the potential to provide important context to the decisions driving Federal Government climate policy, giving business a sense of direction for their operations going forward. In particular, the requirement for the

statement to contain matters of general climate policy may provide insights to the public and industry on the climate policy areas of key concern to Government.

Consequential Amendments Bill

Last week also saw the introduction of amending legislation that, if passed, will update relevant legislation to support effective implementation of the Climate Bill. The Consequential Amendments Bill embeds Australia's 2030 and 2050 targets into the objects and functions of a range of relevant Commonwealth entities, including ARENA, the Clean Energy Finance Corporation, the Clean Energy Regulator and the Climate Change Authority. It also embeds these targets in relevant Federal schemes, including the NGER scheme.

If passed, this legislation will help to focus the objectives, and support the functions, of relevant Federal entities in meeting the legislated target, further consolidating a broad, whole-of-Government approach to tackling climate change.

Next steps for Australia's climate and energy policies

The Bills are being debated in Parliament in detail this week. The Senate's new environment and communications legislation committee has opened submissions for its inquiry into the Government's Bills, with the committee's report due by August 31.

It is also likely that consideration of the impacts on climate change from major projects will be raised when legislation to implement the findings of the Samuel Review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) comes before Parliament, with the Greens and a number of Independents supportive of a climate trigger being introduced into the EPBC Act.

NEW REGULATIONS AND FUNDING STRATEGY 'RENEW' ARENA'S FOCUS ON RENEWABLES

Under the *Australian Renewable Energy Agency Act 2011* (Cth) (**ARENA Act**), ARENA's functions include providing financial assistance for the research, development, demonstration, commercialisation or deployment of 'renewable energy technologies', and for the storage and sharing of information and knowledge about these technologies.

The previous Federal Government had introduced regulations that broadened ARENA's financial assistance functions to also include providing assistance for 'clean energy technologies', which included carbon capture and storage (**CCS**) and soil carbon (among other things). Late last month, however, the Minister reversed these changes by introducing the *Australian Renewable Energy Agency Amendment (Powering Australia) Regulations 2022* (Cth). These new regulations, which took effect on 23 July 2022, clarify that, as well as providing financial assistance for renewable energy technologies, ARENA can support:

- '**electrification technologies**', which means technologies that use electricity and replace technologies that use fossil fuels, or technologies that facilitate the replacement of technologies that use fossil fuels with technologies that use electricity; and
- '**energy efficiency technologies**', which includes energy conservation technologies, demand management technologies and technologies (including enabling technologies) that are related to energy efficiency technologies.

The Minister has made clear that these new regulations seek to refocus ARENA's funding on renewable technologies, and combat concerns that the former Federal Government had unreasonably extended ARENA's mandate.

The new regulations are accompanied by a revised funding strategy for ARENA for 2022–23 to 2024–25, which removes CCS and soil carbon from ARENA's list of strategic priorities. Accordingly, ARENA's revised strategic priorities are to:

- optimise the transition to renewable electricity;
- commercialise clean hydrogen;
- support the transition to low emissions metals; and
- decarbonise land transport.

According to the funding strategy, these revised priorities reflect a focus on reducing emissions by lowering the cost and increasing the availability of low emissions technologies including renewable energy, growing the share of renewables in the electricity mix, supporting fuel-switching and electrification where possible, increasing flexibility in electricity use and supporting the development of technology solutions for hard-to-abate sectors.

We expect that ARENA's revised strategic priorities will provide opportunities for project proponents and investors in the renewable energy, hydrogen, metal mining and electric transport sectors.

SAFEGUARD MECHANISM AMENDMENTS SET TO STRENGTHEN REPORTING REQUIREMENTS

On 21 July 2022, the Federal Government opened consultations on the National Greenhouse Energy Reporting (Safeguard Mechanism) Amendment (Default Emissions Intensities) Rule 2022 in relation to the setting of 'default emissions intensity values' for those production variables that had not previously been set, including LNG, quarrying and road freight logistics. The Government has indicated that this will not impact its commitments to implement declining emissions baselines through amendments to the Safeguard Mechanism, which could be in the range of 3-5% decreases annually. A consultation paper on the Safeguard Mechanism is due to be published in August, with a view to proposed changes to the scheme taking effect from 1 July 2023.

Amendments to other areas of the NGER scheme for the 2022-23 reporting year have also been introduced through the National Greenhouse and Energy Reporting Amendment (Biomethane and Tyre Fuel Types) Regulations 2022 and the National Greenhouse and Energy Reporting (Measurement) Amendment (2022 Update) Determination 2022. These cover:

+ amendments to the emission factor for scope 2 emissions for electricity purchased from the main grid, in order to better account for renewable energy generation sources;
+ reporting of emissions from consumption of biomethane, which will have a carbon dioxide emission factor of zero;
+ reporting of combustion of blended gaseous fuels, such as biomethane and natural gas;
+ the creation of two new fuel types for end-of-life tyres (being passenger car and truck and off-road tyres, where both are recycled or combusted to produce heat or electricity), to provide for more accurate emissions calculations; and
+ amended provisions for reporting on emissions and leakages from natural gas distribution networks as well as emissions from decommissioned underground coal mines, to ensure more accurate accounting.

Overall, these amendments strengthen reporting requirements, both by ensuring coverage of a wide range of industries as well as by increasing the accuracy of emissions reports.

REVIEW INTO THE INTEGRITY OF ACCUS

On 1 July 2022, Minister Bowen announced an independent review into the integrity of ACCUs and Australia's carbon crediting framework, to be led by former Chief Scientist Professor Ian Chubb. Under the terms of reference, the review will focus on:

+ governance structures and legislative requirements;
+ the integrity of ACCUs and methods for generating ACCUs; and
+ whether carbon crediting projects are providing social, economic, environmental, indigenous and other non-carbon co-benefits.

Professor Chubb will be assisted in his review by Steve Hatfield-Dodds, an associate principal at EY Port Jackson Partners, Ariadne Gorring, co-chief executive of Pollination Foundation, and former Federal Court judge Annabelle Bennett.

Integrity of the ACCU scheme has faced particular scrutiny since early this year, when Professor Andrew Macintosh, former head of the Federal Government's Emissions Reduction Assurance Committee, released a series of academic papers scrutinising the integrity of particular methods used in generating ACCUs. This scrutiny, along with concerns about the decision of the Clean Energy Regulator to facilitate the exit by project proponents of their fixed delivery carbon abatement contracts with the Commonwealth, has led to much market uncertainty. It is hoped that the review into the integrity of ACCUs will provide a basis for restoring confidence in the Australian carbon market.

Significantly, last week, the Integrity Council for the Voluntary Carbon Market released draft Core Carbon Principles for public consultation, with consultation closing by 27 September 2022. The Principles and accompanying assessment framework are intended to provide a credible means of identifying high-quality carbon credits with verifiable greenhouse gas emission reductions and removals, and also with high environmental and social integrity. We expect that the ten principles, which incorporate additionality, permanence, double counting, and sustainable development safeguards (among other things), will feed into submissions on the ACCU review process.

The ACCU review report is expected by the end of 2022. Depending on the report's findings, we may expect to see further reform to the *Carbon Credit (Carbon Farming Initiative) Act 2011* (Cth) and the rules and methods which sit beneath it throughout 2023, with flow on effects for the volumes of ACCUs which particular projects are eligible to generate, and potentially the way in which co-benefits are recognised.

WA EPA EXPANDS ITS REVIEW OF PROJECT EMISSIONS

From a State-level perspective, the WA EPA recently released draft guidance for public comment in relation to the EPA's consideration of the greenhouse gas emissions factor in the environmental impact assessment (EIA) process. The draft guidance proposes the following changes:

+ Proposals will be subject to the guidance 'where they are reasonably likely to exceed' 100,000 tonnes CO2-e of **scope 1 or scope 2 emissions in any year**. Proposals should not be separated in order to avoid reaching that threshold.
+ The EPA has also clearly set out its expectation that project proponents engage in 'deep and substantial emissions reductions' in 2030, so that project emissions reductions follow a linear trajectory from that date to achieve net zero by 2050 at the latest, with proponents urged to exceed those goals. The EPA notes that this expectation is in line with the Paris Agreement and conclusions of the Sixth Report of the Intergovernmental Panel on Climate Change, and further requires that its expectations on emissions reductions are reflected in a proponents Greenhouse Gas Management Plan.
+ The EPA has also placed significant emphasis on the implementation of best practice design, technology and emissions management to avoid and reduce scope 1 emissions. The EPA adopts a definition of 'best practice' as being 'the most effective, best combination of technologies used and the way in which an installation is designed, built, maintained, operated and decommissioned to avoid and minimise the environmental impacts arising from emissions'.

The EPA requires that independent peer or expert reviews should be provided alongside a proponent's Greenhouse Gas Management Plan to ensure the Plan adopts best practice measures.

This continues the WA EPA's proactive approach to project greenhouse gas emissions management, with more projects likely to be captured through the amended threshold. Companies will need to engage with best practice measures to ensure they meet the EPA's stringent requirements and contribute to Australia's ambition under the Paris Agreement. They will also need to prepare for potential requirements to reduce their Scope 2 emissions and consider what measures they can take to reduce scope 3 emissions.

NEW PARTNERSHIP WITH THE UNITED STATES TO SUPPORT ZERO EMISSIONS TECHNOLOGIES

Moving to overseas developments, on 12 July 2022, the Minister for Climate Change and Energy and the United States Secretary of Energy signed the Australia – United States Net Zero Technology Acceleration Partnership (**Partnership**) at the Sydney Energy Forum. The Partnership will seek to accelerate development and deployment of zero-emissions technologies through collaborating with industry and creating opportunities for co-investment from the private sector, for example, to support applied research and pilot projects. The Partnership is intended to incentivise investment, expand trade, and develop commercial opportunities between Australia and the US.

Initial focus areas for cooperation are expected to include the development and deployment of:

1. long duration energy storage technology;
2. digital electricity grids and technology to support integration of variable renewable energy;
3. hydrogen, including applications in mining and heavy vehicles, and supporting industry growth, including on Guarantee of Origin certification and deployment of hydrogen hubs; and
4. carbon dioxide removal, including direct air capture.

The two countries also intend to collaborate with respect to ensuring resilient and sustainable critical material supply chains, and to contribute funding to initiatives that support the Partnership's objectives.

While it remains to be seen how the Partnership will be implemented by the two countries over coming months, it is likely to give rise to opportunities for industry participants in the low emissions technology space in Australia and the US – particularly those working in energy storage, digital electricity grid, hydrogen and carbon dioxide removal technologies – to work with Government to advance development and deployment of these technologies. In light of that, participants should look out for funding opportunities in this space. The Partnership is also likely to benefit investors interested in co-investment opportunities in the low emissions technology space.

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KNOWLEDGE ARTICLES YOU MAY BE INTERESTED IN:

Australia to move on climate and energy policy

Green Mining: Net Heroes

Ready, set, reform: Western Australia's regulatory readiness for the clean energy transition

SAFEGUARD MECHANISM REFORM: CONSULTATION PAPER RELEASED FOR FEEDBACK

22/08/2022

Since its election in May 2022, the new Federal Government has moved quickly on climate law and policy reform. Last week, the newly established Department of Climate Change, Energy, the Environment and Water released its Safeguard Mechanism Reforms: Consultation Paper (**Consultation Paper**), setting out its proposed reforms to the Safeguard Mechanism.

The Safeguard Mechanism is Australia's primary instrument for controlling carbon emissions from large emitters, by setting emissions limits (or 'baselines'), which covered facilities must either emit below or purchase carbon credits to offset any exceedance of that limit. The scheme currently covers 215 of Australia's biggest emitters.

A key proposal flagged by Labor in its election campaign was to bring these entities under declining baselines, to align the mechanism with Australia reaching net zero greenhouse gas emissions by 2050. In this article, we consider the government's key proposed amendments to the Safeguard Mechanism.

It is important to note that Safeguard Mechanism reform is but one of a raft of proposed reform items Labor will introduce, or has introduced, as part of its legislative agenda. Already, Labor has introduced legislation to embed Australia's emissions reduction target under the Paris Agreement, as well as commencing a review to strengthen the Emissions Reduction Fund and the value and integrity of Australian Carbon Credit Units. To read more on these recent pivotal developments in climate law and energy, see our article Movements in Australia's climate and energy policy.

Submissions on the Consultation Paper are due by 20 September 2022, with transitional changes expected to take effect from 1 July 2023.

KEY TAKEAWAYS FROM SAFEGUARD MECHANISM REFORMS: CONSULTATION PAPER

+ The current coverage threshold of 100,000 tonnes of Scope 1 (direct) CO2-e emissions each year will remain in place under the reformed scheme.
+ Significantly, the government proposes changes to facility baselines to align the Safeguard Mechanism with Australia's updated 2030 and 2050 targets and emissions budget in its Nationally Determined Contribution under the Paris Agreement (**NDC**). While final baseline decline rates will not be settled until other policy settings are finalised, indicative decline rates are expected to be between 3.5 and 6 percent each year to 2030. If a higher rate of decline is ultimately adopted, covered facilities will need to upscale their operational decarbonisation strategies and/or purchase more offsets in order to comply.
+ How baselines are set will be critical to determining the baseline decline trajectory, with important implications for Safeguard Mechanism facilities' operations. The government is seeking feedback on whether to maintain a production-adjusted approach to baseline setting or revert to absolute limits, and how to minimise headroom. Setting absolute limits would entail particular challenges for covered facilities, by requiring reductions in absolute operational emissions.
+ It is proposed that the Clean Energy Regulator (**Regulator**) will automatically issue new carbon credits called Safeguard Mechanism Credits (**SMCs**) to Safeguard facilities when their emissions fall below their baseline. SMCs have been proposed so that Safeguard participants can manage compliance costs as baselines decline.
+ Emissions-intensive, trade-exposed entities (**EITEs**) will likely be able to access tailored treatment under the Safeguard Mechanism. The proposed amendments seek to balance genuine abatement incentives with the practical realities that many EITEs operate in hard to abate sectors where technological solutions are still nascent.

SETTING BASELINES UNDER THE SAFEGUARD MECHANISM

Fixed versus production-adjusted baselines

The Consultation Paper seeks feedback on whether the Safeguard Mechanism should retain, and build on, the existing production-adjusted (intensity) baseline setting framework, or return to the fixed (absolute) approach, which applied when the Safeguard Mechanism initially commenced in 2016.

The current projection-adjusted approach allows a facility's baseline to change annually as its production levels fluctuate: facilities comply with their baselines through reducing the emissions intensity of production. Conversely, fixed baselines place an absolute limit on covered emissions, and require facilities to reduce their production and / or improve emissions intensity in order to comply.

Combatting the headroom problem

The Consultation Paper notes the considerable 'headroom' – that is, the gap between how much carbon facilities are allowed to emit under their baselines, and their actual emissions – that currently exists for Safeguard Mechanism-covered facilities, and seeks input on how baselines can be set in a way that removes this headroom and enables crediting and trading to commence when baselines start to decline.

Baselines for new and existing facilities

Most facilities that are currently covered by the Safeguard Mechanism are afforded flexibility to set their baselines by reference to industry average emissions-intensity benchmarks ('default' values) set by government, or site-specific intensity values calculated by the businesses themselves. The Consultation Paper notes that this optionality has been identified as a contributor to the headroom problem, and seeks input on whether all baselines should be set by reference to just one of these reference points, or using different standards altogether.

The Consultation Paper also requests feedback on the best approaches to setting baselines for new facilities (that is, facilities that become covered by the Safeguard Mechanism after 1 July 2021).

Setting a rate for baseline decline

Importantly, the Consultation Paper seeks input on how best to reduce Safeguard Mechanism baselines in a way that is consistent with Australia's emissions budget under its NDC, which commits Australia to reducing national emissions by 43 percent below 2005 levels by 2030, and reaching net zero emissions by 2050.

According to the Consultation Paper, for facilities currently covered by the Safeguard Mechanism to contribute to their proportional share of the national emissions target, aggregate baselines must fall from 137 million tonnes to 99 million tonnes CO2-e by 2030: this equates to a need for Safeguard Mechanism facilities to cumulatively abate 170 million tonnes of CO2-e over the next 8 years. Feedback is sought as to what extent the Safeguard Mechanism should contribute to Australia meeting its emissions reduction targets.

The government expects indicative decline rates of between 3.5 and 6 percent each year, although final decline rates cannot be settled until other policy settings have been finalised. Variables

that will feed into calculating the decline rate include, among other things, whether baselines are set using the 'fixed' or 'production-adjusted' approach: decline rates are likely to be higher if a production-adjusted approach is taken. Another key consideration is whether a 'reserve' is built into the decline rate, so that the rate is steeper (to accommodate for the potential introduction of new covered facilities, and higher than expected emissions growth in upcoming years).

With respect to post-2030 decline rates, the Consultation Paper suggests that these be set in 5-year blocks, with the process for setting them aligned with updates to Australia's NDC. For example, decline rates for 2030 to 2035 could be the subject of consultation in 2026 following Australia's NDC update in 2025.

INTRODUCING SAFEGUARD MECHANISM CREDITS AND THE USE OF OFFSETS

It is proposed that the Regulator will automatically issue SMCs to facilities when their emissions fall below their baseline. SMCs will only be traded within the Safeguard Mechanism. It is proposed that Safeguard facilities will continue to receive SMCs when their annual emissions fall below 100,000 tonnes as an incentive to continue reducing emissions. SMCs have been proposed so that Safeguard participants can manage compliance costs as baselines decline. Safeguard participants with relatively low-cost abatement will be able to sell SMCs to Safeguard facilities with more costly or limited abatement options.

SMCs will not be carbon "offsets" like ACCUs, because they will be generated within a regulated emissions limit, which will limit the overall emissions of Safeguard participants. Therefore, SMCs will not need to be 'additional' as defined under the Carbon Credits (**Carbon Farming Initiative**) Act. It is anticipated that the crediting and trading of SMCs will commence on 1 July 2023.

The Government is now seeking consultation on a range of issues relating to the use of SMCs and their interaction with ACCUs, including (among other things):

+ whether banking and borrowing arrangements should be implemented for SMCs;
+ whether Safeguard facilities should still be able to generate ACCUs for reducing direct (scope 1) emissions if they have an existing registered ERF project and whether to retain double counting provisions to prevent a facility from generating both ACCUs and SMCs;
+ whether Safeguard facilities should still be allowed to participate in ERF projects that reduce emissions from electricity use (scope 2) emissions; and
+ whether international units should be available for compliance under the Safeguard Mechanism at a point in the future when rules for international trading have been settled.

ASSESSING AND PROTECTING EMISSIONS-INTENSIVE TRADE-EXPOSED SECTORS

The Consultation Paper also considers avenues for tailored treatment of EITEs. EITEs are businesses that are affected by carbon pricing and cannot pass through costs of that pricing due to issues of international competition or their market share: these are big emitters often operating in hard to decarbonise sectors who are unlikely to stay below their baselines and are therefore more exposed to the Safeguard Mechanism regime.

In the Consultation Paper, the government proposes how to define EITEs for the purposes of assessing eligibility for 'tailored' (concessional) treatment under the Safeguard Mechanism. The paper then sets out three possible forms of tailored treatment.

In order to assess whether an entity is an EITE and therefore eligible for tailored treatment, the Government proposes a "comparative" approach that assesses whether Australian businesses are disadvantaged compared to international competitors, and aims to ensure no emissions "leakage" overseas. EITEs could be defined as:

+ **Trade-exposed**: "assessed as a trade share greater than 10 per cent or a demonstrated lack of capacity to pass through costs due to potential for international competition"; and
+ **Emissions-intensity**: based on the "cost intensity" at the facility level, being the "cost per unit or revenue of value added at the facility level", rather than the emissions intensity.

The Consultation Paper notes the importance of ensuring that emissions reductions, not increases, are incentivised, and proposes that historical emissions could be used to set a ceiling as to the relevant level of emissions going forward. This would ensure that ceilings are linked to proven emissions data, so that facilities are subject to specific, tailored limits. The paper further proposes that the cost of compliance could be based on ACCU pricing, though this cost could be lowered if a facility had its own, cheaper abatement avenues. EITE classifications would also be reviewed periodically. These approaches ensure there is flexibility in the mechanism to adapt to changes in a facility's production and revenue, as well as reflecting the impact of declining baselines.

The Government has also indicated that it may, in future, compare EITEs to global competitors' exposure to carbon pricing, which may detract from the rationale to treat EITEs differently to entities reporting normally under the Safeguard Mechanism. This would likely mean that classification as an EITE becomes harder, given the existence of carbon prices and cap-and-trade regimes in a number of Australia's global trading partners.

The Consultation Paper proposes three possible forms of special treatment for EITEs:

+ Financial assistance to help facilities meet their emissions reduction obligations, which could include grants through

the new Powering the Regions Fund or the National Reconstruction Fund, as well as established entities such as the Australian Renewable Energy Agency and Clean Energy Finance Corporation. Such assistance would be subject to the relevant fund's grant requirements. This would mean that entities would still need to compete with other applicants for funding.

+ Direct assistance to help facilities meet emissions reduction obligations, for instance providing SMCs to facilities. In order to ensure that abatement is still achieved, the Government would withhold a certain percentage of all SMCs credited under the Safeguard Mechanism.
+ Application of differentiated baseline decline rates, which the Consultation Paper notes might initially be most relevant for EITEs just exceeding their baseline that are impacted by costs largely due to the baseline decline rates themselves. However, this could reduce environmental effectiveness (as emissions are not reduced quickly enough) as well as impacting fairness, as other entities would need to reduce emissions faster.

The Government is now seeking consultation on how best to treat EITEs under the Safeguard Mechanism, including (among other things):

+ the appropriateness of a comparative approach built on existing EITE definitions;
+ the effectiveness of additional funding opportunities and the kinds of financial or other arrangements that would assist decarbonisation in this space. In that regard, the Government expressly requests feedback on appropriate design features for the Powering the Regions Fund; and
+ whether providing SMCs directly or applying differential baselines is appropriate support for EITEs.

TRANSITIONING TO EMERGING TECHNOLOGIES

The Government has recognised that for certain industries, the availability of cost-effective abatement technologies may be delayed and that some form of inter-temporal flexibility may be needed to manage the transition to declining baselines.

The existing concept of multi-year monitoring periods (**MYMPs**), which currently operate over two or three year periods to manage compliance risks, have been highlighted by the Government as potentially being an appropriate feature of the Safeguard Mechanism to continue, particularly given that some technologies required to decarbonise industries are yet to become commercially viable. MYMPs could be determined on a facility basis and with regard to current and emerging technologies.

However, the Government proposes that MYMPs are only available in certain circumstances, for instance where a facility "reasonably anticipates" that it will be able to reduce its emissions over the MYMP period and, further, that MYMPs would not extend beyond 2030 to ensure that actual emissions reductions are achieved. Given the imperative to reach net zero by 2050, and indeed the growing calls to reach net zero even earlier than that and with less reliance on carbon credits, ensuring that decarbonisation does not occur right at the very end of this time frame is imperative in limiting global warming. Striking the balance between flexibility in the face of technology challenges while also encouraging genuine abatement will be key.

BROADER POLICY ISSUES IN THE CONSULTATION PAPER

Other policy issues considered in the Consultation Paper include:

+ what transitional or other arrangements should be in place for site-specific production variables;
+ whether oil refinery production variables should remain fixed and not generate SMCs, or become production adjusted and be eligible to generate SMCs;
+ whether existing government-defined production variables are suitable for the Safeguard Mechanism;
+ whether the inherent emissions variability calculated baseline approach should be removed; and
+ in relation to landfills, whether landfill baselines should decline at the same rate as other facilities and should be able to generate SMCs in the transitional implementation phase; and also whether long-term arrangements for landfills should be considered prior to full commencement of Safeguard Mechanism reforms in 2025.

NEXT STEPS

Public submissions on the Consultation Paper are due by 20 September 2022. Further feedback will be sought on a more detailed design proposal and proposed changes to subordinate legislation later in the year. The reforms will be implemented through subordinate legislation, including the *National Greenhouse and Energy Reporting (Safeguard Mechanism) Rule 2015* (Cth), with some amendments required to be made to the *National Greenhouse and Energy Reporting Act 2007* (Cth).

Once finalised, the Safeguard Mechanism reforms are set to take effect from 1 July 2023, with two implementation phases: the first transition phase will commence on 1 July 2023, with changes to take full effect from 1 July 2025. The design of these phases will be informed by the current consultation process.

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SAFEGUARD MECHANISM REFORM: GOVERNMENT PUBLISHES DRAFT SAFEGUARD MECHANISM CREDITS LEGISLATION

12/10/2022

SAFEGUARD MECHANISM CREDITS LEGISLATION

In August, the Department of Climate Change, Energy, the Environment and Water released a Consultation Paper outlining its proposed reforms to the Safeguard Mechanism, Australia's primary instrument for controlling carbon emissions from large industrial emitters which make up approximately 28% of Australia's direct emissions. A pillar of the proposed reforms was the introduction of tradeable 'Safeguard Mechanism Credits' (**SMCs**) to be issued to facilities covered by the Mechanism whose emissions fall below their designated 'baseline' emissions limit. The purpose of introducing SMCs is to allow covered facilities who can more easily reduce their emissions below their baseline to generate credits which they can sell to facilities whose emission reduction options are more costly or limited, thereby incentivising cost-efficient carbon abatement. Our summary of the Government's Consultation Paper and SMCs can be found in this article 'Safeguard Mechanism reform: consultation paper released for feedback'.

The Government has received approximately 240 submissions from a range of stakeholders across government, community groups and industry and is considering those as it now prepares amendments to the Safeguard Mechanism Rule. Meanwhile, the Department has released draft legislation which will enable the issuance by the Clean Energy Regulator, transfer and surrender of SMCs. The draft, titled the Safeguard Mechanism (Crediting) Amendment Bill 2022 (Cth) (**Draft Bill**), and accompanying legislative rule (the Carbon Credits (Carbon Farming Initiative) Amendment (Safeguard Facility Eligibility Requirements) Draft Rules 2022) (**Draft Rule**) are open for public consultation until 28 October 2022.

This update covers key features of the Draft Bill and Draft Rules, and what we expect to see over coming months as the Government counts down to the Safeguard Mechanism reforms taking effect in mid-2023.

KEY FEATURES OF THE DRAFT BILL

Safeguard Mechanism Credits to have similar characteristics to ACCUs

The Draft Bill amends the National Greenhouse and Energy Reporting Act 2007 (Cth) (**NGER Act**) to allow for creation of SMCs, and also to apply the same laws to SMCs about registration, transfers and use for compliance obligations that already apply to Australian Carbon Credit Units (**ACCUs**). The Bill also make changes to the Australian National Registry of Emissions Units Act 2011 (Cth) (**ANREU Act**) so that SMCs are treated in the same way as ACCUs in the Australian National Registry of Emissions Units (**ANREU**). Importantly, the Draft Bill enables legislative rules to prescribe SMCs for the purposes of the definition of 'eligible international emissions units' in the ANREU Act, which will have the effect that these units – like ACCUs – are classified as GST-free under relevant tax legislation and also as 'financial products' under the Corporations Act 2001.

Use of SMCs for Safeguard Mechanism compliance

The Draft Bill classifies both SMCs and ACCUs as 'relinquishable units' that can be used by covered facilities to reduce their emissions for the purposes of complying with their Safeguard Mechanism obligations, and also allows for legislative rules to enable other types of unit to be used for this purpose. Minister for Climate Change and Energy Chris Bowen has made clear, however, that at least for the moment, international units will not be able to be used for Safeguard Mechanism compliance, and that separate legislation would be required to allow for this. The question of whether to allow the use of international units drew strong views from across the spectrum of submitters on the Consultation Paper, with some businesses and industry groups advocating for international credits (for example, Paris Agreement compliant units) to be available for compliance use. Meanwhile, others supported a ban on the use of these units, or for their use only to be considered at a later point should market liquidity become an issue.

Bankability of Safeguard Mechanism Credits

The question of whether SMCs can be 'banked' (that is, whether an SMC created in one year can be stored and then surrendered for compliance in a future year), was a key discussion point in the Consultation Paper. One benefit of banking is that it makes it easier for facilities to maintain a supply of compliance SMCs in circumstances where there are fluctuations in their emissions from year to year. However, banking runs the risk of creating future oversupply of SMCs, leading to low prices which can erode market incentives to cut emissions. In the Consultation Paper, the Government had proposed that issuance of SMCs be phased, with Phase 1 operating for 2023-24 and 2024-25, and Phase 2 operating for 2025-26 to 2029-30, and that SMCs could be banked within – but not across – phases. A number of stakeholders who submitted feedback on the Consultation Paper supported banking, although many suggested that this should be in limited circumstances. The Government has not yet reached a decision on whether or how to limit banking. However, by requiring the Regulator to record the financial year vintage of each issued SMC, the Draft Bill reserves the ability for the Government to limit banking of SMCs, for example, by specifying that SMCs issued in certain financial years cannot be surrendered for compliance in future years.

New carbon abatement projects at covered facilities cannot generate ACCUs

A further proposed amendment included in the Draft Bill is to the Carbon Credits (Carbon Farming Initiative) Act 2011 (Cth) (CFI Act) to allow legislative rules to prevent new carbon abatement projects that reduce covered emissions at Safeguard facilities from eligibility to generate ACCUs: instead, these would be able to generate SMCs. Accordingly, the accompanying Draft Rule prevents new eligible offsets projects from being registered if they reduce covered emissions at a Safeguard facility.

This amendment aligns with the Government's proposal in the Consultation Paper, but contrasts with submissions from some industry stakeholders, who advocated that whether new Safeguard facility projects can earn ACCUs should be considered on a case-by-case basis. The approach to limiting eligible offsets projects that reduced covered (i.e. scope 1 emissions) at Safeguard facilities would clearly apply to projects that would have sought to use methods such as the facilities method but would not necessarily prevent the carrying out of other types of projects that sit outside the facility boundary.

Facilities no longer covered can continue generating Safeguard Mechanism Credits

Interestingly, the Draft Bill also introduces legislative amendments that will allow facilities to continue to generate SMCs if they no longer meet the emissions threshold for coverage under the Safeguard Mechanism, so as to continually incentivise emission reductions even as facilities approach the Safeguard Mechanism's coverage threshold.

Increased transparency

Whereas current legislation only requires the Regulator to publish quarterly information on the total number of ACCUs issued, the Draft Bill imposes additional obligations on the Regulator to publish information about the number of SMCs and ACCUs held in each individual ANREU account every quarter, as well as any additional information that is required by legislative rules.

Legislative rules may also provide for accounts to be exempt from this requirement. This change implements a recommendation from the Climate Change Authority to improve the transparency of the carbon credit market.

AREAS FOR FEEDBACK

The Explanatory Document notes a number of areas where the Government is seeking feedback in respect of the Draft Bill and Draft Rule. These include:

1. the provisions in Schedule 1 of the Draft Bill relating to the NGER Act and Income Tax Assessment Act 1997 (Cth), which broadly allow for the issuance, transfer and surrender of SMCs, and for their tax treatment to align with that for ACCUs;
2. the provisions in Schedule 2, which amend the ANREU Act to allow for SMCs to exist in the ANREU;
3. the provisions in Schedule 3, which change the Clean Energy Regulator Act 2011 (Cth), Clean Energy (Consequential Amendments) Act 2011 (Cth) and NGER Act to address inconsistencies in the frameworks for protecting information under these Acts; and
4. the provisions in Schedule 4 of the Draft Bill relating to the CFI Act, and the Draft Rule, which introduce changes that prevent carbon abatement projects that reduce covered emissions at Safeguard facilities from generating ACCUs.

REMAINING ISSUES FOR CONSULTATION AND NEXT STEPS FOR SAFEGUARD MECHANISM REFORM

Key aspects of the Government's proposed Safeguard Mechanism reforms that are not addressed in the Draft Bill or Draft Rule include the mechanism for setting declining baselines and the treatment of emissions-intensive trade-exposed (EITE) businesses: these will be dealt with through amendments to the Safeguard Mechanism Rule, and the Minister has indicated that feedback will be sought on these arrangements later this year. In the meantime, debate among stakeholders on these issues, as well as how future legislative rules should deal with bankability of SMCs and use of international units, is likely to continue.

With respect to timing, in a speech to the Australian Financial Review Climate and Energy Summit on Monday, the Minister indicated that he intends for the Draft Bill to pass in the 2023 Autumn parliamentary sittings, and for the Draft Rule to be finalised by the end of March 2023, so that reforms can take effect from 1 July 2023.

Meanwhile, at the end of last month, the independent review of the integrity of ACCUs closed the submission period for participants' experiences with the ACCU scheme and views on how the scheme might be improved. The review, led by Professor Ian Chubb, is expected to deliver its report to Government by the end of the year.

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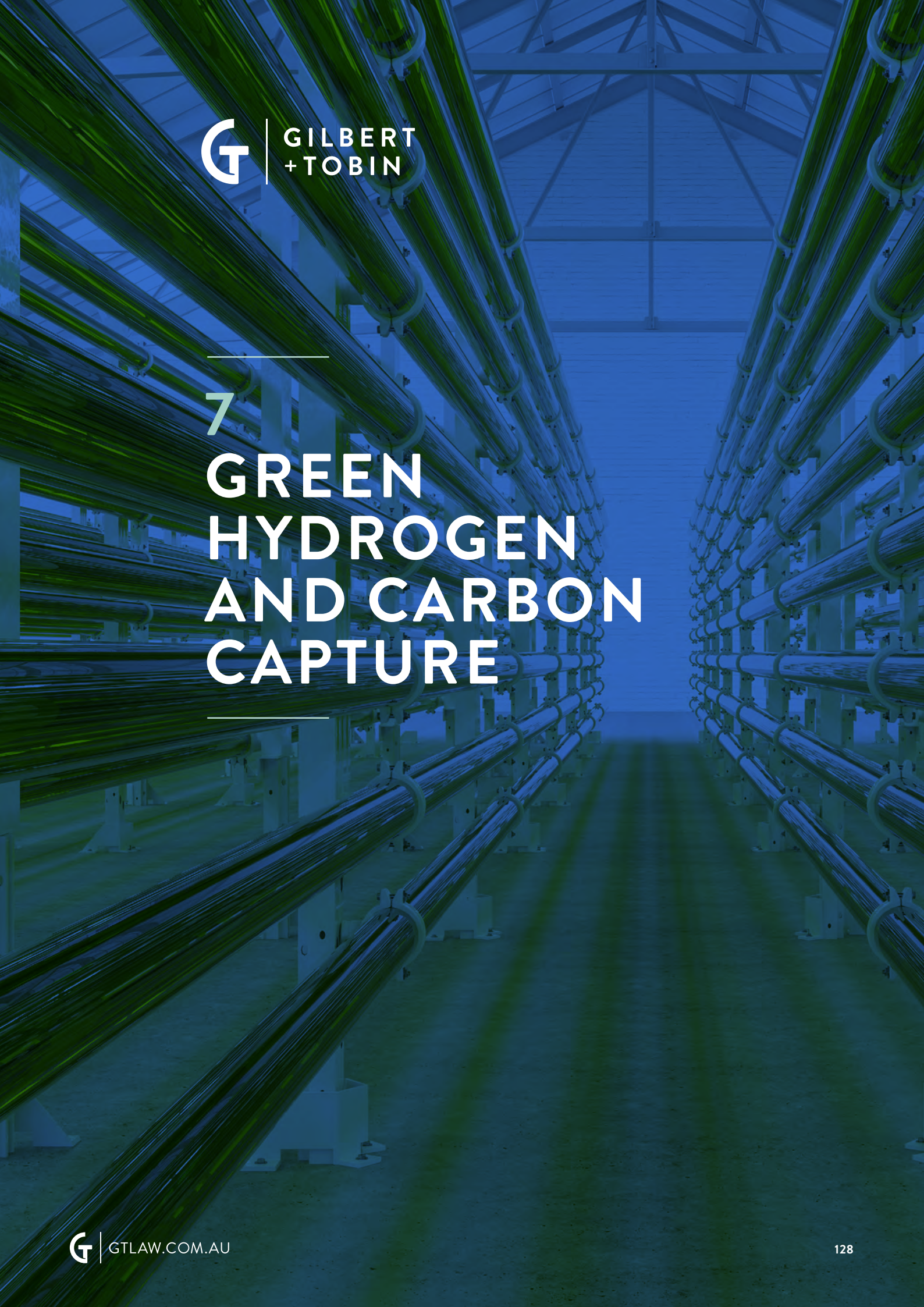
KNOWLEDGE ARTICLES YOU MAY BE INTERESTED IN:

Safeguard Mechanism reform: consultation paper released for feedback

Movements in Australia's climate and energy policy

Australia's proposed Safeguard Crediting Mechanism: An incentive for emissions reduction



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7 GREEN HYDROGEN AND CARBON CAPTURE

REFORM RUMBLES ALONG IN THE WEST – CARBON CAPTURE IN AUSTRALIA SET TO PLAY KEY ROLE

01/04/2022

This month, the Western Australian Government announced funding for a new bill to allow carbon capture, utilisation and storage (**CCUS**) to be further deployed in Western Australia (**WA**). Although WA was the first Australian jurisdiction to require carbon capture and storage (**CCS**) in connection with the Gorgon Project pursuant to project specific legislation, its regulatory regime remains undeveloped and presently does not have an industry wide legislative regime to enable CCS or CCUS projects in WA.

The new bill is one of many recent steps that suggests the McGowan Government is steadily moving ahead with overhauling the WA regulatory framework conducive to supporting global ambition for emissions reduction. This announcement, when considered in the recent context of WA Government action, offers intriguing insight into potential priority areas for policy in WA moving forward including in relation to its own emission reduction objectives.

"THE GREENHOUSE GAS STORAGE AND TRANSPORT BILL"

On 9 March 2022, Mines and Petroleum Minister Bill Johnston approved the drafting of the "Greenhouse Gas Storage and Transport Bill", which the WA Government has described as a Bill aiming "*to provide WA's mining, LNG and natural gas industries with access to opportunities to decarbonise, such as mineral carbonation and carbon capture, utilisation and storage.*"

The announcement of the Greenhouse Gas and Storage and Transport Bill follows another announcement on 3 March 2022 by the Western Australia LNG Jobs Taskforce that the CSIRO and the Global CCS Institute will complete a study relating to the benefits of CCUS in WA.

The WA Department of Mines, Industry Regulation and Safety has also been studying the feasibility of CCS in the South West of WA in the shires of Harvey and Waroona Shires as part of the "South West Hub Carbon Capture and Storage" project.

Prior to the announcement, CCS projects in WA have been limited to the Gorgon Project conducted pursuant to an agreement between the Gorgon joint venturers and the State of WA ratified under the Barrow Island Act 2003 (WA). This has meant that, until now, no legislative regime exists to authorise CCS or CCUS projects in WA outside of the Gorgon Project.

Interestingly, this is not the first time that industry wide legislation has been proposed in WA for CCS. Whilst the *Petroleum and Geothermal Energy Legislation Amendment Bill 2013* (WA) was previously debated in Parliament and aspects of that bill were considered by a standing committee on legislation in 2013, that bill was never enacted into law.

In embarking on the drafting of the Bill, WA will be joining other Australian jurisdictions that already have industry wide legislation regulating the area, namely the Commonwealth, Victoria and Queensland (see our article 'Carbon Capture – a bottomless pit or an important initiative in getting to zero net emissions? for more information on this).

READINESS FOR THE COMMERCIAL DEPLOYMENT OF CARBON CAPTURE AND STORAGE

According to The Carbon Capture and Storage Readiness Index 2018 (**CCS-RI**), Australia has the most comprehensive CCS legislation in the world. The CCS-RI identifies nations which are leaders in the creation of an enabling environment for the commercial deployment of CCS using 70 discrete criteria. Only five countries rank in the CCS-RI's highest category – Australia, Canada, Norway, the United Kingdom and the United States. The CCS-RI found that these five nations have taken significant steps to reduce domestic barriers to CCS, which include the development of:

+ supportive policy framework;
+ comprehensive legal and regulatory frameworks; and
+ detailed and targeted storage assessments.

Therefore, WA is in fortunate position that it will be able to draw inspiration in the Greenhouse Gas and Storage and Transport Bill from existing domestic regulation in Australia including its own existing regulation relating to the Gorgon Project. It will also likely look to other leading nations to deliver, in the words of the CCS-RI, a "robust" legal framework and "policy to create a business case for investment to rapidly deploy CCS for the deep decarbonisation of power and industry".

For the Bill to provide WA with robust legal framework, it must:

1. provide a clear and efficient administrative process under the CCS legal framework to apply for, and obtain, regulatory approval for CCS projects;
2. provide a comprehensive legal framework for all aspects of a CCS project, including siting, design, capture, transport, storage, closure and monitoring for potential releases of stored CO2;
3. provide an appropriate siting of projects and adequate environmental impact assessment processes;
4. provide meaningful and effective stakeholder and public consultation; and
5. deal with long-term liability for closure, monitoring and accidental releases of CO2.

AUSTRALIAN CARBON CREDIT UNITS – DECARBONISING DOLLARS

The development of CCS/ CCUS legislation in WA will also potentially enable project developers to take advantage of access to additional forms of climate finance through the Commonwealth Emissions Reduction Fund (**ERF**) which has recently expanded to allow technologies relating to CCS to earn Australian carbon credit units (**ACCUs**).

In October 2021, the Carbon Credits (Carbon Farming Initiative—Carbon Capture and Storage) Methodology Determination 2021 came into effect under the ERF. This is the method which covers activities that capture and store (or CCS projects) greenhouse gas emissions in secure geological formations.

At the same time, the Commonwealth Minister Taylor announced new ERF priorities for method development in 2022 which included carbon, capture, use and storage (or CCUS projects).

THE ROLE OF CARBON CAPTURE AND STORAGE IN WESTERN AUSTRALIAN EMISSIONS

The media release announcing the Greenhouse Gas and Storage and Transport Bill also noted that the WA Government is currently working hard to reduce its own emissions and would soon be making a related announcement, likely regarding an interim net-zero goal. Given that carbon capture and storage is a recognised method of abating emissions from hard-to-abate and other industrial sectors, we expect this Bill would form a fundamental part of any future net zero goal set by the State, which currently receives significant revenue from those sectors. The Bill is a further indication of the structural reforms currently underway in WA to modernise the regulatory and policy framework in support clean energy and decarbonisation projects. Gilbert + Tobin's Clean Energy and Decarbonisation team will continue to bring you updates regarding the raft of reforms expected to be unveiled this year. If you have any queries about how these might affect your firm or existing or proposed projects, please contact our experts for advice.

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KNOWLEDGE ARTICLES YOU MAY BE INTERESTED IN:

Carbon Capture – a bottomless pit or an important initiative in getting to zero net emissions?

READY, SET, REFORM: WESTERN AUSTRALIA'S REGULATORY READINESS FOR THE CLEAN ENERGY TRANSITION

01/06/2022

"Together we can end the climate wars. Together we can take advantage of the opportunity for Australia to be a renewable energy superpower".

In his first speech as the 31st Prime-minister, Anthony Albanese sent a clear message to not only his Federal colleagues, but also to Australian States and Territories. Cohesion, coherency and cooperation are Australia's pathway to meaningful energy reform and climate change action. If this Commonwealth government can unify Australia's push to transition, and concentrate our natural resources, skills and willingness, the nation stands to become a formidable force for change. In this article, we assess Western Australia's (**WA**) readiness for the potential shift in emphasis nationally.

Australian States and Territories need to engage in significant infrastructure development and regulatory reform in the race to become clean energy leaders and meet net zero goals between 2030 and 2050. The WA Government in particular has begun taking significant steps to expedite WA's clean energy transition and position it as a forerunner in a developing industry (such as preparing the Greenhouse Gas Storage and Transport Bill, which we discussed in our previous article Reform rumbles along in the West – carbon capture in Australia set to play a key role.)

During the transition, Government must provide clear leadership, vision, ambition and translate that into actionable policies through the effective legal and economic encouragement of innovation and investment. However, a key challenge faced by Government is striking the right balance in transforming the energy mix against the scientific, political and economic demands for decarbonisation in the quest to wrest control of our climate through reform.

AUSTRALIA'S CLIMATE AND ENERGY POLICY FRAMEWORKS – UNIFY AND CODIFY

A startling feature of Australia's energy transition is the lack of a coherent energy policy framework at a Commonwealth level. In the absence of such guiding principles, the approach of State and Federal Government as a cohesive force has been lacking. However, the States, recognising the race to be global and industry leaders is far from over, have largely driven all major reform thus far. A national uniform approach to the transition would surely be beneficial and increase the efficiency of a currently disparate national approach punctuated by a myriad of State policies built and implemented at department-level. National uniform laws are not a foreign concept to Australian State and Federal governments.

While WA might benefit from a unification of its many climate and energy policies and strategies, the benefits of already having such a clear vision and implementation provide a clear selling point for energy investors considering the State. As we set out below, the focus areas and key strengths of WA as a clean energy producer are clearly communicated through policy, the implementation of which we will keenly observe.

However, harmonisation of Australia's climate and energy policy framework would not be without difficulties for WA. One of the State's key strengths – a high concentration of natural resources – logically results in a high concentration of energy intensive industry, amounting to WA being home to approximately one third of Australia's biggest emitters. The effect of such concentration can be seen in WA being the only State to increase emissions since 2005. The introduction of emissions reductions targets and changes to Australia's climate change laws and policies touted by federal Labor may result in, not only increased investment in renewable energy and the energy transition in WA, but also pressure on WA to readjust its own policies. In this regard, we understand an announcement may soon be forthcoming from the WA Government regarding an interim net-zero goal.

LAND TENURE REFORM

Land tenure reforms including a new form of tenure – the diversification lease – were announced in November and December 2021 alongside the release of 3 million hectares of unallocated Crown land for carbon farming. The purposes of diversification leases will include carbon farming, providing further support for the creation of environmental offsets and promoting renewable energy, such as hydrogen, wind and solar. We understand that a bill is expected to be introduced into Parliament by the end of the year.

Whilst industry awaits the introduction of the reforms, a number of assumptions need to be made by project proponents in WA regarding the likely effect of the reforms and the complex range of conflicting land use and approval pathway issues that will arise as a result of the new diversification lease being introduced.

For an analysis of the announcements and published information read "Renewable energy and reusable reforms: WA's land tenure amendments are familiar but exciting" and for the takeaways from an in-person consultation session with the then Minister for Lands, Tony Buti, and representatives of the Department of Planning, Lands and Heritage, read our update "WA Land Tenure Reform Bill expected within months".

HYDROGEN GAS BLENDING

In January 2022, a report into the feasibility of blending hydrogen into the Dampier-Bunbury Gas Pipeline was released which found up to 9% hydrogen blending was feasible, despite noting operational and regulatory barriers. The WA Government will need to consider which legislation and regulation needs to be amended in order to enable hydrogen gas blending, with some relevant regulation already identified in the report and summarised in our article Only a pipe dream: Report into hydrogen gas blending in the DBNGP. This identification will be critical to the feasibility of hydrogen projects that are predicated on the ability to transport hydrogen through the natural gas pipeline network. However, it is important to note that the business case for blending hydrogen with natural gas remains informed by implementation challenges such as the introduction of new infrastructure and the necessary upgrade of existing infrastructure to support blending.

HYDROGEN SAFETY

Another area in which Government legislation and regulation will support the development of a hydrogen industry is the development of health, safety and environment standards. Queensland has already announced and released a draft code of practice for hydrogen safety. WA's new work, health and safety (**WHS**) laws have only recently commenced, and there is a substantial amount of regulatory guidance and codes of practice yet to be finalized. Whether a hydrogen safety code of practice is included is yet to be revealed. Such a code could be an important risk management tool under the newly increased WHS obligations which allow approved codes of practice to be relied on in proceedings to establish if a duty of care has been discharged. Currently, a Standards Australia work program is underway to prepare standards specifically tailored to hydrogen. This will include international collaboration to ensure the standards are aligned and harmonized with international standards and approaches. An internationally aligned approach would make WA more competitive, grant greater access to the Australian hydrogen market and facilitate the development of an export market for hydrogen (or as ammonia).

HYDROGEN-FUELED TRANSPORT

Queensland, New South Wales and Victoria have also recently announced a tripartite effort to support domestic hydrogen haulage with refuelling stations and infrastructure. We await to see the WA Government's announcement relating to the recipient(s) of the Hydrogen Fuelled Transport Expression of

Interest under which up to $10 million of funding under the Western Australia Renewable Hydrogen Grants will be awarded to support hydrogen uptake in transport in WA.

GUARANTEE OF ORIGIN SCHEME

Underpinning WA's clean hydrogen future will be a guarantee of origin scheme or certification scheme. A scheme is required to enable businesses to sell verified low emissions hydrogen from renewable sources and fossil fuels with substantial carbon capture and storage. In March, the Australian Government Department of Industry, Science, Energy and Resources commenced 17 voluntary industry trials of a Hydrogen Guarantee of Origin Scheme for Australia (**H2GO**) which are currently being undertaken by the Clean Energy Regulator and will span until June 2023 with the hope to finalise H2GO soon after. H2GO considers clean hydrogen as a production pathway with the output of the scheme being a certificate but it does not specify the manner in which hydrogen would be described as "green".

The Green Hydrogen Organisation, an international organisation focused on the development and utilisation of green hydrogen and whose Board includes Ms Martina Merz of Thyssenkrupp and Dr. Andrew Forrest of Fortescue Future Industries, released a green hydrogen standard (**GH2 Standard**) at its recent Green Hydrogen Global Assembly and Exhibition in Barcelona. The GH2 Standard provides a global definition for "green hydrogen" as well as a holistic framework to evaluate the production of green hydrogen. It is intended that the GH2 Standard will provide governments with a global reference point in developing their national standards. The WA Government will no doubt be paying attention given the developing Commonwealth H2GO scheme and given they have already committed to the Smart Energy Council's Zero Carbon Certification Scheme (formally a green hydrogen-specific certification scheme).

PORTS AND EXPORT

In early March this year, a review into WA's shipping industry was announced in relation to supply chain issues caused by floods and COVID-19. However, the scope of the review as described is likely to touch on port capacity. This will provide a useful insight to future export issues especially in relation to the export of hydrogen and ammonia from the many projects dotted along the vast WA coastline. In addition to the review of WA's shipping industry, reviews conducted by West Australian port authorities provide an insight into Government's long-term strategies and plans for each port, including their green hydrogen export capabilities. For example, the Port of Dampier Land Use Master Plan 2030 published by the Pilbara Port Authority sets out strategies to support anticipated growth at the port over the next decade. Although that Plan does not make specific reference to clean energy exports, it does note the Port of Dampier will remain a bulk liquid operator. These capabilities would likely support the export of ammonia, an alternative method of hydrogen export.

In Port Hedland, extensive consultation is being undertaken between the Pilbara Port Authority and port proponents to finalise the review of the port development plan, expected to be completed by mid-2022. It was recently announced that the plan facilitates a future bulk liquids berth in South West Creek. Given the port of Port Hedland is Oceania's biggest port, it will likely be used for the bulk export of clean energy and we anticipate that the revised port development plan will provide further insights into how the port will be adapted for this purpose. Although the WA Government plays a key role in transitioning the port of Port Hedland into a global clean energy export facility, port proponents play an equally integral role, given they likely fund the development.

The range of structural reforms currently underway to modernise the climate and energy policy framework in WA is positioning the State to be highly competitive in an increasingly global marketplace of clean energy and decarbonisation projects. Gilbert + Tobin's Clean Energy and Decarbonisation team will continue to bring you updates regarding the raft of reforms expected to be unveiled this year. If you have any queries about how these might affect your firm or existing or proposed projects, please contact our experts for advice.

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KNOWLEDGE ARTICLES YOU MAY BE INTERESTED IN:

Reform rumbles along in the West – carbon capture in Australia set to play key role

Emissions Reduction Fund: Implementation of the Direct Action Policy to Tackle Climate Change

Renewable energy and reusable reforms: WA's land tenure amendments are familiar but exciting

GILBERT +TOBIN

8 LAND TENURE AND NATIVE TITLE

DIVERSIFICATION LEASES POLICY RELEASED FOR PUBLIC COMMENT IN WA

02/08/2022

The Western Australian Department of Planning, Lands and Heritage (**DPLH**) has released for public consultation a draft Policy Framework that will guide the use of the proposed "diversification leases" on Crown land under the *Land Administration Act 1997* (WA) (**LAA**).

WHAT ARE DIVERSIFICATION LEASES?

"Diversification leases" are the proposed new form of non-exclusive leasehold tenure; intended to support large scale clean energy projects and the expansion of carbon farming and other broad-scale uses in Western Australia (**WA**).

This article summarises the key aspects of the draft Policy Framework, particularly those aspects that shed new light on how the diversification lease reforms will operate upon enactment.

KEY TAKEAWAYS - DIVERSIFICATION LEASES DRAFT POLICY FRAMEWORK

+ The Policy Framework will, once the reforms are enacted, provide vital guidance in relation to key aspects of diversification leases (including minimum considerations in granting applications and suitable uses for these new leases). Underpinning the need for this framework is the expectation that the diversification lease head of power under the LAA will be broadly drafted and without overly prescriptive criteria (like the head of power for granting a section 79 lease under the LAA).
+ Broad Ministerial discretion is preserved for the Minister for Lands (**Minister**) in relation to various express matters. Combined with the guidance about how a

diversification lease should be used in conjunction with other forms of tenure (including when it is more appropriate to utilise other forms of LAA tenure instead of a diversification lease), these policy positions require careful consideration when determining the role and use (or uses) of a diversification lease in a particular project.

+ Further, material legal structuring implications for diversification lease projects will arise where there will be multiple:
  - uses/ activities (such as wind and solar developments to be conducted in conjunction with less-intensive uses such as carbon farming);
  - stakeholders (such as existing landholders (such as pastoralists), native title holders and developers); and/or
  - subleases to different sub-lessees for different purposes, as expressly contemplated in the draft Policy Framework.
+ In our view, the approval of the areas of "*substantial structures*" (for example, approval of the location of wind and solar infrastructure where applicable) by the Minister for Mines and Petroleum is expected to be one of the most challenging policy aspects related to the grant of diversification leases - with the draft Policy Framework recommending early engagement with the Department of Mines, Industry Regulation and Safety.
+ Based on our experience, we expect that uses associated with energy generation and transmission under a diversification lease will attract a material rental valuation. However, for project financial modelling purposes, the draft Policy Framework does not resolve the uncertainty regarding the market rent that will be charged for diversification leases.

The LAA amendments to include the diversification lease as a new form of tenure are currently being drafted and are set for introduction into Parliament in the second half of 2022.

For further background about diversification leases and the proposed legislative reform, see our previous updates: "Renewable energy and reusable reforms: WA's land tenure amendments are familiar but exciting" and "WA land tenure reform bill expected within months".

To join in a further discussion of the issues related to the diversification lease reforms, register for the "*Laying the foundations for a successful clean energy project: land acquisition and assembly*" session as part of G+T's 2022 Clean Energy and Decarbonisation Masterclass series: register now.

BROAD MINISTERIAL DISCRETION

Ever since the reforms were first announced in November 2021, the diversification lease has promised significant potential to:

+ enable economic growth and development through diversified land use;
+ facilitate best-practice land management and more effective administration of the WA pastoral estate; and
+ provide energy producers, pastoralists, native title parties and others with greater opportunities to get involved in the growing markets for carbon farming, hydrogen production, and wind and solar energy.

Various policy statements in the draft Policy Framework are supportive of these objectives, including that:

+ *"[the] purpose of a diversification lease is to provide for proponents to conduct single, or multiple, land uses on a large area of Crown land, where the primary land use can coexist with other land uses."* (paragraph 1);
+ *"[a] diversification lease will co-exist with other rights, including mining, native title, and the right for Aboriginal people to access unenclosed and unimproved parts of the lease."* (paragraph 2);
+ *"[there] is no minimum or maximum allowable area for a diversification lease…"* (paragraph 15);
+ *"[the] permitted land uses can be varied and flexible to include multiple land uses on the one diversification lease."* (paragraph 19); and
+ *"[the] term of a diversification lease will be considered on a case-by-case basis and granted for any length of term that is appropriate for the permitted use."* (paragraph 31).

However, key aspects of the draft Policy Framework preserve broad Ministerial discretion in relation to various express matters and guide how the diversification lease should be used with other forms of tenure – these have been outlined below.

Generally, the preservations of Ministerial discretion in relation to specific matters have merit considering:

+ the Crown is the owner of the land and there is a stated policy intention to serve proponents requiring "*a large area of Crown land*";
+ the expected demand for diversification leases, economy wide, as WA industry urgently positions itself to reach "net-zero", decarbonisation and ESG goals and outcomes; and
+ the expectation that the head of power under the LAA for granting a diversification lease will be broadly drafted and without overly prescriptive criteria (like section 79 leases under the LAA).

MINIMUM CONSIDERATIONS FOR DIVERSIFICATION LEASE GRANTS

The Policy Framework sets out "*minimum considerations*" for determining when a diversification lease may be granted by the Minister.

Key among these is that the lease must be able to co-exist with other rights and uses (reflecting its non-exclusive nature) and that the proponent has a need for a large area of Crown land (reflecting

the intention of the tenure reform to address a lack of suitable tenure for broadscale projects).

Other stated considerations include whether a proposed use provides "*social, economic or environmental benefit*", the "*land is appropriate for the intended uses*" or the grant will provide "*social and economic opportunities to Aboriginal peoples/ communities*". The WA land allocation and other outcomes that these policy positions are directed towards are fairly obvious and well-known already, including that land in WA with the best wind and solar resources is used under (or in association with) a diversification lease for green energy generation.

The requirement for the proponent to have the "*capability, capacity and experience to deliver the intended outcome*" will drive natural selection in a customary and a likely uncontroversial (albeit, broad) way.

In addition, an overarching discretion is expressly preserved by the statement that diversification lease applications will be considered by the Minister on "*a case-by-case basis*".

These policy positions require careful consideration when determining the role and use (or uses) of a diversification lease in a particular project.

These minimum considerations will also have material legal structuring implications for diversification lease projects, particularly where there will be multiple:

+ uses/ activities, such as wind and solar developments to be conducted in conjunction with less-intensive uses such as carbon farming;
+ stakeholders, such as existing landholders (such as pastoralists), native title holders and developers; and/or
+ subleases to different sub-lessees for different purposes, as expressly contemplated in the draft Policy Framework.

The draft Policy Framework also incorporates potentially important "*competing application*" protections – with the Minister being entitled to take into account "*benefits to the State, the relevant region or locality*" and "*any other considerations the Minister may deem relevant*" - and also contemplates competitive tendering for highly sought-after land. Whilst not expressly stated in the draft Policy Framework, these policy positions go to "*land-banking*" issues and would likely enable the Minister to determine applications in a manner which best serves the increasingly urgent and onerous requirements of the clean energy and decarbonisation transition.

The draft Policy Framework is also quite explicit that diversification leases will not be granted "*to improve a party's negotiating position in relation to third party proposals*", recognising the current competition for Crown land (to say the least) in WA.

It should be noted that securing the consent/ agreement of any existing interest holders, such as pastoralists (who must surrender their pastoral lease to enable the grant of a diversification lease) and native title holders, may go a long way to addressing risks associated with competing applications and/or competitive tendering requirements.

"FINANCIAL AND MANAGEMENT CAPACITY" AND "PUBLIC INTEREST" TESTS

There will be no minimum or maximum allowable area for a diversification lease, however the factors that the Minister may take into account in granting a diversification lease are expressed to include:

+ the proponent's "*financial and management capacity to commence the intended use in a timely manner*"; and
+ whether the grant is likely to "*result in a concentration of control over Crown land such as to be against the public interest*".

The "*concentration of control/ public interest*" criteria is a pre-existing concept found in the LAA in relation to pastoral lease holdings and concepts of "financial and management capacity" are customary to energy and resources legislation in various jurisdictions.

Even so, these criteria will necessitate input from various legal and non-legal advisers in preparing diversification lease applications as the Policy Framework has noted the need for rigour behind an applicant's submission. In the absence of more detailed policy guidance, there is also a risk of "teething issues", such as risk of delays in approvals processes, arising from the need for the Government to assess "*financial and management capacity*" to conduct projects which are at the cutting edge of industry and technical innovation (such as green hydrogen and ammonia projects).

One glaringly obvious omission in the Policy Framework is the lack of any statement on how foreign ownership will be considered. Given these leases will be a direct grant by the State, in most cases they will not be assessed under Australia's foreign investment laws. The State has a published policy relating to foreign ownership of pastoral leases but it appears it does not intend to make a similar statement in relation to these new diversification leases, presumably leaving that to the Minister's discretion and the "*capability, capacity and experience*" test.

The draft Policy Framework also flags potential lease termination consequences if the lessee does not commence use of the diversification lease within a reasonable period of time and in accordance with the lease. We can expect the lease terms will impose specific commencement timeframes that are negotiated in the context of the specific use or project involved. The Policy Framework has also flagged the potential for options to lease

being used where project details and/or the affected land areas are yet to be confirmed.

In addition, the lease terms should set out greater granularity regarding the concept of "*commence using*" to ensure "*commencement*" does not occur in such a way that allows large areas to remain under-exploited during the diversification lease term.

TENURE TOOLBOX

The diversification lease is a non-exclusive form of tenure that is intended to be used in conjunction with other forms of LAA tenure – such as (exclusive) section 79 leases and (non-exclusive) easements. This is reflected in the policy statement that "*[a] diversification lease may be granted to enable a range of activities that are associated with or ancillary to intensive activities on land outside the diversification lease area*" (paragraph 7).

However, the draft Policy Framework provides important guidance by specifying that diversification leases are not suitable for certain type of uses – in particular:

+ the primary land use must be able to "*co-exist with other land uses*" (paragraph 1);
+ the appropriate form of tenure for activities which "*can be carried out on a smaller land area*" and/or which will be "*predominantly intensive*" is an (exclusive) section 79 lease (paragraph 4); and
+ a diversification lease will not be granted solely for a "*highly intensive land use*", grazing or mining (paragraph 20).

These references to "*intensive*" land uses should be read as references to the types of industrial activities that until now have been conducted on exclusive land tenure under the LAA such as a section 79 lease – say, the construction and operation of power stations and other similar industrial facilities. This also means that, in the future, the construction and operation of hydrogen and ammonia production facilities will not occur on a diversification lease (but on land "*outside*" of the diversification lease area).

Rather, diversification leases are intended to be most suitable for the construction and operation of wind turbines and associated cabling and related infrastructure (in addition to other less-intensive land uses). Whether diversification leases or exclusive tenure will be the most suitable form of tenure for solar farms may be determined on a case-by-case basis, particularly having regard to an operational need to fence-off or exclude access to large land areas on which solar arrays will be constructed.

MINISTER FOR MINES AND PETROLEUM APPROVAL

One of most challenging policy aspects of the new reforms relates to the approval of the location of wind and solar infrastructure for the purposes of the *Mining Act 1978* (WA) (**Mining Act**).

The grant of a diversification lease requires the approval of the Minister for Mines and Petroleum under section 16(3) of the Mining Act (which applies an existing legislative requirement that no Crown land in a mineral field shall be leased, transferred in fee simple or otherwise disposed of without prior Ministerial consent). This legislative requirement is the basis for the stated policy position that the Minister for Mines and Petroleum must first approve of:

+ the "*uses proposed under the diversification lease, including the locations of those uses within the lease area*"; and
+ the "*locations of any substantial structures to be erected*",

with a new approval required to "*vary the permitted the use*" and/or "*change the location of substantial structures or infrastructure*" (paragraphs 11 and 12).

There will also be amendments to section 20 of the Mining Act that will have the effect of preventing mining from being conducted on the areas of the "*substantial structures*" unless written consent from a lease holder is otherwise obtained.

For this reason, the approval of the areas of the "*substantial structures*" (being, approval of the location of wind and solar infrastructure where applicable) by the Minister for Mines and Petroleum is expected to be one of the most challenging policy aspects related to the grant of diversification leases as that Minister will take into account the various relevant customary factors - including if the land is prospective for mining (such as any known current or future resource or current or future potential development), amongst other factors.

For this reason, the draft Policy Framework suggests engagement with the Department of Mines, Industry Regulation and Safety as to the location of any substantial structures and/or cables at an early stage.

The status of the amendments to section 20 of the Mining Act, including the interaction with the regime under the Mining Act for the payment of compensation, are not addressed by the draft Policy Framework, which only sets out the policies from the perspective of DPLH and the Minister for Lands.

RENT AND VALUATION CONSIDERATIONS

As expected, the draft Policy Framework provides limited guidance regarding the calculation of the "*market rent*" that will apply to diversification leases, other than stating that it will be assessed by the Valuer-General and the valuation will consider the permitted uses set out in the lease. Based on our experience in analogous circumstances, we expect that uses associated with energy generation and transmission will attract material rental valuations. Given the need to reflect such material amounts in project financial models, relevant proponents should seek relevant legal and non-legal advice at an early stage.

CONSULTATION ON THE DRAFT POLICY FRAMEWORK

DPLH has invited comments on the draft Policy Framework, with consultation closing on 13 August 2022.

Gilbert + Tobin operates at the forefront of the energy and resources sector and interacts extensively with industry experts, Government, regulators and key industry stakeholders to provide a meaningful contribution to the clean energy and decarbonisation transition.

We have extensive experience advising on land assembly for complex projects clean energy projects in WA. For advice on the how the diversification lease reforms may affect your firm or existing or proposed projects, please contact one of our experts.

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KNOWLEDGE ARTICLES YOU MAY BE INTERESTED IN:

WA land tenure reform bill expected within months

Developments in politics and legislation in Australia's race to embrace clean energy opportunities

Pilbara's Powerhouse - Our observations from the 2022 Pilbara Summit

WA GOVERNMENT DIVERSIFICATION LEASE POLICY SHOULD BE TOUGH ON LAND USE

30/09/2022

WA is home to some of the best land for renewable energy projects—in particular the Pilbara, where the combination of intense sun and wind presents an unparalleled opportunity to generate renewable energy during the day and through the night for most of the year. On a global scale, land like this is highly valuable in terms of its renewable energy potential. Any policy surrounding wind, solar and green hydrogen projects therefore needs to ensure that value is fully realised.

Given this, the release in June 2022 by the WA Department of Planning, Land and Heritage (**DPLH**) of its *Exposure Draft on the Proposed Policy Framework guiding the use of Diversification Leases on Crown land under the Land Administration Act 1997* (**Exposure Draft**) (which we first commented on in our article *Diversification leases policy released for public comment in WA*) requires a closer look at whether adequate protections will be incorporated into the diversification lease regime to ensure valuable land assets, such as the Pilbara, are fully utilised.

The Exposure Draft sets out the proposed policy framework in relation to the diversification lease regime, expected to be implemented later this year pursuant to the proposed Land and Public Works Legislation Administration Bill 2022 (WA). The Exposure Draft includes policies regarding the grant of diversification leases to project proponents as well as indicating that proponents will need to 'use' their diversification lease or risk 'losing' it.

KEY TAKEAWAYS – REALISING THE VALUE IN DIVERSIFICATION LEASE LAND FOR RENEWABLE ENERGY PROJECTS

- Diversification lease proponents must demonstrate the necessary capability, capacity and experience to deliver the project they intend to operate.
- Looking to examples of 'capability' or 'capacity' requirements in other WA and Commonwealth legislation, proponents will likely be required to demonstrate technical and financial capacity at the very least.
- Competitive tendering for diversification leases rather than granting tenure by application will allow the WA Government to realise the most value from land, given that it will create a formal process for identifying the most suitable applicant.
- Where proponents do not adequately realise the value of the land granted under a diversification lease, the WA Government should revoke the grant. There are adequate policy reasons for taking a strict stance on this issue.

PROPOSED GRANT REGIME

Under the Exposure Draft, diversification leases will only be granted where a proponent demonstrates the "*capability, capacity and experience to deliver the intended outcome*" (paragraph 3(e)). The terms capability and capacity are not explained further in the Exposure Draft, other than a subsequent reference to "financial and management capacity" (paragraph 15(a)). It would seem that capability is therefore a reference to technical capability.

The Minister for Lands will be able to grant a diversification lease through private treaty or a public tender-type process (paragraph 5). Where there are competing applications for a diversification lease, the Minister for Lands will have discretion as to the grant, including considering (paragraph 8):

- *"the benefits to the State, the relevant region or locality;*
- *the rights and interests of existing land users/interest holders;*
- *ensuring a diversity of investment; and*
- *any other considerations the Minister may deem relevant."*

Where the consent of pastoralists and/or native title parties is required for the grant of the diversification lease, we expect that some considerations the Minister may deem relevant include which applicant has or will be able to obtain those third party approvals. This could give negotiating power to those third parties who obtain this first.

A proponent will also be expected "*to commence using the diversification lease within a reasonable period of time*", or risk the lease being terminated (paragraph 17).

DPLH has also indicated that it will be utilising the grant of options to lease land, which it can do under section 88 of the *Land Administration Act 1997* (WA) (**LAA**). This not only provides certainty for project proponents seeking to assemble all of the parts of their project before making their final investment decision, but enables a process for the State to ensure that all necessary approvals are obtained and the project will proceed before the lease is actually granted.

EXISTING REGIMES REQUIRING DEMONSTRATION OF CAPABILITY

Requirements around the capability and capacity of a proponent as well as commencement of land use is not currently captured by the LAA, the legislation into which the diversification lease concept will be incorporated. These are a matter for Departmental processes, Ministerial discretion and the eventual lease terms. However, questions arise as to how the State will determine a proponent's capacity—to which some answers can be found in existing legislation.

The *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) (**OPGGS Act**) sets out a tender process by which petroleum acreage is released for bidding by project proponents. The application for such a "*work-bid petroleum exploration permit*" requires details of an applicant's technical qualifications and the financial resources available to it. The Department of Industry, Science, Energy and Resources (DISER) has issued guidelines on applicant suitability, stating that the rationale for this approach is to ensure that "*Australia's petroleum resources and [greenhouse gas] storage permits*" are entrusted to capable applicants. Suitability is not only "*tested on entry into the regime*" but also "at major decision-points"; where the decision-maker is not satisfied of the applicant's suitability, the relevant application will be refused. Such a policy aims to ensure that, from the beginning, a proponent is suitable to undertake a project and, indeed, that the proponent continues to have the requisite skills. Ultimately, this ensures that the value of offshore resources is fully realised.

Similarly, the *Pipelines Act 1969* (WA) requires an applicant for a pipeline licence to demonstrate their technical qualifications and financial resources, as well as the technical advice available to the applicant. Under the *Offshore Electricity Infrastructure Act 2021* (Cth), an applicant for a licence provided under that Act must also demonstrate technical and financial capability. With hydrogen production there is, of course, the question of whether the State will be comfortable with an entity demonstrating the requisite technical experience through the use of offshore consultants and contractors, given the current dearth of local hydrogen project experience in Australia. However, we expect that DPLH, on advice from the Department of Jobs, Tourism, Science and Innovation, will take a practical approach that will recognise and work with these realities.

USE IT OR LOSE IT

In relation to ensuring prompt commencement of projects, WA Government environmental approvals frequently contain the requirement that the proposal must be 'substantially commenced' within a certain time frame. Consequently, if an applicant does not undertake their project within the time frame, the environmental approval will terminate and the project proponent will be required to re-apply for the approval.

While the use of options can assist to ensure land tenure is only granted once the project is assured of commencement, as flagged by the Exposure Draft we expect diversification lease terms to also reflect the approach above and prescribe a period of time in which the project must commence before the tenure is revoked by the Minister.

In some African countries, valuable assets are simply nationalised if their full potential is not realised. While one could argue that this may reflect less democratic nations, it is likely the case that this reflects the principle of utilising land for the greatest public good. By no means do we suggest that the WA Government should consider nationalising valuable land assets for renewable energy generation, but it should implement a clear policy that allows it to revoke diversification lease (or any preceding option) grants to holders that do not commence using the tenure within a certain time frame. There are adequate policy reasons for taking a strict stance on this issue, most importantly ensuring that maximum value is obtained from prime land locations.

REALISING THE PILBARA'S POTENTIAL

The Pilbara has been identified as a promising renewable energy and green hydrogen hub, one amongst only a few such sites in the world. A report by Net Zero Australia has found that solar hubs the size of Tasmania will be required for Australia to continue exporting current rates of energy and we expect that mega projects will flood the Pilbara with green electrolysers. Given the scarcity of land perfectly suited for green hydrogen production in particular and the once in a generation opportunity being afforded to our State, the WA Government should dispense with private treaty applications and instead focus on tendering access rights for highly productive land. This will ensure that, as under the OPGGS Act, the proponent most able to realise value from the land is given the rights to that land. We will watch with interest the extent to which the WA Government will focus on tendering.

The Exposure Draft provides a starting point for the policy that will underpin the diversification lease regime. We expect that proponents will need to demonstrate their technical and financial capability, and that DPLH will work with proponents to ensure this can be achieved. However, rather than allowing proponents to apply for diversification lease tenure, DPLH may focus on competitive tendering for the most valuable locations. In the absence of a tendering regime, the Government should be quick to revoke diversification leases where proponents are slow to realise projects.

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KNOWLEDGE ARTICLES YOU MAY BE INTERESTED IN:

Diversification leases policy released for public comment in WA

PROPOSED GUIDELINES TO THE ABORIGINAL CULTURAL HERITAGE ACT 2021

14/11/2022

Proposed guidelines have been released for comment ahead of the third and final round of co-design workshops for the *Aboriginal Cultural Heritage Act 2021* (WA) (**ACHA**). The finalised guidelines, along with the unreleased ACHA Regulations, comprise the substance of how the ACHA will work in practice to protect Aboriginal Cultural Heritage (**ACH**). We briefly set out some of the key takeaways, the underlying theme of which is that parties will need to be well-prepared in advance of the ACHA commencing. For more detailed advice, contact our team below.

Co-design workshops are being held around the State during November. G+T will again be engaging in the process and continue to provide updates as they become available. According to the latest government advice, the ACHA is expected to commence July 2023, with the Regulations Gazetted in late February 2023.

ABORIGINAL CULTURAL HERITAGE MANAGEMENT CODE

The ACHA introduces a positive requirement to undertake a due diligence assessment (**DDA**) in accordance with the ACH Management Code (Code) prior to proposed Tier 1-3 Activities. Among other things, a DDA determines what steps a proponent needs to take prior to undertaking a given activity. Having done a DDA properly may also comprise part of a defence to an offence under the ACHA.

The proposed Code sets out five steps of a DDA:

1. confirm whether the activity is located within a protected area;
2. confirm whether the activity is exempt and, if not, the activity tier of the proposed activity;
3. assess whether ACH is or is likely to be located in the proposed activity area;

4. assess if there is a risk of harm to ACH by the proposed activity; and
5. identify the persons to be notified or consulted about a proposed Tier 2 or a Tier 3 activity.

Alternative to approvals

Much of the practical details of a DDA will depend on the particular activity and location.

Early and meaningful engagement with knowledge holders is a central aspect to best practice operations, legislative compliance and operational efficiency. The Code also contemplates that DDA's which result in an agreement with knowledge holders to allow proponents to alter proposed activities to avoid risk of harm to ACH *do not need any further approval*. Pragmatic engagement from parties therefore offers potential relief from delay or constraints in obtaining ACH Permits or Management Plans.

Existing ground disturbance

The Code introduces two new defined terms – '**new and additional disturbance**' and '**like for like**' activities. If a proposed activity is 'like for like' (as compared to a prior disturbing activity) and does not cause 'new and additional disturbance', the Code states that such activities will be exempted from the DDA process by the ACHA Regulations.

Social surrounds and ACH Management Plans

The proposed guidelines also include a template ACH Management Plan – the approval required for Tier 3 activities that may harm ACH. The template is not particularly prescriptive in that it primarily sets out the broad substance of **what** should be included, rather than how it should be included. The template resembles those currently found in Heritage Agreements and survey reports.

The Code includes a recognition that some Tier 3 activities may trigger the significant proposal regime in the *Environmental Protection Act 1986* (WA). The Code states that a DDA and resulting ACH Management Plan may be considered by the EPA as sufficiently mitigating potential impacts of the proposal on social surroundings. The Code does not provide recognition of this approach from the EPA itself and it will remain to be seen whether DPLH is correct in their assessment that the processes under the EPA will, in practical terms, satisfy the EPA's requirements.

Existing surveys

Existing surveys may be used to satisfy some aspects of DDAs.

However, such surveys must be compliant with the (presently unreleased) Survey Guidelines. We expect as a minimum, reliance on existing surveys will be possible where all correct knowledge holders were consulted and contributed to the survey results. To the extent that intangible ACH and all knowledge holders are not covered by a survey, there will need to be additional work.

ACTIVITY TIER CATEGORIES

The activity categories proposed as part of the phase two co-design process have been expanded upon. Notably, 'diversification of land use that is not like for like or less' is introduced as a Tier 3 Activity, likely referencing the imminent introduction of the new form of land tenure, Diversification Leases.

The new table also provides some quantitative measures for determining the tier of general clearing and excavation works by reference to depth and scale. Some activities (such as infrastructure works in both water and on land and management of existing ACH or historical object) appear to have been upgraded from Tier 2 to Tier 3.

Those changes might reflect the difficulty of distinguishing between Tiers 2 and 3 that some proponents have raised, and the potential risks associated with a prescriptive, yet necessarily general approval framework.

LOCAL AREA CULTURAL HERITAGE SERVICES FEES FOR SERVICES GUIDELINES

Local Area Cultural Heritage Services (**LACHS**) are intended to be the primary interface for proponents under the ACHA.

Significant burden is placed on LACHS by the ACHA's framework. The policy of the ACHA is to offset the costs of LAHCS by setting up a 'fee for service' model. In this regard, Fees for Services Guidelines regulate how LACHS may charge fees. These guidelines only apply to entities appointed as LACHS pursuant to the ACHA.

Notably, the guidelines not only regulate how much can be charged, but also what tasks can be charged for and by whom. The guidelines point to section 48 of the ACHA (LACHS' functions) as the basis for the ability to charge for a given task. This obviously suggests any activity straying beyond the legislative functions is not covered, but also potentially creates risk by requiring legislative interpretation by non-judicial entities.

The Guidelines set out three roles that can charge for services – LACHS Heritage Officer (**LHO**), LACHS Senior Heritage Officer (**LSHO**) and Expert Service Provider (**ESP**) such as Elders, legal and heritage professionals.

The approved fees range from $100 per hour for LHOs to $2,000 per day for ESPs. Heritage professionals are capped at $1500 per day, while legal professionals' rates are limited by the Legal Profession (Solicitors Costs) Determination. Administration fees are set at 15% and there is a 10 hour per day cap for services with hourly rates, with out of pocket expenses to be determined at cost plus GST or according to relevant ATO allowance rates.

LACHS may approach the ACH Council to have fees exceeding the guidelines approved but will need to demonstrate complexity or urgency.

CONSULTATION AND KNOWLEDGE HOLDER GUIDELINES

The Consultation and Knowledge Holder Guidelines are concerned with genuine and meaningful engagement in a cross-cultural context. The Knowledge Holder Guidelines establish persons or groups to contact where the primary entities are not existent or responsive. LACHS are the first point of contact, in the absence of which proponents should seek advice from Native Title Parties and Registered Native Title Bodies Corporate, local Aboriginal groups, or in the last instance, the DPLH. For areas with multiple knowledge holders, each will need to be consulted and notified as required by the ACHA.

The Consultation Guidelines set out several requirements proponents need to demonstrate compliance with. In this respect, documentation of all processes and attempts to consult is a necessary risk management tool.

There are timeframes for consultation that could impact operations for some proponents, especially junior explorers. Those timeframes may be shortened by agreement between the parties, but it is difficult to see a circumstance where that would occur short of entering a full agreement. Obviously, and perhaps more so than presently, early engagement and forward-planning will be necessary for proponents to minimise operational impact.

In addition to timeframes, proponents must also consider the form in which information is delivered throughout the consultation process to ensure such consultation is meaningful for all parties. Readily understandable information about the proponent's project will also be relevant to the requirement to have obtained knowledge holders' informed consent for ACH Management Plans pursuant to s 146 of the ACHA.

PRESCRIBED TIMEFRAMES

There have not been significant changes to the approvals timeframes.

Parties negotiating an ACH Management Plan by consent now have 100 business days (or more by agreement) to reach agreement before the ACH Council can become involved. For parties unable to reach agreement, the timeframe for the ACH Council to make its recommendation to the Minister has been shortened from 120 to 60 business days. ACH Permits now contemplate a maximum 50 business days for approval. However, the ACH Council may 'stop the clock' on these timeframes if it requests further information.

These timeframes again highlight the need to plan ahead, especially in light of the burden that LACHS will carry without further resourcing.

PROTECTED AREA ORDERS

Protected area orders have the effect of excluding activities from a given area that has outstanding significance. Only knowledge holders may apply for a protected area order. If an area is subject to an order, it cannot be accessed by proponents unless in accordance with conditions set out by the order (if any) or in accordance with the Regulations.

Applications are made to the ACH Council which must form a view and make a recommendation to the Minister with reference to the following factors:

+ Community health –the ACH is central to the ongoing wellbeing of Aboriginal people, particularly where there is a traditional obligation to prevent harm to the ACH;
+ Sacred – including Dreaming places and ceremonial grounds;
+ Educational potential – protection is required to ensure generational education or more widespread education resulting in increased awareness, understanding and appreciation of ACH;
+ Contemporary usage – where the cultural value of an area remains through customs and traditions;
+ Enhancing knowledge – the potential to generate research outcomes that benefit Aboriginal people and to help further the understanding of Country and Culture;
+ Uniqueness or rarity of ACH within its context; and
+ Protection into the future – where the ACH has already been degraded and protection is needed for preservation.

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KNOWLEDGE ARTICLES YOU MAY BE INTERESTED IN:

What does Aboriginal heritage reform look like?

Slow down and enjoy the surroundings: Cultural tourism and the Native Title Act expedited procedure

GILBERT +TOBIN

9 GLOBAL PERSPECTIVES

THE EFFECT OF THE SEC'S PROPOSED CLIMATE-RELATED DISCLOSURES ON AUSTRALIAN COMPANIES

01/04/2022

On 21 March 2022, the United States Securities and Exchange Commission (**SEC**) issued a proposed rule (**Proposed Rule**) to enhance and standardise the climate-related disclosures provided by public companies including both domestic and foreign private issuers. The Proposed Rule seeks to amend the Securities Act of 1933 and the *Securities Exchange Act* of 1934 (**Exchange Act**) to require public companies (which includes foreign private issuers) to provide disclosures regarding their annual greenhouse gas (**GHG**) emissions and the climate-related risks their businesses face.

In introducing the Proposed Rule, SEC Chair, Gary Gensler, stated "*I believe the SEC has a role to play when there's this level of demand for consistent and comparable information that may affect financial performance. Today's proposal thus is driven by the needs of investors and issuers.*"

SEC's consideration of this issue follows the introduction of mandatory climate risk disclosures by corporate regulators in countries including the UK, the EU, Switzerland, Hong Kong, Japan, Singapore and New Zealand. It draws on the recommendations of the Taskforce for Climate-related Financial Disclosures (**TCFD**). Whilst not mandatory in Australia, APRA and ASIC have both cited the TCFD recommendations as being best practice for climate-related financial disclosures. The Investor Group on Climate Change (**IGCC**) has also called for Australia to make climate-related financial disclosures mandatory.

The Proposed Rule will be open for consultation until the later of 30 days after the proposal's publication in the Federal Register or 20 May 2022. Whilst a final rule could be adopted later in 2022 and taking effect in financial year 2023, it is expected that there will

be highly divergent views on the scope and content of the Proposed Rule, which may draw out the process and could lead to legal challenges.

Australian companies who have securities registered under the Exchange Act will need to be across these disclosure requirements as they may need to include climate-related information in their filings. The Proposed Rules, if adopted, may also inform the scope and content of future disclosure requirements in Australia.

CONTENT OF PROPOSED DISCLOSURES

The Proposed Rule would require public companies (including foreign private issuers) to provide similar disclosures to those under the TCFD recommendations across the areas of governance, strategy, risk management and metrics and targets, informed by scenario planning.

Assessment of material impact of climate risk

The Proposed Rule would require companies to disclose any climate-related risks reasonably likely to have a material impact on the company's business or consolidated financial statements which may manifest over the short, medium or long term.

Climate-related risks means the actual or potential negative impacts of climate-related conditions and events on a company's consolidated financial statements, business operations, or value chains (including both upstream and downstream activities) as a whole, and includes both physical and transition risks.

Physical risk includes both acute and chronic risks to a company's business operations or the operations of those with whom it does business. The Proposed Rule defines "Acute risks" as event-driven risks related to shorter-term extreme weather events, such as hurricanes, floods, and tornadoes. "Chronic risks" are defined as those risks that the business may face as a result of longer term weather patterns and related effects, such as sustained higher temperatures, sea level rise, drought, and increased wildfires, as well as related effects such as decreased arability of farmland, decreased habitability of land, and decreased availability of fresh water.

Transition risks refer to the actual or potential negative impacts on a company's consolidated financial statements, business operations, or value chains attributable to regulatory, technological, and market changes to address the mitigation of, or adaptation to, climate-related risks. These can relate to regulatory, technological, market (including changing consumer, business counterparty, and investor preferences), liability, reputational, or other transition-related factors.

Companies will be required to specify whether an identified climate-related risk is a physical or transition risk, and the nature of that risk, so that investors can better understand the nature of the risk and the company's actions or plan to mitigate or adapt to it.

The SEC notes that a matter is material if there is a substantial likelihood that a reasonable investor would consider it important when determining whether to buy or sell securities or how to vote.

The disclosure of climate-related opportunities is optional to allay any anti-competitive concerns that might arise from a requirement to disclose a particular business opportunity.

The SEC has not proposed a specific range of years to define short, medium and long term time horizons. Instead, companies are required to describe how it defines these time horizons to allow companies to select the time horizons most appropriate to them.

Companies must also discuss their assessment of the materiality of climate-related risks over the short, medium, and long term to ensure companies are considering the dynamic nature of climate-related risks. The Proposed Rule notes that the materiality determination regarding potential future events requires an assessment of both the probability of the event occurring and its potential magnitude or significance to the company. Noting the difficulty in determining future impacts for some businesses, it is proposed that the forward-looking statement safe harbors pursuant to the Private Securities Litigation Reform Act (PSLRA) would apply, assuming the conditions specified in those safe harbor provisions are met.

Disclosure regarding climate-related impacts on strategy, business Model and outlook

Once the company has described the climate-related risks reasonably likely to have a material impact on the business or consolidated financial statements over the short, medium, and long term, it is then required to describe the actual and potential impacts of those risks on its strategy, business model, and outlook, and the time horizons in which those risks may manifest. This would require disclosures regarding:

+ business operations, including the types and locations of its operations;
+ products or services;
+ suppliers and other parties in its value chain;
+ activities to mitigate or adapt to climate-related risks, including adoption of new technologies or processes;
+ expenditure for research and development; and
+ any other significant changes or impacts.

The Proposed Rule would require a company to discuss how it has considered the identified impacts as part of its business strategy, financial planning and capital allocation. This includes providing both current and forward-looking disclosures that facilitate an understanding of whether the implications of the identified climate-related risks have been integrated into the company's business model or strategy, including how resources are being used to mitigate climate-related risks.

The SEC notes that companies are required to provide a narrative

discussion of whether and how any of its identified climate-related risks have affected or are reasonably likely to affect the company's consolidated financial statements. However, this narrative discussion of the climate-related impacts on its consolidated financial statement should cover more than just short-term impacts.

Carbon offsets

If a company has used carbon offsets or renewable energy certificates (RECs) as part of its emissions reduction strategy, information about the carbon offsets or RECs is required to be disclosed, including how much of the progress made is attributable to offsets or RECs. The SEC notes that understanding the role that carbon offsets or RECs play in a company's climate-related business strategy can help investors gain useful information about the company's strategy, including the potential risks and financial impacts. Companies that purchase offsets or RECs would need to reflect the additional set of short and long term costs and risks, including the risk that the availability or value of offsets or RECs might be reduced by regulation or market changes.

Maintained internal carbon price

An internal carbon price is defined as an estimated cost of carbon emissions used internally within an organisation. If a company uses an internal carbon price, it would be required to disclose:

+ the price in units of the company's reporting currency per metric ton of carbon dioxide equivalent (**CO2e**);
+ the total price, including how the total price is estimated to change over time, if applicable;
+ the boundaries for measurement of overall CO2e on which the total price is based; and
+ the rationale for selecting the internal carbon price applied.

Companies would also be required to describe how they use their disclosed internal carbon price to evaluate and manage climate-related risks.

The Proposed Rule would not require a company to maintain an internal carbon price or to mandate a particular carbon pricing methodology, but where it does, the proposed disclosures would apply.

Scenario analysis

Scenario analysis is a process for identifying and assessing a potential range of outcomes of future events under conditions of uncertainty. In the climate change context, this typically involves testing how climate-related risks may impact on a business at different levels of global temperature increases.

If a company uses scenario analysis or other analytical tools to assess the impact of climate-related risks on its business and consolidated financial statements, the Proposed Rule state it must disclose a description of the scenarios, assumptions and projected financial impacts on the company's strategy under each scenario. However, the SEC is not proposing to mandate scenario-analysis.

Governance disclosure

The Proposed Rule would require a company to disclose, as applicable, certain information concerning the board's oversight of climate-related risks, and management's role in assessing and managing those risks.

At a board level, it is proposed that a company identify board members and committees responsible for oversight of climate-related risks, including:

+ their expertise;
+ the process and frequency of discussion on this topic; and
+ whether and how the board or committee considers climate-related risks as part of business strategy, risk management and financial oversight.

Additionally, disclosure about if and how the board sets climate-related targets or goals and oversees progress against those targets or goals is required.

At a management level, the Proposed Rule would require a company to disclose a number of items about management's role in assessing and managing any climate-related risks.

Risk management disclosure – risk management processes

The Proposed Rule would require a company to describe its processes for identifying, assessing and managing climate-related risks, and whether any such processes are integrated into the company's overall risk management system or processes.

In the context of risk identification, companies would be required to disclose the following factors:

+ how it determines the relative significance of climate-related risks compared to other risks;
+ how it considers existing or likely regulatory requirements or policies, such as GHG emissions limits, when identifying climate-related risks;
+ how it considers shifts in customer or counterparty preferences, technological changes, or changes in market prices in assessing potential transition risks; and
+ how it determines the materiality of climate-related risks, including how it assesses the potential size and scope of any identified climate-related risk.

In the context of risk assessment, a company would be required to describe its processes in respect of:

+ how it decides whether to mitigate, accept, or adapt to a particular risk;

+ how it prioritizes addressing climate-related risks; and
+ how it determines how to mitigate a high priority risk, including the use of insurance or other financial products.

The integration of these risks into a company's overall risk management system would also need to be disclosed.

Risk management – transition planning

A "transition plan" is defined to mean a company's strategy and implementation plan to reduce climate-related risks. These types of plans are typically seeking to align a company's plan to reduce GHG emissions in line with the Paris Agreement commitments of jurisdictions in which it has significant operations, and may also detail how transition risks are being addressed.

If a company has adopted a transition plan, the Proposed Rule would require it to describe its plan, (including the relevant metrics and targets used to identify and manage physical and transition risks), and to disclose how it plans to mitigate or adapt to identified transition risks and how it plans to achieve identified opportunities (eg through the production of low-carbon products, generation and use of renewable energy, setting conservation goals etc). The company would then need to update its disclosures about the plan on an annual basis.

As with other forward-looking statements, the Proposed Rule anticipates that safe-harbour provisions in the PSLRA may apply for these statements.

Financial statement metrics

The Proposed Rule would require a company to disclose certain disaggregated climate-related financial statement metrics that are mainly derived from existing financial statement line items in a note to its financial statements. This would include the impact of the climate-related events and transition activities on the company's consolidated financial statements. Such statements would cover financial impact metrics, expenditure metrics and financial estimates and assumptions.

Financial impact

"Climate-related risks" would be defined, in part, as the actual or potential negative impacts of climate-related conditions and events on a company's consolidated financial statements and would include physical risks, such as extreme weather events, as well as transition risks.

The proposed threshold for disclosure is set at a very low level. Disclosure would be required unless the aggregated impact of the severe weather events, other natural conditions, transition activities and identified climate-related risks is less than one % of the total line item for the relevant financial year.

By way of example, the Proposed Rule notes the following circumstances in which financial impacts may arise:

+ changes to revenue or costs from disruptions to business operations or supply chains;
+ impairment charges and changes to the carrying amount of assets due to assets being exposed to physical climate risks;
+ changes to loss contingencies or reserves (such as environmental reserves or loan loss allowances) due to impact from severe weather events;
+ changes to total expected insured losses due to flooding or wildfire patterns;
+ changes to revenue or cost due to new emissions pricing or regulations resulting in the loss of a sales contract;
+ changes to operating, investing, or financing cash flow from changes in upstream costs, such as transportation of raw materials;
+ changes to the carrying amount of assets due to a reduction of the asset's useful life or salvage value; and
+ changes to interest expense driven by financing instruments such as climate-linked bonds issued where the interest rate increases if certain climate-related targets are not met.

Expenditure

The proposed expenditure metrics would be subject to the same disclosure threshold as the financial impact metrics. For the purposes of calculating the disclosure threshold for the expenditure metrics, a company would be permitted to separately determine the amount of expenditure expensed and the amount of expenditure capitalised. However, a company would be required to aggregate expenditure related to climate-related events and transition activities within the categories of expenditure (ie amount capitalised and amount expensed).

Estimates and assumptions

The Proposed Rule would require a company to disclose whether the estimates and assumptions used to produce the consolidated financial statements were impacted by exposures to risks and uncertainties associated with, or known impacts from, climate-related events. If so, the company would be required to provide a qualitative description of how those events have impacted the development of the estimates and assumptions used by the registrant in the preparation of its financial statements.

GHG emissions metrics disclosure

Applying definitions and concepts aligned with the GHG Protocol and other internationally recognised standards, the Proposed Rule would require a company to disclose its GHG emissions for its most recently completed financial year.

The Proposed Rule would require a company to disclose its total Scope 1 emissions separately from its total Scope 2 emissions after calculating them from all sources that are included in the company's organisational and operational boundaries.

A company would also be required to disclose separately its total Scope 3 emissions for the financial year if those emissions are material, or if it has set a GHG emissions reduction target or goal that includes its Scope 3 emissions.

For each of its Scopes 1, 2, and 3 emissions (if applicable), the Proposed Rule would require a company to disclose the emissions both disaggregated by each constituent GHG and in the aggregate. The company would also be required to disclose emissions in gross terms and in terms of GHG intensity (or carbon intensity) and to specify the methodology used to calculate emissions, as well as the way in which organisational and operational boundaries had been determined.

To balance concerns about reporting Scope 3 emissions with the need for decision-useful emissions disclosure, the Proposed Rule set out the following accommodations for Scope 3 emissions disclosure:

+ a safe harbor for Scope 3 emissions disclosure from certain forms of liability under the Federal securities laws, so that disclosure of Scope 3 emissions by or on behalf of the company would be deemed not to be a fraudulent statement, unless it is shown that the statement was made or reaffirmed without a reasonable basis or was disclosed other than in good faith;
+ an exemption for smaller reporting companies (SRCs) from the Scope 3 emissions disclosure provision; and
+ a delayed compliance date for Scope 3 emissions disclosure.

Attestation of Scope 1 and Scope 2 emissions disclosure

A company that is an accelerated filer or large accelerated filer would be required to include in the relevant filing an attestation report covering the disclosure of its Scope 1 and Scope 2 emissions. The attestation would start at the level of "limited assurance", but move to "reasonable assurance" at the beginning of the fourth financial year. Information about the independent third-party attestation provider would also need to be disclosed.

Targets and goals

If a company has set any climate-related targets or goals, then the Proposed Rule would require the company to provide certain information about those targets or goals. This includes information about:

+ the scope of activities and emissions included in the target;
+ the unit of measurement, including whether the target is absolute or intensity based;
+ the defined time horizon by which the target is intended to be achieved, and whether the time horizon is consistent with one or more goals established by a climate-related treaty, law, regulation, policy, or organisation;
+ the defined baseline time period and baseline emissions against which progress will be tracked with a consistent base year set for multiple targets;
+ any interim targets set by the registrant; and
+ how the registrant intends to meet its climate-related targets or goals (including with respect to the use of offsets and RECs).

The SEC has made it clear that disclosure of its climate-related targets or goals should not be construed to be promises or guarantees. Similar to other forward-looking statements, it is proposed that the PSLRA safe harbors would apply to those statements, assuming all other statutory requirements for those safe harbors are satisfied.

WHERE AND WHEN WILL DISCLOSURES BE MADE?

The Proposed Rule would require a company to:

+ provide the climate-related disclosure in its registration statements and Exchange Act annual reports;
+ provide the Regulation S-K mandated climate-related disclosure (being matters related to governance, impacts on strategy, business model and outlook, risk management, GHG emission metrics, and targets and goals) in a separate, appropriately captioned section of its registration statement or annual report, or alternatively, to incorporate that information in the separate, appropriately captioned section by reference from another section, such as Risk Factors, Description of Business, or Management's Discussion and Analysis;
+ provide the Regulation S-X mandated climate-related financial statement metrics and related disclosure in a note to the company's audited financial statements;
+ electronically tag both narrative and quantitative climate-related disclosures in Inline XBRL; and
+ file, rather than furnish, the climate-related disclosure.

It is proposed that there be a phase-in for all companies, with the compliance date dependent on the company's filer status. An additional phase-in period for Scope 3 emissions disclosure is proposed, along with the previouslymentioned safe harbor provisions for Scope 3 emissions disclosure. SRCs would also be subject to an exemption from the Scope 3 emissions disclosure requirement.

IMPLICATIONS FOR AUSTRALIAN COMPANIES AND BANKS

The significance of the proposed adoption of mandatory reporting standards aligned with the TCFD framework in what is still the deepest and most important capital market in the world, cannot be overstated. One way or another, these requirements will likely "filter down" into any jurisdiction, including Australia, that enjoys meaningful capital flows with the US.

If adopted, the Proposed Rule would apply to Australian companies that issue debt or have securities listed in the US as it will apply to foreign private issuers, as well as US domestic companies. It's also likely that over time, the Proposed Rule will, by practice and market expectation if not by law, gradually become part of disclosure practices for other cross border offerings, such as the Rule 144A market. Australian companies that do business with US companies may be required, as a condition of doing so, to provide disclosures to their foreign counterparts to allow them to comply with the required disclosures, including for Scope 3 GHG emissions.

Further, as investors become used to seeing this level of disclosure in jurisdictions where it has become mandatory, they are likely to pressure companies operating under voluntary regimes to ensure they provide similar levels of disclosure as apply under mandatory regimes. Similarly, proxy advisers and activists are likely to single out companies that choose not to voluntarily disclose or provide disclosure which is not commensurate with the mandatory rules that apply in the US and elsewhere.

The Proposed Rule is also likely to guide the future evolution of the regulatory framework for climate-related disclosure in Australia. While there are already comprehensive requirements for the reporting of GHG emissions, energy consumption and energy production data under the National Greenhouse and Energy Reporting Scheme (**NGERS**), the scheme only applies to corporate groups and facilities that exceed specified thresholds. Many ASX listed companies and APRA-regulated entities would not be covered by these reporting requirements due to their emissions profiles. In addition, NGERS only covers Scope 1 and Scope 2 emissions and public information about these is provided in an aggregated form. Reporting on the use of offsets under the corporate emission reporting transparency initiative is about to commence, but this is voluntary and has only had limited uptake from companies.

There have been calls by a number of Australian stakeholders, including the IGCC to introduce mandatory climate-related risk disclosure. Noting the growing number of countries moving in this direction, the SEC Proposed Rule, if adopted, would give further weight to arguments in favour of consistent, comparable and reliable information for investors – using the TCFD recommendations.

In Australia, ASIC and APRA have already both publicly stated their positions that climate risk may have material impacts on entities and their financial positions and performance. Accordingly, these regulators have tied climate-related disclosures to existing mandatory financial disclosure requirements. They have each released guidance on the contents of climate-related disclosures for annual reports, product disclosure statements, prospectuses and other disclosure statements. However, being guidance materials, they are less prescriptive than the Proposed Rule and the covered areas of disclosure are not as broad. For example, neither ASIC nor APRA has recommended a company disclose the role of carbon offsets. ASIC has also stated that it aims to provide targeted guidance on climate-related disclosure to certain listed companies which could be informed by the content of the Proposed Rule.

The ASX Corporate Governance Principles and Recommendations also include a recommendation that a listed entity should disclose whether it has any material exposure to environmental or social risks and, if it does, how it manages or intends to manage those risks. Where those risks include climate-related risks, consideration of the TCFD recommendations is encouraged.

Finally, the ACCC has acknowledged that companies are financially incentivised to make "green claims" in marketing generally and has indicated that greenwashing will be one of its regulatory priorities for 2022.

With this focus across Australian regulators, it is likely that the scope and content of the Proposed Rule will be carefully scrutinised and could inform future steps towards mandatory disclosures in Australia.

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BEYOND THE BARE MINIMUM – PATHWAYS ON NET ZERO IMPACTS OUTSIDE OUR BORDERS

10/10/2022

THE TROUBLE WITH TARGETS

What should Australia's fair share in the race to net zero be? A 43% reduction in greenhouse gas emissions on 2005 levels by 2030, with eventual net zero by 2050 is a start, but the reality is twofold. Firstly, it is probably too slow, and, secondly, even if Australia were to reduce its emissions tomorrow by 100%, our actual impact towards climate change will still, alone, be almost negligible. Getting Australia to net zero as rapidly as possible should only be a first step in this race.

It is time to take a realistic view of our actual impact, our potential broader contributions to the global challenge, and to make uniquely Australian decisions on how to maximise both the global climate benefits, as well as the Australian economic advantages.

DIFFICULT CONVERSATIONS

With over a hundred years of reliance on fossil fuels for economic prosperity and energy generation, our sudden shift to renewables is difficult. High transition costs raise opaque questions as to who should fund at-risk capital, and who should bear key risks in our increasingly complicated and electrified system.

It is a balancing act to ensure funding is efficiently allocated and available, within a stable financial and economic framework. "Rewiring the Nation", with its $20 billion dollar commitment is a strong step in the right direction. However, there are many market risks in regulation which sit almost wholly with the private sector under current regulatory design. Consider the absorption of marginal loss factors, and the passing on of escalating labour and material costs (or even of broader system stability costs).

Private capital is repowering a cleanly-energised Australia and to accelerate this capital deployment, regulatory frameworks and discretion should enhance certainty and stability, rather than be regressive.

EXPLORING NEW ENERGY SOURCES

We also do not necessarily have the luxury to select how we get to net zero. Despite our brave rush towards renewable energy over the past decade, it is instructive that even today, States like NSW are regularly relying on fossil fuels for almost 80% of their daily electricity source. While there seems little doubt the backbone of our transition should be wind and solar, it makes little sense to leave other options off the table purely for historic or political reasons especially.

An egregious example of political wayside-ing in the energy debate is the treatment of nuclear power. Firstly, a historic Liberal government's arbitrary moratorium on the use of nuclear energy inhibits any meaningful private sector evaluation of how such generation could feasibly be considered for Australian gain. Secondly, a not infrequent contemporary attitude seems to seek to stifle meaningful debate on this topic, along historic environmental or political viewpoints.

Both factors diminish our ability to meet the challenge of net zero.

In a time of environmental (and therefore also economic) potential crisis, a spirit of open-mindedness should guide our actions as we seek to accelerate towards net-zero. Nuclear generation has potential for other broad Australian economic benefits through resources exports (as other nations commit or recommit to this new generation technology), and defence and waste sector innovations.

INCENTIVISING ON A GLOBAL SCALE

Our ability to invest in our neighbours and our per capita wealth means Australia has some luxury in choosing where our money goes and how we spend it.

Many major economies are leveraging this ability to globally incentivise greener policies. Take for example, the US-Australia critical minerals collaboration which includes building supply chains for electric vehicles and cooperating on the establishment of new Environmental, Social and Governance (**ESG**) and traceability standards to ensure responsible sourcing of critical minerals.

Working with our neighbours is, in the Australian context, the next frontier in the net zero challenge.

One nascent solution, borrowing from the EU, is a carbon border adjustment. Impose an adjustment on incoming and outgoing goods to match costs that would have applied due to regulatory costs for carbon-intensive products, had production of the incoming goods remained in Australia. Levelling the playing field for domestic manufacturers and producers whose country is 'doing the right thing on carbon' seems to make sense in what should ultimately become a global race for a truly global net zero.

Another idea, old now but not widespread at all, is an internationally standardised carbon emission label for consumer products. Giving people the necessary information to vote their dollars on carbon when purchasing both empowers consumers and creates the information necessary to support broader-scale multilateral efforts towards net zero.

IN OTHER WORDS

Setting a goal of achieving net zero is the bare minimum, it is time to stop thinking of a transition to net-zero as merely a target to reach. We need to acknowledge that, globally at least, achieving net zero is not just switching to more wind or solar in the Australian context. We need to make uniquely Australian decisions on how to best manage the risks of this challenge, do more to encourage and stabilise investment, diversify our energy supply while playing to our actual and potential economic strengths, and, critically, use our global influence.

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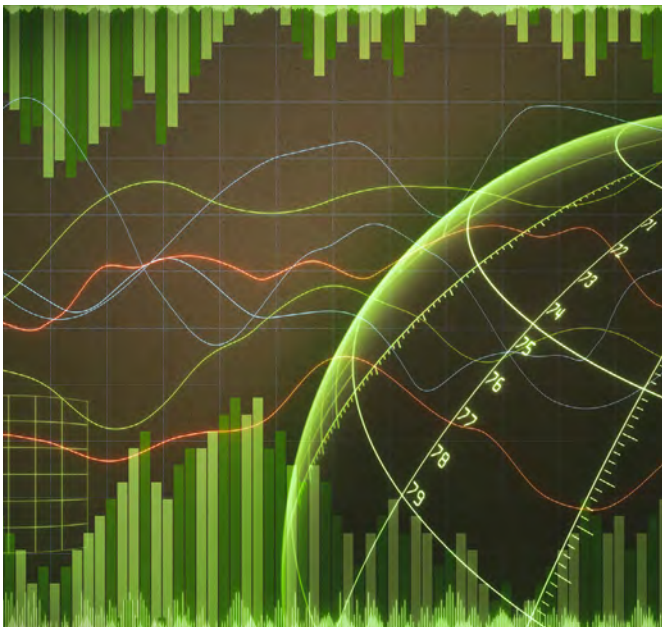
KNOWLEDGE ARTICLES YOU MAY BE INTERESTED IN:

Green Mining: Net Heroes



THE IMPLEMENTATION COP: WHAT TO LOOK OUT FOR AT COP27

25/10/2022

This year's UN Climate Change Conference, the 27th Conference of the Parties (COP27), will be held from 7-18 November 2022, and will see governments, industry, non-government organisations and other climate stakeholders from across the globe travel to Sharm El-Sheikh in Egypt. Following some of the ground-breaking progress at COP26, including the adoption of the Glasgow Climate Pact and an agreement on the rules for market mechanisms under the Paris Agreement, the Egyptian Presidency of COP27 (Presidency) has made it clear that COP27 is intended to be an 'implementation COP'. Egypt's President, Abdel Fattah El-Sisi, has stated that COP27 will become the moment where "the world moved from negotiation to implementation and where words were translated to actions". Given the conference will be held in Africa, it is expected that there will be a particular focus on action that is critical to developing countries and in particular Africa, including climate finance, adaptation and loss and damage.

In this article, we explore the key themes and priorities that will shape COP27. In particular, we look at the Egyptian Presidency's priorities and the agenda for COP27, and opportunities for engagement for the business community.

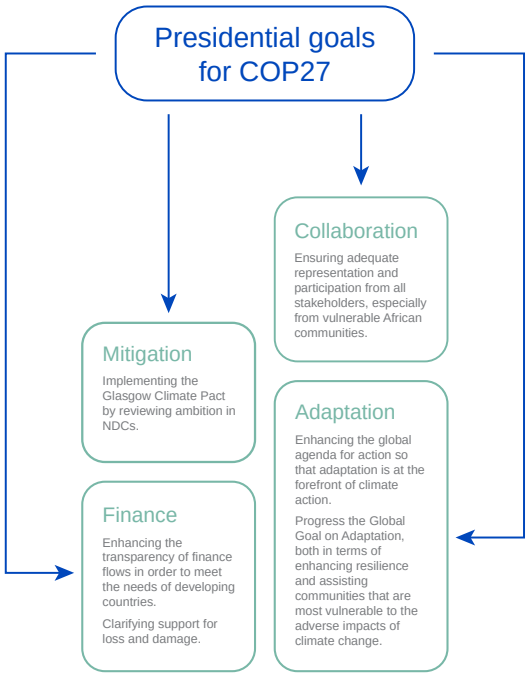
KEY TAKEAWAYS

+ **Climate ambition**: COP27 will see the first annual high-level ministerial roundtable targeting pre-2030 ambition, and a decision on the work programme on urgently scaling up mitigation ambition and implementation (**Mitigation Work Programme**), which was established at COP26. Parties to the Paris Agreement (**Parties**) may face pressure to update their Nationally Determined Contributions (**NDCs**) with more ambitious 2030 targets, in accordance with their commitments in Glasgow.

- **First Global Stocktake**: The Global Stocktake assesses global progress on mitigation, adaptation, and implementation and support. The first Global Stocktake is currently underway, with the information underpinning the stocktake process being gathered and prepared. Technical assessment of this information commenced in June 2022, with key gaps identified around adaptation. Further assessment will be high on the agenda at COP27.
- **Carbon market development**: Whilst the Article 6 Rulebook was agreed at COP26, operationalising Articles 6.2, 6.4 and 6.8 of the Paris Agreement will be a key part of the COP27 negotiations, as Parties consider the infrastructure, registries, databases and reporting platforms necessary to operationalise these market and non-market mechanisms. Recommendations from the United Nations Framework Convention on Climate Change (**UNFCCC**) subsidiary bodies on guidance and rules for these mechanisms will be considered for adoption by the Parties.
- **Climate finance**: At COP27 the Parties will be considering the process to set the new collective quantified goal on climate finance (**NCQG**), in which developed countries must commit to mobilise more than USD100 billion per year for climate finance after 2025. They will also be considering the mobilisation of increased adaptation finance.
- **Loss and damage**: Whether an international loss and damage finance facility should be created is set to dominate negotiations. Such a facility would essentially be a funding mechanism for the loss and damage suffered by developing countries due to the adverse impacts of climate change. The operationalisation, funding and governance of the Santiago Network on Loss and Damage will also be a priority for Parties.
- **Forestry**: Deforestation is still occurring at an alarming rate, however COP27 intends to build on the consensus established at COP26 with a new Forest and Climate Leaders' Partnership to be launched, which seeks to support forests and sustainable land use.
- **Business**: Business leaders will be looking to build key stakeholder relationships to drive climate change action, in particular seeking clear investment incentives. There is also a desire for marginalised voices to be heard at the 'African' COP, and the UN Climate Change High-Level Champions have focused on mobilising the business community in discussions on achieving a just transition in the lead up. In Australia, business stakeholders will be looking for opportunities to engage in Australia's regional efforts to support climate adaptation in the Pacific, while carbon market participants will be following Article 6 developments closely.

PRESIDENTIAL GOALS

The Presidency has identified the following key goals for COP27 that focus on enhancing implementation and raising ambition on a broad range of climate change issues.



AGENDA

The following agenda items will be key issues to look out for at COP27:

1. General climate ambition

While this year's COP will focus more on implementation than ambition compared with COP26, that is not to say that ambition will not remain an integral item on the COP27 agenda. This is particularly the case, given that Parties agreed at Glasgow to revisit and strengthen the 2030 targets in their NDCs to align with the Paris Agreement temperature goal by the end of 2022 (taking into account national circumstances). To date, very few countries have done so, prompting calls by a number of commentators for more ambitious 2030 targets to be submitted before the conference begins.

The Glasgow Climate Pact also established the Mitigation Work Programme, which is focused on urgently scaling up mitigation ambition and implementation in this 'critical decade'. The elements of the programme, including its scope, objectives and modalities, were discussed at the Bonn Climate Change Conference in June, and will be further considered at COP27. Australia has advocated for the programme to provide an opportunity to build understanding, collaboration and investment interest between countries in key technologies and initiatives, and for the design of the programme to facilitate

participation by non-party stakeholders, including the private sector. We expect there to be interest from State and non-State actors alike in the opportunities that may arise from the Mitigation Work Programme as it continues to take shape.

Another further feature of the ambition agenda at COP27 will be the inaugural annual high-level ministerial roundtable on pre-2030 ambition which the Parties agreed to in Glasgow, scheduled for 14 November. Some groups have called for the roundtable to link to the Mitigation Work Programme, and for summary reports from the programme once operational to feed into these roundtables.

Outside of the formal agenda for COP27, the United States and the European Union have requested that all Global Methane Pledge (**Pledge**) participants update (or develop) a national methane reduction plan by the time of COP27, though there are no additional actions or steps that participants are required to take. However, the European Union, the United States and eleven other countries launched the 'Energy Pathway', an implementation step for the Pledge that seeks to accelerate viable methane mitigation solutions. Significantly, the Federal Government confirmed this month that Australia will join the Pledge, which will entail a commitment to supporting the collective effort to reduce global methane emissions at least 30% from 2020 levels by 2030.

2. First Global Stocktake

The Global Stocktake, coordinated by the UN Climate Change Conference and established by Article 14 of the Paris Agreement, is an assessment of global progress in three areas: collective efforts towards mitigation (i.e. limiting global warming to 1.5°C); adaptation progress; and means of implementation and support. The information gleaned from the Global Stocktake is intended to help Parties increase their NDCs and enhance their ambition. The Global Stocktake consists of three components: information collection and preparation; technical assessment and consideration of outputs. In first Global Stocktake is currently underway, with the first two components in train and the final component to occur late in 2023.

As part of the information collection and preparation component, sources of information have been identified and synthesis reports are being prepared based on those sources. These reports will then form the basis of the technical assessment. The UN Secretariat is also preparing synthesis reports covering:

+ the state of greenhouse gas emissions;
+ the state of adaptation efforts;
+ the overall effect of NDCs; and
+ on finance flows, means of implementation and support, as well as mobilisation and provision of support.

The technical assessment kicked off with the first Technical Dialogue (**Dialogue**), launched at the Bonn Climate Change Conference. The Dialogue brings together Party representatives, experts and civil society to workshop best practice and assess progress on long-term Paris Agreement goals, as well seeking opportunities for greater action. The Dialogue will convene once again at COP27 to continue its assessment.

The first Technical Dialogue identified key gaps, in particular in relation to adaptation, noting that adaptation needs to occur more quickly, including the need for better inter-agency coordination at the State level. There are also significant barriers for accurately tracking data and metrics, and wider stakeholder engagement needs to occur. It is interesting to note the difference in approach under this dialogue as compared to the Talanoa Dialogue, a discussion undertaken in 2018 to help Parties prepare updated NDCs for 2020. This dialogue, at its core, was informed by the Fijian concept of 'talanoa', meaning to hold a conversation in an inclusive, receptive space and to build trust and mutual understanding; the Talanoa Dialogue sought to bring Parties closer together through sharing of climate change stories. At the other end of the spectrum, the Technical Dialogue, as the name suggests, adopts a more prescriptive data driven technical approach.

Overall, the Global Stocktake will be high on the agenda at COP27 according to H.E. Sameh Shoukry, the Egyptian Minister of Foreign Affairs and the President-Designate of COP27. This is no surprise given that African countries are particularly vulnerable to climate change impacts and therefore tangible progress is fundamental. More broadly, the Global Stocktake is an important process for taking stock of meaningful and impactful collective action to address climate change, as well as assessing the success of that action in order to meet the global community's climate goals and limit the worst effects of global warming. The process is aimed at helping Parties identify what remains to be done to meet their NDCs as well as emphasise opportunities to increase their ambition.

3. Carbon market development

COP26 saw the Parties agree the 'Article 6 Rulebook', which provides guidance on how the international market mechanisms under Articles 6.2 and 6.4 of the Paris Agreement, and the non-market mechanism contained in Article 6.8, will function.

Although the 'Article 6 Rulebook' provides the fundamental rules for how Articles 6.2 and 6.4 are to operate (and a number of Parties are putting Article 6.2 framework arrangements in place), the Parties at COP26 left a number of matters for further development by the UNFCCC subsidiary bodies. Accordingly, developing implementation guidance for Article 6 market mechanisms was a central focus of the subsidiary body meetings at the Bonn conference earlier this year. The subsidiary bodies have since initiated a number of technical workshops on operational aspects of Articles 6.2 and 6.4, and are expected to present

recommendations on implementation guidance for consideration by the Parties at COP27. Critical elements of Article 6 implementation which will likely feature in COP27 negotiations include:

+ how the infrastructure, registries and databases and centralised reporting platform for Article 6.2 activities, and the registry for the Article 6.4 mechanism, should operate;
+ reporting requirements under Article 6.2; and
+ guidelines for the technical reviews that will take place under Article 6.2.

Further key aspects which will likely feature in discussions include processes for transitioning activities from the Clean Development Mechanism under the Kyoto Protocol to the Article 6.4 mechanism and how the 'Certified Emission Reductions' generated by CDM activities should be used toward NDCs; processes for implementing share of proceeds to cover administrative expenses and to assist developing country Parties who are particularly vulnerable to climate impacts to meet the costs of adaptation; and processes for delivering 'overall mitigation in global emissions'.

The Supervisory Body for the Article 6.4 mechanism became operational this year, and will meet for the third time during COP27. The Supervisory Body recently sought stakeholder feedback on draft recommendations on requirements for developing and assessing Article 6.4 methodologies for removal activities, including (among other things), appropriate crediting periods, monitoring and reporting requirements for these types of activities, and additional requirements that should apply to land-based activities and removal activities which involve carbon storage in geological formations. Feedback on these recommendations will be considered by the Supervisory Body at its third meeting.

4. Climate finance

Developed countries have committed to mobilising USD100 billion per year by 2020 for climate action in developing countries. This climate finance commitment will continue through to 2025, and prior to 2025 a new collective quantified goal on climate finance (**NCQG**) will be set for years following 2025. The NCQG will be set from a floor of USD100 billion per year, taking into account the needs and priorities of developing countries.

At COP26 an ad hoc work programme on the NCQG was established. It was decided that from 2022 to 2024 four technical expert dialogues would be undertaken per year. The fourth technical expert dialogue will be held at COP27 and the focus will be on access to climate finance. The Parties will then be invited to consider the deliberations that occur as part of the ad hoc work programme and to take any action deemed appropriate.

Given the USD100 billion was not mobilised by 2020, nor 2021, the setting of a NCQG remains contentious. It is worth noting that developing countries receiving USD100 billion per year is only a fraction of what is actually needed to meet the Paris Agreement goal of restricting global warming to well below 2°C, and preferably to 1.5°C, compared to pre-industrial levels. It is estimated that developing countries will actually need trillions of dollars every year. H.E. Sameh Shoukry has stated that "We have not yet delivered on the 100 billion dollars' pledge, which in itself is more a symbol of trust and reassurance than a remedy to actual climate needs".

Adaptation finance, alongside mitigation finance, falls with the term 'climate finance'. The USD100 billion pledge is supposed to go towards both mitigation and adaptation. There is a political aspiration of having a 50:50 balance between the two, with a greater share of the adaptation funding going to the most vulnerable countries. At COP26, developed countries were urged to at least double their collective mobilisation of adaptation finance from 2019 levels by 2025, which would raise the amount to USD40 billion annually from 2025. According to the International Institute for Environment and Development, pledges made so far will take the projected total to just $21.8 billion annually by 2025, which is only just over half of the USD40 billion target. A key issue that will be focused on at COP27 is going to be bridging the adaptation finance gap.

The annual reports of the Global Environment Facility, Green Climate Fund and Adaptation Fund will also be considered by the Parties. The reports will detail their financial and operational performance for the year 2021-2022. The Parties will have the opportunity to provide guidance on the policies and programme priorities of the GEF and the GCF, and take any action they deem appropriate in relation to the Adaptation Fund. The annual report of the Standing Committee on Finance will also be considered by the Parties. Of note, the Standing Committee on Finance held its Forum on 'Finance for Nature-based Solutions" (**Forum**) in Australia in September 2022. The objectives of Forum included discussing financing climate adaptation and mitigation with nature-based solutions.

Egypt's vision for successful negotiated outcomes at COP27 includes effectively addressing the climate finance challenge in a manner which creates trust and alleviates concerns that developing countries will need to contribute to climate mitigation, and adapt to the adverse effects of climate change, without adequate support. It also involves making finance flows a reality, by delivering climate finance to developing countries based on needs identified through NDCs with a focus on concessional finance instruments.

5. Loss and damage

The Parties have recognised the need for "enhanced funding arrangements for loss and damage" to address the loss and damage finance gap. So far, there is limited research regarding the amount of loss and damage finance that is required by developing

countries. It has been estimated that loss and damage costs, which are costs that go beyond the costs of adaptation, could reach USD580 billion per year by 2030, and over USD1 trillion per year by 2050.

The issue of loss and damage finance has been contentious for many years, as developed countries are generally reluctant to accept financial responsibility for the adverse impacts of climate change caused predominately by industrial activity in their territories. Recently, the UN secretary-general has stated that "wealthier countries bear a moral responsibility to help poorer nations recover, adapt and build resilience to disasters… let's not forget that 80 per cent of emissions driving this type of climate destruction are from the G20." There are calls for loss and damage finance to be additional to the USD100 billion climate finance commitment of developing countries, and the NCQG.

At COP26, many Parties, including the negotiating group the Alliance of Small Island Developing States, held the position that a new loss and damage finance facility should be created, which would essentially be a fund dedicated to loss and damage. It was decided by the Parties that such a facility would not be created at COP26, but that the two-year Glasgow Dialogue would occur instead, where the Parties could discuss possible arrangements for loss and damage funding. The possibility of a loss and damage finance facility is predicted to dominate the agenda at COP27.

Parties will also consider the operationalisation, funding and governance of the Santiago Network on Loss and Damage, which is a part of the Warsaw International Mechanism for Loss and Damage and aims to provide technical assistance to developing countries to address loss and damage.

6. Forestry

COP26 saw a landmark agreement to halt and reverse deforestation in the Glasgow Leaders' Declaration on Forest and Land Use (**Forest Declaration**), under which over 100 countries committed to collectively ending deforestation by 2030. Since then, some progress has occurred: in the Democratic Republic of Congo, which encompasses part of the Congo Basin, the world's second largest rainforest, the Government and the Central African Forest Initiative have signed a second letter of intent, thereby extending a partnership to preserve the value of forests; the Congo Government also submitted an updated NDC and commenced a review of concessions provided for forestry by the General Inspection of Finances.

Meanwhile, Indonesia has reduced its primary forest loss for the fifth year in a row, which appears to reflect the impact of business and government commitment to reduce deforestation, particularly in relation to palm oil production. However, it is expected that the primary boost provided by the Forest Declaration will be to those already working in forest conservation, with most of the tangible progress to be made in the private sector. On a global scale, much still remains to be achieved: at the Bonn Climate Change Conference in June 2022, government and indigenous representatives, as well as researchers, identified the need to involve local communities, increase political goodwill and provide adequate financing in order to reach the Forest Declaration goals.

COP27 will build on the Forest Declaration: Alok Sharma, the COP26 President, announced that a new Forest and Climate Leaders' Partnership will be launched at COP27, which establishes a group that will meet annually to support forests and sustainable land use in order to contribute to global climate goals. At COP27, Parties will present successful examples of halting deforestation and encouraging the expansion of forest estate. As part of the Partnership, countries will be expected to drive action in key areas, including scaling up sustainable land use as well as economies and supply chains that are beneficial to forests, supporting Indigenous peoples and local communities and their land tenure rights, and mobilising public and private finance to protect forests.

OPPORTUNITIES FOR THE BUSINESS COMMUNITY TO ENGAGE AT COP27

1. Global

For the global business community, the focus at and around COP27 will be on cooperation through building relationships with a broad range of stakeholders to drive climate change action and achieve transformational change. In general, there is a perception amongst business that clear, consistent policies and economic incentives are required to enable business investment in a low-carbon future.

In the lead up to COP27, the UN Climate Change High-Level Champions for COP27, Nigel Topping and Mahmoud Mohieldin, are focusing on encouraging mainstream climate action as well as finding innovative solutions to access technology and finance, whilst also supporting the focus of COP27 on implementation. A key priority for the Champions is to mobilise the business community and other non-State actors via the Marrakech Partnership for Global Climate Action (a body tasked with enabling collaboration between State and non-State actors in order to implement the Paris Agreement) to engage in discussions around how to achieve a just transition, while advancing adaptation and resilience, and achieving decarbonisation by 2030.

From the perspective of the broader business community, COP27 brings hope that traditionally excluded voices will be heard, paving the way for emerging markets to push for the action that they need. This is expected to focus on climate finance to fill the funding gap for mitigation and adaptation projects.

In that regard, the business community in emerging markets has been busy:

- the World Economic Forum has launched the 'Alliance of CEO Climate Leaders India', aimed at realising climate change ambition through multi-stakeholder collaboration and private sector leadership;
- Leaders for a Sustainable MENA (Middle East and North Africa), a group of public and private sector leaders established to scale up low-carbon technologies and infrastructure in that region, has identified three priority action areas for climate adaptation: a just energy transition; ensuring resilient water and food systems; and encouraging greener cities through innovation; and
- the Glasgow Financial Alliance for Net Zero (**GFANZ**), set up at COP26, has published resources to support the efforts of financial institutions to finance and transition economies to net zero. The recommendations published by GFANZ are voluntary and intended to support financial institutions to develop and implement strategies to become net zero. However, GFANZ has begun to encounter barriers, for instance in ensuring that its members adhere to the Race to Zero criteria, with which GFANZ is aligned, being criteria aimed at mobilising non-State and sub-State actors to reach net zero by 2050. There is increasing recognition that divestment of fossil fuel heavy assets, while perhaps a green opportunity for the divesting entity, may not amount to a greener world in real terms, with fossil fuel assets more likely to end up in the hands of opaque private companies or under-funded, inexperienced players.

2. Australia

The Australian delegation will be attending COP27 with a new Federal Government and an updated NDC sporting a more ambitious emissions reduction target of 43% below 2005 levels by 2030 (rather than the previous government's 26-28% reduction target), and commitment net zero by 2050. These targets are now enshrined in legislation through the *Climate Change Act 2022* (Cth). Australia will likely take opportunities at COP27 to engage with other Parties on its new commitments and the suite of decarbonisation policies which it is looking to implement, for example, the National Electric Vehicle Strategy, upgrading the national electricity grid, and reforming the Safeguard Mechanism.

Australia will also be hosting a Pavilion, which we expect will be used to provide a platform for First Nations communities, to showcase Australia's climate partnerships with Pacific Island nations and South East Asia, and to provide a space for strengthening these regional relationships. Australia's recent efforts to actively engage with the Pacific include the former Federal Government's decision to double Australia's climate finance for developing countries to $2 billion from 2021 to 2025 at COP26, with a significant portion of this finance directed to supporting Australia's Pacific neighbours to strengthen climate resilience and deploy renewable energy infrastructure. More recently, the current Prime Minister joined other foreign ministers in declaring a climate emergency in the Pacific at the Pacific Islands Forum in July. Further, the ongoing development of the Indo-Pacific Carbon Offsets Scheme (IPCOS) is likely to provide a particular focus for engagement among Australia and Indo-Pacific Parties.

COP27 may provide opportunities for Australian business stakeholders to engage in discussions around the Federal Government's ambition and climate initiatives, and capacity-building opportunities in the region, including with respect to IPCOS. Carbon market participants will also want to keep a close eye on Article 6 negotiations, and any developments with respect to the types of activities that will be able to generate credits under the Article 6.4 mechanism.

Businesses will also be interested in following progress on the Business Manifesto for Climate Recovery which was launched by the World Business Council for Sustainable Development at COP26 in the Business Pavilion, and calls for a new 'Corporate Determined Contributions' mechanism to measure the private sectors' contributions to global decarbonisation.

We will be tracking the progress of the climate change negotiations at COP27 closely and reporting on key takeaways and themes daily. Sign up to our newsletter here to stay up-to-date. Our daily reports will include updates specific to industry as well as the public sector and the broader community.

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FOLLOW THE COP27 UN CLIMATE CHANGE CONFERENCE

21/11/2022

WHAT IS COP27?

The 27th Conference of the Parties (COP27) to the UN Framework Convention on Climate Change (**UNFCCC**) will be held this year from 7-18 November in Sharm El-Sheikh, Egypt. The purpose of each Conference of the Parties (COP) is to bring together government negotiators, representing those nations who are a Party to the UNFCCC, to progress issues regarding the implementation of the UNFCCC, Kyoto Protocol and Paris Agreement. Non-State actor engagement at each COP is coordinated and led by the Climate Change High-Level Champions, with industry and civil-society side events taking place throughout the two weeks.

COP27 is expected to differ from previous COPs in that it will focus on implementation. Given this COP is taking place in Africa, it is also expected that it will focus on action critical to developing countries, in particular those issues facing African nations. While COP26 in Glasgow saw an emphasis on ambition and net zero commitments, as well as finalisation of the Article 6 rulebook, key priorities at COP27 include implementing the Glasgow Climate Pact, advancing adaptation efforts and scaling up climate finance.

This is the first COP that Australia will be attending since the Federal Government legislated Australia's 2030 and 2050 decarbonisation targets, and we expect this will bring a different level of engagement and action. For an overview of the key themes, priorities and issues to expect at COP27, see our previous article - *The Implementation COP: What to look out for at COP27*.

21/11/2022 By - Emily Morison, Ashleigh McCoach, Clinton Ducas and Brandon Zheng

DAY 10 - 17 NOVEMBER 2022

Solutions Day

Day 10 of COP27, Solutions Day, was the final thematic day for COP27. Transportation was a major theme, featuring in several major announcements. For example, the COP27 Presidency launched the Low Carbon Transport for Urban Sustainability Initiative (**L^{c}O$_2$TUS**), which aims to bring widespread systematic changes to transportation systems in order to decarbonise existing networks. L^{c}O$_2$TUS seeks interventions on:

+ improved investment for e-vehicles and sustainable mobility infrastructure;
+ investment for informal transportation by providing salaried labour for those working in informal transportation and integrating informal modes with expanded public transport networks; and
+ net zero urban transport policymaking capacity building in low- and middle-income countries.

Similarly, the Sustainable Urban Resilience for the next generation initiative (**SURGe**), also launched by the Presidency, has five objectives to assist in achieving the Paris Climate Goals and Sustainable Development Goals:

+ improving energy efficiency, the use of low-carbon materials and processes, and land use policies for building and housing;
+ advancing renewable energy and energy efficiency in cities;
+ enhancing urban waste management to enable 'zero waste cities';
+ encouraging the uptake of public transport and active mobility; and
+ improving access to potable water and management of water for households and public buildings.

SURGe includes representatives from the national governments of Japan, Morocco, Egypt, and Nauru, and local government representatives from across the world.

The Accelerate to Zero (**A2Z**) coalition was launched, comprising over 200 organisations across government, industry, and civil society. Its main purpose is to make all new car and van sales in leading markets zero emissions by 2035, with global conformity by 2040. The United States, meanwhile, launched its own campaign designed to improve zero-emission vehicle penetration in emerging markets. Named the Zero Emission Vehicles Emerging Market Campaign (**ZEV-EM-C**), the initiative will run for one year. The Collective for Clean Transport Finance, a coalition of five leading organisations, was announced, with the purpose of initiating finance projects aimed at investments in e-buses, road freight, and two-wheel electric vehicles.

The finance necessary to fund these new transportation programmes featured throughout the announcements and in the draft text for the COP27 cover decision, which was released in a twenty-page 'non-paper'. Notably, the text estimated a requirement of $4 trillion per year in renewable energy investment until 2030 to reach net zero emissions by 2050. A low-carbon global economy will itself require an estimated investment of at least $4-6 trillion per year until 2030. The text notes that these figures will require transformation of the financial system and cooperation between government, central banks, and commercial banks. It is also notable that the text begins by acknowledging the global challenges the international community is facing due to overlapping crises of food, energy, geopolitical and economic challenges, compounded by more frequent and intense climate impacts.

In negotiations, Parties expressed diverging views on a number of aspects of the draft decision text, including its references to multilateral development bank reform, debt, and phasing down fossil fuel subsidies and use. A revised version of the draft will be released on 18 November.

Meanwhile in other negotiations, facilitators from Australia and India indicated that draft text has been prepared on the New Collective Quantified Goal for Climate Finance that could provide an approach that will enable a decision on the new goal to be made in 2024. The facilitators are now expected to meet with Heads of Delegation to hear Parties' views. As to Article 6 negotiations, revised decision drafts have been prepared, and technical-level negotiations were expected to continue into the evening.

In the Australian Pavilion, the events highlighted ocean based climate solutions and the importance of climate action at the grassroots level. The Coalition for Disaster Resilient Infrastructure called for action to be taken towards resilient coastal infrastructure, and discussed pathways that can be taken to strengthen disaster and climate resilience of infrastructure in the Indo-Pacific, particularly in coastal areas.

8/11/2022 By - Ashleigh McCoach and Lucy Burns

DAY 9 - 16 NOVEMBER 2022

Biodiversity Day

Day 9 of COP27 was Biodiversity Day, where discussions focused on the fostering of integrated responses, shared solutions, and defined pathways to address biodiversity loss and climate action. The Enhancing Nature-based Solutions for an Accelerated Climate Transformation Initiative (**ENACT**) was launched by the COP27 Presidency, the Government of Germany and the International Union for Conservation of Nature. ENACT is a voluntary coalition of both state and non-state parties that aims to coordinate global climate action to address biodiversity loss through the adoption

and strengthening of nature-based solutions and partnerships. The initiative has committed to produce a State of Nature-based Solutions Report each year, which will be delivered to future COP Presidencies to inform future meetings of the Conference of the Parties to the United Nations Framework Convention on Climate Change. ENACT's key aims are:

+ to enhance the climate resilience of at least 1 billion of the world's vulnerable people, including at least 500 million women and girls;
+ to secure and protect up to 2.4 billion hectares of natural agricultural ecosystems which are sustainable and healthy; and
+ to increase global mitigation efforts significantly through the conservation of carbon-rich terrestrial, freshwater and marine ecosystems.

The world's oceans were a recurring talking point throughout Day 9. For example, discussions continued in relation to the High Quality Blue Carbon Principles and Guidance, which were launched at COP27 by Conservation International and Salesforce. The principles and guidance focus on developing a robust, high quality blue carbon projects and credits system. The development of the principles and guidance is indicative of the high demand for blue carbon credits. Such demand is of significance to Australia, as it harbors 12% of the world's blue carbon ecosystems.

In the negotiations, the Parties agreed on the institutional arrangements to operationalise the Santiago Network of the Warsaw International Mechanism (**Network**), which is a body that will offer technical assistance to communities and countries that are impacted significantly by climate fueled natural disasters. It was agreed that, in providing technical assistance, the Network should take into consideration human rights, the rights of Indigenous Peoples, intergenerational equity, gender equality, and local and vulnerable communities. There was also agreement between the Parties on the draft texts relating to the Adaptation Fund Board, which encourage increased and continued contributions to the fund, and also state that financial pledges to the fund are welcome.

Discussions regarding the Clean Development Mechanism (**CDM**) were advanced in informal consultations, with a particular focus on how the CDM might operate beyond the second commitment period of the Kyoto Protocol. Conversations explored certified emission reduction (**CER**) issuance, methodologies, accreditation, afforestation and reforestation. It was also suggested that post-2020 CER units could be voluntarily cancelled, however that proposition was met with opposition from several parties who stated that, as decided in the Glasgow Agreement, issuance for post-2020 emission reductions is not possible and that temporary CERs do not exist.

Meanwhile, the Australian Pavilion hosted events that continued building on the biodiversity theme of the day. For example, EarthWatch Australia ran an event that focused on ClimateWatch, a program in Australia that aims to address research gaps regarding the way that changes in rainfall and temperature affect biodiversity in Australia. Biodiversity issues will be the focus of the meeting of the Conference of the Parties to the Convention on Biological Diversity, which will be held in Montreal, Canada from 7 – 19 December 2022.

Co-authored by Amy Van Dongen

16/11/2022 By - Emily Morison and Jim Power

DAY 8 - 15 NOVEMBER 2022

Energy, Ace and Civil Society Day

Day 8 of COP27 saw Minister for Climate Change and Energy Chris Bowen MP present Australia's National Statement to COP27 at the High-Level Segment, declaring that "Australia is back as a constructive, positive, and willing climate collaborator". Minister Bowen used the speech to emphasise Australia's domestic decarbonisation initiatives and plans to become a 'renewable energy superpower', noting that Australia's first Annual Climate Change Statement will be delivered in coming weeks to provide a stocktake against how the nation is tracking against its climate targets. Australia's support for climate resilience in the Pacific was also reiterated, along with an announcement that Australia will seek to host COP31 in 2026 alongside its Pacific neighbours. Interestingly, Minister Bowen also used his address to ask multilateral development banks to step up their support to developing countries, noting the need to increase the proportion of funding spend on climate, while also ensuring that such funding does not saddle countries with unsustainable debt.

Outside of the High-Level Segment, energy and civil society engagement were the key themes of the day, with the launch of a number of initiatives focused on supporting renewable energy projects, and discussions centring around the importance of civil engagement in enhancing climate action.

Meanwhile in relation to carbon market developments, informal consultations on Article 6 of the Paris Agreement continued, and in a side event, Ministers from Canada and Chile launched a Global Carbon Pricing Challenge initiative aimed at tripling carbon pricing emissions coverage at a global level, with support from the UK, New Zealand and Sweden.

Negotiations on climate finance also continued. Australia was invited, alongside India, by the COP27 President, to lead ministerial consultations on finance, in particular, the new collective quantified goal.

The energy transition

Day 8 saw the launch of the Africa Just and Affordable Energy Transition Initiative, which will target a 25% increase in electricity generation and an increase in use of clean energy end products by way of facilitation through technical and policy support across Africa. The initiative aims to provide access to electricity, clean cooking fuels and technologies to at least 300 million people by 2027.

Meanwhile, two initiatives were launched that focus on supporting the renewable energy transition at a global level, being:

+ the Planning for Climate Commission, which aims to expedite approvals processes to assist renewable energy projects; and
+ the Global Renewables Alliance, which seeks to bring together expertise and technology of key players across the wind, solar, hydrogen, energy storage and geothermal energy industries to facilitate the accelerated transition to renewable energies and promote accountability through joint targets.

The extent to which the launch of multiple alliances working towards similar goals represents progress or fragmentation of resources is yet to be seen.

With respect to wind energy, Australia announced that it will join the Global Offshore Wind Alliance, which was established at COP26, with the aim of achieving a minimum total offshore wind capacity of 380GW by 2030 and 2000GW by 2050. The announcement was complemented by events in the Australian Pavilion, where the Clean Energy Council discussed opportunities for Australia's offshore wind sector.

Hydrogen proved to be a key focus of discussions throughout the day, with the recently launched African Green Hydrogen Alliance publishing encouraging industry data with McKinsey on the potential for green hydrogen production to boost GDP across a number of African nations. Meanwhile, Egypt launched the first ever technical panel discussion on Global Renewable Hydrogen, and in the Australian Pavilion, the Australian Renewable Energy Agency (**ARENA**) addressed Australia's potential to become a global leader in green hydrogen.

Other events in the Australian Pavilion explored the role of youth in supporting climate action, and the centring of Indigenous-led initiatives in Australia's responses.

Civil society engagement

Day 8 also saw a number of events focused around civil society engagement, including a high-level ministerial roundtable on the role of civil society in mobilizing and tracking climate finance, and a presidency event on best approaches to implementing the Action for Climate Empowerment (ACE) Framework, which was adopted under the UNFCCC and Article 12 of the Paris Agreement. The overarching goal of the ACE Framework is to empower society's engagement in climate action through education, public awareness, training, public participation, access to information and international cooperation.

Co-authored by Amy Van Dongen

16/11/2022 By - Ashleigh McCoach

DAY 7 - 14 NOVEMBER

Gender and Water Day

Day 7 of COP27 focussed on gender and water, where the role of women in climate solutions, and the impact of global temperature increases on water supply, featured heavily. Meanwhile, the climate negotiations on issues including climate finance, adaptation and loss and damaged continued as COP27 entered its second week.

The Action on Water Adaptation and Resilience Initiative (**AWARe**) was launched by the COP27 Presidency. AWARe will offer adaptation solutions for both the earth and people and has three main objectives:

+ to promote interlinkages between climate action and water in order to achieve Agenda 2030, and in particular Sustainable Development Goal 6 (which is to ensure availability and sustainable management of water and sanitation);
+ to improve water supply and decrease water losses worldwide; and
+ to propose and support implementing methods and mutually agreed policy for co-operative water-related adaptation action along with its co-benefits.

During the Precedency's consultations on loss and damage governance, Parties considered the governance of the Warsaw International Mechanism (**WIM**). One point of contention is whether the WIM should be governed only by the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement (**CMA**), or governed by both the CMA and the Conference of the Parties to the United Nations Framework Convention on Climate Change (**COP**). It has been argued that the WIM could be governed under the COP, due to the COP establishing the WIM. However, Article 8.2 of the Paris Agreement provides that the WIM shall be subject to the authority and guidance of the CMA. It is of note that the Paris Agreement does not negate the existing relationship between the COP and the WIM. While all developing country Parties held the position that the WIM should be governed by the COP and CMA, multiple developed country Parties were of the view that the WIM is only governed by the CMA. Parties agreed to continue this discussion next year.

In the High-level Ministerial Roundtable on Pre-2030 Ambition, the ministers all called for an urgent increase in ambition, with the UNFCCC Executive Secretary advocating for a mitigation work

programme that would reduce emissions at a faster rate and secure pledges from Parties that they will raise their ambition. In addition, the Nationally Determined Contributions (**NDC**) Synthesis Report was presented by the UNFCCC Secretariat. This report provided a summary of current and updated NDCs, and noted that the implementation of these NDCs would see emissions raise by 10.6% by 2030.

Aspects of Article 6 were considered in informal consultations. These discussions included the agreed electronic format (**AEF**) under Article 6.2 and the Supervisory Body's recommendations for Article 6.4. On the AEF, the Parties differed on their views regarding the specificity of the information required in the AEF. One developing country group stressed that Parties should first test the usability of the tables given the limited experience in this area and also suggested provisionally approving the AEF at this CMA. Others noted that multiple countries intend to use internationally transferred mitigation outcomes (**ITMOs**) in 2023 and that AEFs are required for other components of Article 6.2. On the Supervisory Body's recommendations for Article 6.4, there was broad support for the proposed rules regarding share of proceeds and procedure. However, several Parties raised concerns on removals and environmental integrity and also made calls for ensuring that language on environmental and social safeguards and Indigenous Peoples' and human rights is aligned with previous decisions.

Informal consultations also continued on the draft text for the guidance to the Green Climate Fund (**GCF**). Several Parties noted that the draft decision texts needed a lot of work. Concerns were also raised against an outcome that sees the GCF being micromanaged and that the current structure of the GCF renders it unable to address loss and damage. Consultations will continue, and Parties were requested to submit written submissions for the next iteration of the draft text.

On the transition of the Clean Development Mechanism (**CDM**), in informal consultations Parties expressed differing views on the time frames for temporary and transition processes. These processes included Certified Emissions Reduction (**CER**) issuance, approvals for methodologies and accreditation of operational entities. Parties also disagreed on whether afforestation and reforestation activities should be subject to the temporary measures, and whether to allow the voluntary cancellations of post-2020 CERs.

In the Australian Pavilion, events centred around the themes of gender and water, including events on how the Murray-Darling Basin Plan can be used as a climate adaptation tool and how First Nations knowledge of water can be utilised in our approach to water management.

In other news, a collaboration between Australia's Department of Foreign Affairs and Trade, CSIRO, and Google Australia has also been announced at COP27. The 'blue carbon' collaboration will work together to map seagrass ecosystems and to understand how they can support climate resilience, particularly at Australian and Indo-Pacific coastlines.

Co-authored by Shanae Streeter

15/11/2022 By - Ashleigh McCoach and Shay Kiriakidis

DAY 6 - 12 NOVEMBER

Agriculture and Adaptation Day

Day 6 of COP27, Agriculture and Adaptation Day, saw discussions focusing on adaptation related issues, agriculture and loss and damage. With the agriculture sector and food industry together accounting for approximately 32% of the Earth's total greenhouse gas emissions, significant attention was given to climate-resilient agriculture. Key announcements of the day included:

+ the launch of the Food and Agriculture for Sustainable Transformation (**FAST**) by the COP27 Presidency, which aims to increase both the quantity and quality of climate finance contributions to transform agriculture and food systems by 2030. FAST aims to do so by focusing on the following deliverables: (1) access to climate finance and investment, (2) supporting knowledge and capacity development, and (3) ensuring agrifood systems are fully embedded in climate change policies;
+ the launch of the Initiative on Climate Action and Nutrition (**I-CAN**), a collaboration with the Food and Agriculture Organization, Egypt's Ministry of Health and the World Health Organization. I-CAN's main objective is to increase awareness on malnutrition and encourage state and non-state actors to increase their investment and support on the issue of malnutrition;
+ the Agriculture Innovation Mission for Climate's announcement of increased investment of more than US$8 billion (up from US$4 billion at COP26); and
+ the joint announcement of the African Food Systems Transformation Initiative and 70 African-owned agri-businesses of an action plan to direct financial flows to food supply chain in Africa.

Day 6 marked the close of the first week of COP27, with many expressing disappointment in the unresolved issues. UNFCCC Executive Secretary Simon Stiell warned that "*if we create a logjam in the process, we will not create an outcome that is deserving of this process*". Closing plenaries were held by the Subsidiary Body for Scientific and Technological Advice and the Subsidiary Body for Implementation. Parties adopted the draft reports of SBSTA 57 and SBI 57.

Informal consultations were held on long-term finance, where concerns were raised by developing country Parties regarding the

gaps in fulfillment of pledges and between needs and delivery, and a common definition of climate finance. Developing country Parties also opposed references to 'donors', noting the provision of finance is a commitment, not a donation.

The New Collective Quantified Goal on Climate Finance was also discussed in informal consultations. There was a broad agreement to make the ministerial dialogues more interactive. Parties also discussed the level of the new goal, transparency and accounting arrangements for the new goal, principles of the United National Framework Convention on Climate Change and grant-based and public finance.

In further informal consultations, funding arrangements responding to loss and damage continued to be discussed. Multiple developing country Parties restated their call to launch a finance facility for loss and damage at COP 27/CMA 4 and to establish a roadmap to ensure the operationalisation of such a facility by 2024. There was also broad acknowledgement of funding gaps, the diversity of challenges related to loss and damage, and the urgency to address loss and damage.

Following the agriculture and adaptation theme of the day, the Australian Pavilion hosted a number of events that were centred around the agricultural sector. This included the showcase of the Climate Services for Agriculture program – a program which develops agriculture specific climate information services that directly address on farm decision-making – as well as an event on insights from the Australian Centre for International Agriculture Research on tangible ways we can progress climate-resilient food system changes.

In other news, Australia has endorsed the Glasgow Breakthrough Agenda on Agriculture which aims to accelerate clean technology transitions through strengthened international co-ordination, co-operation, and collaboration. The goal of the Glasgow Breakthrough Agenda on Agriculture is to make sustainable, climate-resilient agriculture the most widely adopted and attractive option for farmers worldwide by 2030.

Co-authored by Shanae Streeter

14/11/2022 By - Anneka Thomson and Adam Sibum

DAY 5 - 11 NOVEMBER 2022

Decarbonisation Day

Day 5, Decarbonisation Day, saw discussions focused on encouraging and facilitating the transition towards a low carbon economy, with specific attention given to hard-to-abate sectors such as oil and gas, steel, concrete and fertilisers.

The "Breakthrough Agenda" was announced, a master plan to accelerate decarbonisation of five major sectors: power, road transport, steel, hydrogen and agriculture. The Breakthrough Agenda contains 25 collaborative actions to be delivered by COP28 (November 2023) to assist in making lower-carbon technologies cheaper and more accessible. Building on the commitments made by the 122 countries under the Global Methane Pledge introduced at COP26, Decarbonisation Day also featured the release of the Sharm El-Sheikh Methane Roadmap, a comprehensive guide for reducing emissions with a particular focus on short-term action.

In informal consultations, the extent of guidance to the Green Climate Fund (**GCF**) was considered, with many developed countries calling for high-level guidance only to avoid micromanaging the GCF Board. Discussions continued on funding arrangements for responding to loss and damage with developing countries calling for new, additional and adequate financing, as well as the establishment of a dedicated operational entity. On the Adaptation Fund, Parties debated whether to require developed countries to double their climate finance provision for adaptation in developing countries, while noting the general financing issues suffered by that fund.

The Work Programme for Urgently Scaling up Mitigation Ambition and Implementation was considered in informal consultations, where diverging views between developing country Parties and developed country Parties became clear, particularly with regards to attributing the carbon budget as well as push back from some developing countries on the concept of "major emitters" as a new category of developing country. Elsewhere, draft conclusions were introduced for the first Global Stocktake, with the objective of agreeing a plan for 2023 in order to reach the first Global Stocktake's goals.

Day 5 saw the US launch a major support package of over US$150 million, as part of implementing the President's Emergency Plan for Adaptation and Resilience (**PREPARE**) across the African continent, as well as US$20 million to facilitate PREPARE's work in small island developing states. US President Joe Biden also announced that the US would double its pledge to the Adaptation Fund to US$100 million.

In the Australian Pavilion, the role of collaboration in decarbonisation, and in particular Australia's contribution, was a key theme. The events included panels on how industry, government and other stakeholders can work together to address climate change, as well as how Australian science and technology is supporting the African continent in responding to climate change.

Co-authored by Shanae Streeter.

11/11/2022 By - Ashleigh McCoach and Claudia Russo

DAY 4 - 10 NOVEMBER 2022

Science Day

Day 4 of COP27 was Science Day, where the significance of scientific initiatives as well as research and development in the battle against climate change was highlighted. One of the key takeaways was that scientists need to make their data more publicly accessible and understandable in order to facilitate the development of climate change policies.

Science Day saw the launch of Egypt's inaugural Vulnerability Assessment Map and the "One Health for All: One Vision and One Response" initiative (One Health) – a joint initiative by the Egyptian Presidency, the WHO, UNDP and FAO which affirms Egypt's commitment to improving the health of all humans and animals in the wake of the climate change health crisis. One Health considers the impact that COVID-19 has had on lower and middle income countries and utilises this analysis to plan for, and mitigate the risks, which the climate change health crisis poses for these countries.

In negotiations, funding arrangements responding to loss and damage were discussed in informal consultations. There was broad acknowledgement amongst the parties that there is a gap between the availability and the need of loss and damage finance and that the gap must be addressed urgently. Parties had different views on what the nature of funding arrangements should be. Some developing country groups called for a loss and damage facility and detailed a number of options including a loss and damage window under the Green Climate Fund and risk insurance facilities.

The New Collective Quantified Goal on Climate Finance was also discussed in informal consultations. There was agreement that the technical expert dialogues should be more outcome focused and also focus on specific topics. Potential topics were discussed, such as the specific vulnerabilities of small island developing states and Least Developed Countries and the challenges that contributors and recipients experience. Developing countries called for discussions regarding the focus of the goal itself, stating that the goal should address loss and damage finance in addition to mitigation and adaptation finance.

In the Australian Pavilion, the role of nature based climate solutions and supporting climate action within the Indo-Pacific region continued to be key themes. The events centred around supporting our Indo-Pacific neighbours to ensure a consistent regional response to climate change, the potential opportunities and challenges of nature based solutions, and data based approaches to coral reef conservation and climate change adaptation.

In other news, Australia will join the Mangrove Alliance for Climate, which aims to increase and accelerate conservation, restoration and plantation efforts of mangrove ecosystems to help combat climate change and support adaption. The initiative was launched at COP27.

10/11/2022 By - Emily Morison

DAY 3 - 9 NOVEMBER 2022

Finance Day

Day 3 of COP27 was Finance Day; the first of eleven thematic days to take place over the course of the conference. Pledges by developed countries to assist developing countries to combat climate change, and discussions on the new collective quantified goal on climate finance, featured heavily throughout the day's events.

In negotiations, developing countries expressed their frustration over previous failures by developed countries to deliver on their pledges to provide climate finance. Meanwhile, outside the negotiations, a number of developed countries made new pledges of assistance, including the United States, who launched the Energy Transition Accelerator (ETA) to help developing nations invest in renewable and low-carbon technologies. Similarly, Austria and New Zealand announced $50m and $20m respectively to go towards climate-related loss and damage in developing countries. In addition, the United Kingdom announced that its export credit agency will be the world's first to include 'climate resilient debt clauses' that pause debt service payments for low-income countries and small island developing states in the event of a climate disaster.

At the High-Level Ministerial Dialogue on the New Collective Quantified Goal on Climate Finance, calls were made to set this new goal at a level that reflects the funding needed to meet the temperature objective of the Paris Agreement. UNFCCC Executive Secretary, Simon Stiell, underscored the importance of transparency and accountability in delivering on the new goal once it is finalised in 2024. Significantly, several developed countries called for the private sector to be included as contributors to delivering on the new goal, recognising the vital role that private sector actors will play in mobilising the $trillions of investment required to keep 1.5 degrees in reach.

In further acknowledgment of the role of the private sector, the UN Climate Change High-Level Champions published a report on 'Assets to Flows', summarising the work and key insights gained from a series of multidisciplinary forums on what it will take to convert financial assets into flows. The report lists over 100 projects, including 19 projects in the Asia-Pacific region, that would support emissions reduction and climate adaptation in developing countries, and estimates the required financing for these projects at approximately $120 billion. The report notes the

importance of engaging the private sector early in projects, and emphasises that private actors should be viewed as a pool of expertise, and not just a source of capital.

In recognition of Finance Day, several Glasgow Financial Alliance for Net Zero (GFANZ) sector alliances published reports on the progress of their members in implementing net-zero targets. However, some groups raised concerns regarding the credibility of approaches used to set these targets. The concerns follow the release of a report by the High-Level Expert Group on Net Zero Emissions Commitments of Non-State Entities (HLEG), which was established by the UN Secretary General last year. The report sets out ten recommendations for preventing net-zero commitments from being undermined by greenwashing, including:

+ that net-zero commitments include 'stepping stone' targets for every five years and establish ways to achieve net-zero in line with the Intergovernmental Panel on Climate Change or International Energy Agency net zero greenhouse gas emissions modelled pathways;
+ that high-integrity carbon credits should be used for beyond value chain mitigation but not towards interim emissions reductions required by its net zero pathway; and
+ that net-zero plans must not support new supply of fossil fuels.

In the Australian Pavilion, finance and nature continued to be a key theme, with the day's events including a session on challenges and success stories relating to unlocking finance for nature-based solutions, and a panel discussion on advancing the development of innovative financing structures and economic linkages to achieve a rapid and just energy transition.

In other news, the Federal Government signed up to the Green Shipping Challenge: an international pledge to reduce greenhouse gas emissions in the shipping industry.

Co-authored by Shanae Streeter

09/11/2022 By - Emily Morison

DAY 2 - 8 NOVEMBER 2022

World Leaders Summit

Day 2 of the World Leaders Summit saw repeated calls from World Leaders, particularly those from developing countries, for progress on the mobilisation of climate finance and the need for a global response to address the threat of climate change. The COP President also launched the Sharm el-Sheikh Adaptation Agenda, which will focus on boosting world climate resilience by 2030 through collaboration among state and non-state actors.

In formal negotiations, work commenced on the item of long-term climate finance which will be looking at what lessons can be learned from the US$100 billion goal and what more can be done to deliver on this goal. On loss and damage, appropriate funding arrangements were a focus of COP/CMA discussions, with some calling for a multilateral loss and damage response fund under the Financial Mechanism to be operational by 2024. One suggested approach was that the fund operates ex-post, becoming accessible to states for rebuilding purposes within 24-48 hours of a climate event, while another Party noted the need to address slow onset non-economic loss and damage.

Discussions around Article 6 of the Paris Agreement featured strongly on Day 2, with the Subsidiary Body for Scientific and Technological Advice (SBSTA) holding informal consultations on Article 6.4 modalities and procedures, and the Glasgow Committee on Non-Market Approaches commencing its second meeting on the framework for Article 6.8 non-market approaches. With respect to Article 6.4, Parties discussed (among other things) how reporting duplication could be avoided between Articles 6.2 and 6.4; the need for interlinkages between the Article 6.4 registry and Article 6.2 international registry; and how credits generated under Article 6.4 can deliver 'overall mitigation in global emissions' (OMGE). Over the course of the CMA meeting, Parties will also need to consider whether to adopt recommendations from the Article 6.4 Supervisory Body.

Of note, immediately prior to COP/CMA, the Supervisory Body adopted recommendations on the requirements of greenhouse gas removal activities that are to receive credits under Article 6.4, which clarified the definition of 'removals' under Article 6.4 as processes or the outcome of processes to remove greenhouse gases from the atmosphere through anthropogenic activities and durably store them in geological, terrestrial or ocean reservoirs, or in products. The recommendations cover monitoring requirements for these activities, the contents of monitoring reports and requirements for participants to minimize risks of reversal, leakage, and negative environmental and social impacts when undertaking these kinds of activities. It remains to be seen whether the CMA will adopt or amend these recommendations.

In the Australian Pavilion, events centred around Pacific climate priorities, the importance of First Nations Peoples' perspectives on climate change and use of ancestral cultural practices to care for land, and the role of nature-based climate solutions. We expect Indigenous-led climate solutions, nature and supporting climate action among Australia's Pacific partners to be strong themes at the Pavilion over the next two weeks.

Day 2 also saw ministers announce that Australia has become a founding member of the new 'Forests and Climate Leaders Partnership', a UK-led initiative which aims to accelerate the contribution of forests to global climate action and progress the work of the Glasgow Leaders Declaration on Forests and Land Use.

Co-authored by Amy Van Dongen

08/11/2022 By - Shay Kiriakidis and Anneka Thomson

DAY 0 AND DAY 1 – 6 & 7 NOVEMBER 2022

Opening Ceremony and World Leaders Summit

COP27 kicked off in Sharm El-Sheikh on Sunday with Egyptian Foreign Minister and COP27 President H.E. Sameh Shoukry acknowledging that the conference comes at the end of a year that has seen political turmoil resulting in rising energy prices and food, water and cost of living crises. Despite these challenges, Shoukry urged nations to not use this as a reason to delay efforts to fight climate change. These sentiments were reinforced by UN Secretary General Antonio Guterres, who proclaimed that "we are on the highway to climate hell with our foot on the accelerator".

The conference follows a year of climate disasters, including the devasting floods in Pakistan that killed more than 1,700 people. The World Meteorological Organisation on Sunday stated that the planet had likely witnessed its warmest eight years on record. The stark realities of the impacts of climate change seen in recent years, and particularly in 2022, have increased calls for loss and damage funding to be on the agenda. At the eleventh hour, the Conference of the Parties agreed to include it in the final agenda adopted on Sunday for the first time since the adoption of the UN Framework Convention on Climate Change.

At the World Leaders Summit on Monday, governments were called upon to provide concrete actions and plans to further raise ambition on climate change and emissions reduction. Developing countries reiterated calls for the delivery of US$100 billion in climate finance, noting that failure to act would be more costly. Plans were also made to set up new joint energy partnerships to aid the energy transition in developing countries as well as partnerships to protect ecosystems in countries with significant biodiversity to ensure continued carbon storage potential. Not least, Monday saw the commencement of negotiations in relation to various issues, including guidance for the operation of cooperative approaches under Article 6.2 as well as the commencing the Glasgow Climate Pact work programme to scale up mitigation ambition and implementation.

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THE GLOBAL BIODIVERSITY COP: KEY OUTCOMES AND WHAT THEY MEAN FOR BUSINESS

22/12/2022

INTRODUCTION

On Monday 19 December 2022 in Montreal, Canada, the 15th Conference of the Parties to the United Nations Convention on Biological Diversity ended, culminating in the adoption of the "Kunming-Montreal Global Biodiversity Framework", which sets out a series of global targets to address biodiversity loss and restore ecosystems by 2030.

In this article, we highlight key features of the Framework and other significant developments from the conference, and what these mean for Australian businesses.

WHAT IS THE BIODIVERSITY CONFERENCE OF THE PARTIES?

Established in 1992 and with 196 current signatories (including Australia), the Convention on Biological Diversity (**CBD**) is an international treaty for the conservation of biodiversity, sustainable use of the components of biodiversity and the equitable sharing of the benefits derived from the use of genetic resources.

The Conference of the Parties (**COP**) to the CBD have since established a number of global protocols aimed at furthering these objectives, including the Cartagena Protocol on Biosafety which seeks to protect biodiversity from risks posed by living modified organisms, and the Nagoya Protocol, with sets out a legal framework for fair and equitable sharing of benefits arising from genetic resources.

At COP10 in 2010, the COP agreed on a Strategic Plan for Biodiversity for 2011-2020, which set out a series of targets aimed at (among other things) addressing the underlying causes of biodiversity loss, improving the status of biodiversity, and promoting sustainable use

of biodiversity. Significantly, in a report published in 2020, the United Nations found that none of these targets had been achieved.

It is against this background that COP15 was tasked with finalising the post-2020 successor to the Strategic Plan. The conference took place in two parts, the first held online in October 2021 and the second from 7-19 December 2022 in Montreal.

WHAT DID COP15 AIM TO ACHIEVE?

Although the focus of this year's COP was on finalising the successor to the 2011-2020 Strategic Plan and putting in place measures to galvanise urgent and transformative action by governments and civil society to halt and reverse biodiversity loss, other key priorities for the conference included increasing the voices of Indigenous Peoples and communities in dialogue over biodiversity knowledge and benefit sharing, and discussing how information from genetic sequencing can be more fairly shared. Alignment of financial flows with nature and driving finance toward sustainable investment was also a key discussion point.

KEY OUTCOMES FROM THE CONFERENCE

Adoption of the "Kunming-Montreal Global Biodiversity Framework"

The last day of negotiations saw parties finally agree on the successor to the 2011-2020 Strategic Plan, adopting the "Kunming-Montreal Global Biodiversity Framework" (Framework).

The overarching goals of the Framework envision that by 2050, areas of natural ecosystems will be substantially increased, biodiversity will be sustainably managed, that there will be increased equitable benefit sharing of genetic resource use, including with Indigenous Peoples and local communities, and that adequate means of implementation will be provided to close the biodiversity finance gap. The 23 targets in the Framework are geared toward achieving these goals, and include (among others):

- ensuring that the loss of areas of high biodiversity importance, including ecosystems of high ecological integrity, is as close to zero by 2030;
- ensuring that by 2030 at least 30 per cent of areas of degraded terrestrial, inland water, and coastal and marine ecosystems are under effective restoration;
- ensuring that by 2030 at least 30 per cent of terrestrial, inland water, and coastal and marine areas, especially areas of particular importance for biodiversity and ecosystem functions and services, are effectively conserved and managed;
- reducing the negative impact of pollution from all sources, by 2030, to levels that are not harmful to biodiversity and ecosystem functions and services;
- taking effective legal, policy, administrative and capacity-building measures at all levels to ensure the fair and equitable sharing of benefits that arise from the utilisation of genetic resources and from digital sequence information on genetic resources; and
- ensuring the full, equitable, inclusive and gender-responsive representation and participation in decision-making, and access to justice and information related to biodiversity by indigenous peoples and local communities.

Importantly, the Framework recognises the need to align 'public and private activities, fiscal and financial flows' with the goals and targets of the Framework, and to that end, sets out a series of targets geared toward enhanced private sector participation. We explore these below.

(a) Aligning financial flows with implementation

The gap between current and required annual financing needed for biodiversity conservation is estimated at approximately US$700 billion.

Acknowledging the need to close this gap, the Framework calls for Parties to 'substantially and progressively' increase levels of financial resources from all sources, including domestic, international, public and private resources, to implement national biodiversity strategies and action plans. It also calls for at least US$200B per year to be mobilised by 2030. To achieve this, developed countries are asked to increase total biodiversity related international financial resources to at least US$20 billion per year by 2025, and at least US$30 billion per year by 2030.

Parties are also asked to leverage private finance, promote blended finance, implement strategies for raising new and additional resources, and encourage the private sector to invest in biodiversity, including through impact funds and other instruments.

Importantly, COP15 also saw the parties agree to establish by 2024 a new Global Biodiversity Fund to support implementation of the Framework. The fund will be established by the Global Environment Facility.

(b) Requiring disclosure of biodiversity-related risks

A significant inclusion in the Framework is a call for biodiversity-focused disclosure requirements. In particular, Target 15 asks parties to take legal, administrative or policy measures to encourage and enable businesses, and in particular, to ensure that large and transnational companies and financial institutions:

- regularly monitor, assess, and transparently disclose their risks, dependencies and impacts on biodiversity including with requirements for all large as well as transnational companies and financial institutions along their operations, supply and value chains and portfolios;

+ provide information to consumers to promote sustainable consumption patterns; and
+ report on compliance with access and benefit-sharing regulations and measures.

It is anticipated that over time, the adoption of such disclosure requirements will reduce biodiversity-related risks to business and financial institutions whilst also reducing negative impacts on biodiversity and increasing positive impacts.

This aspect of the Framework reflects growing regulatory and stakeholder demand for companies and financial institutions to assess, report and manage their nature-related risks, and recent efforts to facilitate this type of reporting. In particular, the Taskforce on Nature-related Financial Disclosures (TNFD) is developing a framework for organisations to report and act on evolving nature-related risks and opportunities, which will provide guidance and recommendations on the disclosure of nature-related risks and opportunities. Businesses may voluntarily choose to disclose their nature-related risks and opportunities in line with that guidance. Further, the International Sustainability Standards Board (ISSB) announced that it will release guidelines for transparency on biodiversity after the ISSB publishes its requirements for climate and sustainability-related disclosures in 2023.

(c) Eliminating subsidies for harmful practices, and incentivising sustainable use

Encouraging sustainable consumption and reducing pollution and harmful practices are also key themes emerging from the Framework. Importantly, the Framework asks parties to identify by 2025, and eliminate, phase out or reform incentives, including subsidies, that are harmful for biodiversity in a proportionate, just, fair and effective way, while substantially and progressively reducing them by at least US$500 billion per year by 2030. Alongside this, parties also agreed to scale up positive incentives for the conservation and sustainable use of biodiversity.

Private sector initiatives

COP15 saw an unprecedented presence of business and finance sector participation, with investor groups calling for alignment of financial flows and mandatory disclosure, and the launch of a number of private sector initiatives.

The World Business Council for Sustainable Development announced that it is developing business guidance for actions to align strategies with the shared goal of a nature-positive planet by 2030. The guidance will provide a checklist of actions to assess, commit, transform and disclose performance. Meanwhile, NatureFinance announced the development of an 'alignment tool' which can track private and public financial flows to assess whether they are 'nature positive'.

In addition, the Nature Action 100 (NA100) engagement initiative was 'soft launched', with at least 120 investors reported to be considering participating. Similar to the initiative Climate Action 100+ (CA100), NA100 aims to engage with 100 companies, deemed to have the highest impact on nature; encouraging them to track, and report on progress against biodiversity focused indicators; and to advocate for, and support, nature-focused policy change.

In market developments, the Biodiversity Credit Alliance (BCA) was launched during COP15, with the aim of defining and categorising biodiversity credits for the voluntary biodiversity market, identifying a set of universal principles that all biodiversity credit methodologies should achieve, and establishing a peer review mechanism for biodiversity credits. We note important parallels between the work of the BCA and work to enhance integrity in the voluntary carbon market. For example, the Integrity Council for Voluntary Carbon Markets (ICVCM), is due to release its core carbon principles (CCPs) and assessment framework later this year. This work will complement the work of the Voluntary Carbon Market Integrity Initiative (VCMII) which has recently published its Provisional Claims Code of Practice (Code) for public consultation. The Code provides guidance for ensuring integrity in both the demand for and supply of carbon credits.

Australia's participation at COP15

Australia took a fresh and constructive approach to its engagement at COP15. Of note, Australia was one of a number of countries that joined the High Ambition Coalition for Nature, which will be working on the implementation of the Framework, and will join the Steering Committee of the Coalition.

Outside of negotiations, Australia signed an agreement with the US to measure the environment's economic value and reflect it in national accounts and economic measures. Australia also agreed to join the Sustainable Critical Minerals Alliance, which is an alliance of Canada, the United Kingdom, France, Germany and the United States that is focused on preventing biodiversity loss, ensuring engagement with Indigenous peoples and phasing out emissions from the mining of critical minerals.

Australia also announced that it will host the 2024 global Nature Positive Summit, which will aim to promote private investment in environmental protection and increase international public finance for nature up to 2030. The Summit also aims to assist countries, in particular developing countries, to acquire the knowledge and tools needed to attract private investment in nature.

It is also significant that during the conference, the Federal Government delivered its long-awaited response to the statutory review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**), announcing that significant reforms to the EPBC Act will be made, including:

- establishing an independent environmental protection agency;
- implementing numerous national environmental standards;
- creating a new data division to improve the availability and quality of environmental information;
- developing the regional planning initiative to enable better decision-making under the EPBC Act;
- reforming the offset arrangements to ensure they deliver nature positive outcomes and reduce delays;
- improving the national conservation planning framework; and
- increasing the role of First Nations partnerships.

In pursuing the legislative and policy actions to give effect to these reforms, Australia will also need to reflect upon how the targets in the Framework will be given effect domestically.

WHAT DOES COP15 MEAN FOR BUSINESSES AND THE PRIVATE SECTOR?

The targets in the Framework, as well as the various initiatives launched by both the Australian Government and business groups throughout the conference, will hold important implications for the private sector.

Private sector commentators have welcomed the adoption of the Framework, and its inclusion of specific targets focused on business and on consumers. For financial institutions, the adoption of the Framework may lead to opportunities to engage with governments to increase financial resources for biodiversity, including through blended finance, impact funds, and through developing innovative financing instruments. For businesses, opportunities may arise from the call for parties to encourage private sector investment in biodiversity, and for parties to introduce incentives to encourage nature positive actions.

Further, the work of the BCA and increased global focus on the voluntary biodiversity credit market may open up opportunities for project developers, financiers, landholders and consultants alike to engage with this market. Efforts to create a national biodiversity credit market in Australia are already well underway with the Federal Government announcing their plans to establish a national voluntary biodiversity market and certification scheme as well as the recent launch of the NaturePlus Credit Scheme by GreenCollar.

There will be challenges too, particularly for resource-intensive businesses whose practices are not yet aligned with biodiversity conversation. The targets in the Framework will require parties including Australia to implement strong measures in coming years to halt biodiversity loss, phase out incentives for negative practices, and reduce pollution. It can be expected that there will be flow-on effects for business practices.

Further, the likelihood of countries introducing mandatory biodiversity risk reporting in coming years signals that businesses should start preparing to disclose these types of risks to their businesses and supply chains, and putting strategies in place to mitigate nature-related risks. While the Federal Government is yet to signal the introduction of a mandatory biodiversity risk reporting framework for Australian businesses, it is currently consulting on a mandatory climate-related financial risk disclosure framework (read more about the Consultation Paper in our article Government consults on mandatory climate risk disclosure framework). Businesses should keep a close eye on developments in this space, and be prepared for climate reporting frameworks to expand to require parallel biodiversity risk reporting.

As we look ahead to 2023, it will be important to keep watch as Australia and the global community get to work on implementing the targets in the Kunming-Montreal Global Biodiversity Framework, 2030 is not far away.

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COP27 CONCLUDES WITH A BREAKTHROUGH ON LOSS AND DAMAGE, AND WITH IMPORTANT DIRECTIONS FOR THE BUSINESS COMMUNITY

25/11/2022

1. INTRODUCTION

COP27 concluded on Sunday 20 November, with Parties reaching agreement on a global loss and damage fund to provide financial assistance to vulnerable nations suffering from climate change impacts. While this is a significant development, other workstreams on the implementation of the Paris Agreement, including the mitigation work programme and market and non-market approaches under Article 6, saw less progress, with a number of issues deferred for further consideration in 2023.

Outside of negotiations, COP27 represented important developments for Australian public and private stakeholders alike. Firstly, the conference saw a step change in Australia's engagement on the international climate stage, with the Federal Government committing to a number of initiatives that will likely represent opportunities for private sector engagement. Second, the role of private stakeholders was a focal point of the conference, as was highlighted by the release of the recommendations of the United Nations' High-Level Expert Group on the Net Zero Emissions Commitments of Non-State Entities, and the launch of initiatives aimed at facilitating private sector ambition.

In this article, we canvas some of the key outcomes of the conference and their likely implications.

2. THE COVER DECISION

The importance of climate finance was front and centre in the cover decision for the conference – titled the 'Sharm el-Sheikh Implementation Plan' – which highlights that approximately USD 4 trillion per year needs to be invested in renewable energy up until

2030 in order to reach net zero emissions by 2050, and that a global transformation to a low-carbon economy is expected to require investment of at least USD 4–6 trillion per year.

The decision also recognises the role of financial institutions, highlighting that delivering the required funding will require a transformation of the financial system and its structures and processes, engaging governments, central banks, commercial banks, institutional investors and other financial actors. This recognition arises from the so-called 'Bridgetown Agenda', established earlier this year, which emphasised the need to reform the international financial system in a way that transcends national borders to funnel trillions of dollars into green investments.

With the launch of the 'Sharm el-Sheikh dialogue', the cover decision also aims to enhance understanding of the scope of Article 2.1(c) of the Paris Agreement, which states that "financial flows" should align with the Paris Agreement temperature goals.

With respect to mitigation, the decision resolves to 'pursue further efforts' to limit global temperature increases to 1.5°C and recognises that limiting global warming to 1.5°C requires rapid reductions in global greenhouse gas emissions of 43% by 2030 relative to 2019 levels. The decision calls upon Parties to accelerate efforts to phase down inefficient fossil fuel subsidies, but does not go so far as to reference a phase out of fossil fuels; an aspect that has been criticised by commentators. It also calls on Parties to communicate new or updated Nationally Determined Contributions (**NDCs**) in line with the Paris Agreement temperature limits as well as requests the Secretariat to prepare a synthesis report on long-term low greenhouse gas emission development strategies.

Significantly, for the first time, the cover decision encourages Parties to consider nature-based solutions or ecosystems-based approaches to facilitate climate mitigation. This clear recognition of nature-based solutions has been welcomed by commentators, including the IUCN, which notes that recognising the link between biodiversity and climate crises sets an important tone leading into the UN biodiversity conference (CBD COP15) in Montreal in December. Further, the decision also included first-time references to food, tipping points that could push parts of the planet into irreversible decline and an acknowledgement of the right to a healthy environment.

The cover decision also establishes a work programme on just transition, with a draft decision to be prepared for adoption at COP28 and a high-level ministerial roundtable to be convened annually.

Despite this COP being billed as the "African COP", there is very little mention of Africa in the decision. Although there was a push throughout COP27 for African special needs to be considered and dealt with, ultimately other developing regions also requested consideration of their special needs, thereby watering down any focus on Africa specifically.

3. PROGRESS ON THE GLOBAL STOCKTAKE

COP27 hosted the second meeting of the Technical Dialogue for the first Global Stocktake. The second meeting focused in particular on identifying the knowledge gaps in implementing the Paris Agreement in order to achieve greater climate ambition as well as enhance international cooperation on climate action. This included consideration of additional information required to inform the Global Stocktake, as well as 'attention gaps' for which additional time is needed to consider the issues more fully.

The subsidiary bodies adopted conclusions following the second meeting, with the Technical Dialogue Co-Facilitators to consider the feedback from Parties in preparing the summary report for the meeting as well as in designing the third meeting of the Technical Dialogue. Following publication of the summary report, the Co-Facilitators are to continue engaging with Parties as well as non-Party stakeholders through workshops in 2023.

The first Global Stocktake culminates with COP28 and it is expected that next year's conference in the United Arab Emirates will galvanise implementation and ambition as a result.

4. LOSS AND DAMAGE

Loss and damage was a major focus of COP27, despite funding arrangements being a late addition to the COP27 agenda – and the global community delivered. A global loss and damage fund was agreed by Parties to provide financial assistance to developing nations suffering from climate change impacts. Previously, the EU and US had argued that funds already in existence should be re-directed for loss and damage purposes. However, agreement for the establishment of a specific fund was reached on the basis that the fund will prioritise the most vulnerable developing countries, while big economies and big emitters that are classed as developing countries may be considered potential donors to the fund.

Despite an agreement being reached on the fund, it still needs to be operationalised. A transitional committee has been established to make recommendations on how to operationalise new funding arrangements, including identifying and expanding funding sources as well as ensuring coordination and complementarity with existing funding arrangements, and operationalising the loss and damage fund at COP28 in 2023. In order to aid the work of the transitional committee, the UN Secretariat will run two workshops in 2023 to address loss and damage issues, with relevant institutions participating. The UN Secretariat will also prepare a synthesis report on existing funding arrangements and potential further sources of funding.

Significantly, at COP27 the Parties agreed on the institutional arrangements to operationalise the Santiago Network on Loss

and Damage (**Network**). The Network is a body that was established under the Warsaw International Mechanism on Loss and Damage in 2019, and will offer technical assistance to communities and countries that are impacted significantly by climate fuelled natural disasters. At COP27, the terms of reference for the Network were adopted, which set out the functions and structure of the Network. The Network will have a hosted secretariat, called the Santiago Network Secretariat, that will facilitate the work of the Network. The Network will also have an advisory board, and a network made up of member organisations, bodies, networks and experts covering many topics relevant to addressing loss and damage. The Santiago Network Secretariat will prepare annual reports on the work of the Network. Additionally, it was agreed by the Parties that in providing technical assistance, the Network should take into consideration human rights, the rights of Indigenous Peoples, intergenerational equity, gender equality and vulnerable communities.

5. LONG-TERM AND NEW GLOBAL GOAL OUTCOMES FOR FINANCE

As was noted in the cover decision, the mobilisation of USD100 billion per year for climate finance for developed country Parties remains elusive, not least due to challenges in mobilising private finance: developed country Parties are being urged to meet the goal through to 2025, along with pressure on multilateral development banks and international financial institutions to mobilise climate finance. The Conference of the Parties also noted the need for 'grant-based' funding in developing countries, particularly for least developed countries and small island developing States, while acknowledging that access to climate finance needs to be simplified and stream-lined. Parties are being called on to create policy frameworks and environments that are conducive to the effective deployment of climate finance. Additionally, the UN Secretariat has been tasked with assisting developing country Parties to translate climate finance into action based on their specific needs, especially in respect of technology and capacity-building. The Standing Committee on Finance will prepare a biennial report summarising key findings on progress towards achieving the climate finance goal.

Parties will continue to deliberate on a New Collective Quantified Goal on Climate Finance. The new goal, to be decided by 2024, is recognised as being integral to urgently scaling up climate action and must continue to support the Paris Agreement temperature goals. In quantifying the new goal, Parties are to take into account the particular needs and priorities of developing countries, as well as sources of funding and the ability to track progress towards achieving the goal. Lessons should be taken from the current goal of USD100 billion per year and incorporated into the deliberations on the new goal. The co-chairs of the ad hoc work programme on the new collective quantified goal on climate finance must publish a work plan for 2023 by March of next year, with Parties and financial institutions to be consulted on the focus of the technical expert dialogues to be held. Significantly, the broader community will also participate in the technical expert dialogues, including multilateral development banks, the private sector, youth, civil society and academia.

Ultimately, much work still remains to be done in mobilising adequate climate finance and it is clear that it is not only developed country Parties who must pull their weight: the focus is also squarely on multilateral development banks and private finance.

6. WORK PROGRAMME FOR URGENTLY SCALING UP MITIGATION AMBITION AND IMPLEMENTATION

Following the decision at COP26 to establish a work programme for urgently scaling up mitigation, ambition and implementation, COP27 saw parties unable to agree the structure of the work programme: several developing countries held the view that the principle of "common but differentiated responsibilities" continues to apply, and therefore developed countries should shoulder more of the burden in addressing climate change mitigation ambition. This view is evident in the resulting CMA decision, which specifies that outcomes of the work programme will be 'non-prescriptive, non-punitive, facilitative, respectful of national sovereignty and national circumstances', and 'will not result in new targets or goals'.

The CMA decision also sets out a number of aspects of the work programme, including that its scope should (among other things) span all sectors (including energy, industrial processes, agriculture, forestry and waste) and that implementation of the programme is to start immediately and continue until 2030. At least two global dialogues are to be held on the program each year, with participation of Parties and non-Party stakeholders.

7. GLOBAL GOAL ON ADAPTATION

In Paris in 2015, the CMA established a 'global goal on adaptation' for enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change; subsequently, COP26 saw the launch of a two-year Glasgow–Sharm el-Sheikh work programme to advance this goal.

By the conclusion of COP27, the CMA agreed to develop a framework to guide achievement of the global goal and review of overall progress, with the aim of adopting the framework at COP28. Adaptation is necessarily context-specific, as countries are affected by different climate impacts; as such, the framework is intended to enable the accurate capture of diverse information on progress. This framework will take into account a number of considerations, including the themes of water; food and agriculture; cities, settlements and key infrastructure; health; poverty and livelihoods; terrestrial and freshwater ecosystems; and oceans and coastal ecosystems. The framework will also consider an array of dimensions, including impact, vulnerability

and risk assessment; planning; implementation; finance; capacity-building; technology transfer; and monitoring and evaluation. The CMA also invited the subsidiary bodies to consider outputs from the adaptation work programme as part of the first Global Stocktake, which will conclude next year.

The first workshop for the framework will be held by March 2023, with four workshops to be held in total, the last just before COP28. A single annual report on the workshops is to be published three weeks prior to COP28, with subsequent individual summaries of the workshops to guide future workshops. Parties and observers will be invited to share their views on the outcomes of the global goal on adaptation and the work undertaken prior to COP28. The IPCC is expected to update its technical guidelines for assessing climate change impacts and adaptation, while the Adaptation Committee is to continue its information-sharing practices with the global goal on adaptation work progamme.

Outside of developments on the framework, commentators have criticised the lack of progress made on adaptation. The cover decision notes 'with serious concern' the existing gap between current levels of adaptation and levels needed to respond to the adverse effects of climate change and, among other things, urges developed country Parties to 'urgently and significantly' scale up climate finance, technology transfer and capacity-building for adaptation, to respond to the needs of developing country Parties. Indeed, the Glasgow Climate Pact, arising from COP26, had included a call for developed country Parties to double adaptation finance on 2019 levels by 2025. However, the COP27 decision on long-term climate finance does not include any reference to doubling climate adaptation funding.

8. ARTICLE 6 MARKET AND NON-MARKET APPROACHES

With respect to market and non-market mechanisms, progress was made on a number of technical aspects of the guidance and rules, modalities and procedures for Articles 6.2, 6.4 and 6.8 of the Paris Agreement. However, many aspects have been put off for further discussion into 2023.

On Article 6.2, the CMA agreed on various elements of the Article 6.2 registry, characteristics of internationally transferred mitigation outcomes (**ITMOs**), requirements of the web-based platform, reporting formats and elements of the technical expert review process, including (see draft decision FCCC/PA/CMA/2022/L.15):

+ elements of the registry that each participating country will be required to have (or have access to) for tracking ITMOs;
+ requirements for ITMOs to be tagged with unique identifiers that enable them to be traceable to the mitigation outcomes they represent;
+ guidance in relation to the web-based centralised platform that will contain the international registry and 'Article 6 database', including requirements for the platform to store templates for Parties to report on their Article 6.2 activities, as required under the Article 6.2 Rules. The Parties agreed that the Article 6 database must include an automatic process for identifying inconsistences in information submitted by Parties and notify the relevant Parties where such inconsistencies arise;
+ outlines for participating Parties to use to prepare their initial and biennial transparency reports (which parties are encouraged, but not mandated, to use); and
+ aspects of the Article 6 technical expert review process, including guiding principles for reviews, the types of information which the experts will review, outlines for expert review reports and requirements for the review teams to provide recommended actions for participating Parties to improve consistency in their Article 6 reporting. Participating Parties will be able to designate information as 'confidential', in which case the review team must be careful not to compromise the confidentiality of that information. Commentators have raised concerns regarding the impacts of these confidentiality concessions on the transparency of Article 6.2 approaches. In particular, the confidentiality provision is considered too broad, creating a significant loophole that will obscure participating Parties' compliance and therefore their accountability. The Subsidiary Body for Scientific and Technological Advice has been tasked with developing modalities for reviewing confidential information ahead for consideration by the CMA next year.

Arguably, more significant Article 6.2 developments at COP27 took place outside of negotiations, with Switzerland and Ghana authorising the first ever bilateral ITMO project under Article 6.2. This project will encourage low-methane rice production techniques in Ghana, with the resulting ITMOs flowing to Switzerland. Vanuatu also unilaterally authorised an ITMO project. Meanwhile, Singapore formalised three bilateral Article 6 agreements, with PNG, Ghana and Peru. Japan was also active on Article 6 operationalisation, launching the Paris Agreement Article 6 Implementation Partnership, which will facilitate knowledge-sharing to help countries participate in Article 6 carbon market activities.

On Article 6.4, some progress was made on elaborating processes for transitioning CDM projects to the Article 6.4 mechanism and the rules of procedure of the Article 6.4 Supervisory Body were adopted. Aside from these developments, however, many aspects were deferred to 2023, including (among other things) appropriate processes for monitoring and reporting on removal activities under the Article 6.4 mechanism, and whether the mechanism should allow emission avoidance and conservation enhancement activities (see draft decision FCCC/PA/CMA/2022/L.14).

One significant development was the separation of Article 6.4 emissions reduction units (**A6.4ERs**) into two different streams: 'authorised' A6.4ERs and 'mitigation contribution' A6.4ERs. 'Authorised' A6.4ERs are those authorised for use towards achievement of NDCs or other international mitigation purposes (for example, CORSIA). Conversely, 'mitigation contribution' A6.4ERs are not specified as authorized for use towards achievement of NDCs or other international mitigation purposes. Instead, these A6.4ERs may be used (among other things) for results-based climate finance, domestic mitigation pricing schemes or domestic price-based measures for the purpose of contributing to the reduction of emission levels in the host Party. Commentators have raised concerns about the potential for mitigation contribution A6.4ERs to be used by parties to offset their own emissions, which may create risks of double claiming and corporate greenwashing of net zero pledges. In negotiations, parties disagreed as to whether the Article 6.4 mechanism registry should specify what non-authorised (i.e. contribution mitigation) A6.4ERs are, their uses and the process for issuing them.

As to the impact of these carbon market developments, some commentators believe that 'good, if not ideal' progress has been made in providing the rules for operationalising Article 6 markets, which will allow some ongoing investment in projects while further rules are developed.

On Article 6.8, the CMA agreed to various specifications for the UNFCCC web-based platform for non-market approaches. The platform is one aspect of the work programme for the 'Glasgow Committee on Non-market Approaches' decided upon at COP26. Its purpose is to provide a place for Parties to exchange information on non-market approaches and to support opportunities for participating Parties to identify, develop and implement these approaches. At COP27, the Parties agreed on various types of information that Parties can submit to the platform, among other things (see draft decision FCCC/PA/CMA/2022/L.13). The CMA also agreed to a phased schedule for the Glasgow Committee on Non-market Approaches to continue implementing the work programme activities agreed last year. Phase 1 (from 2023 to 2024) will focus on identifying and framing all relevant elements of the work programme activities and operationalising the web-based platform. Subsequently, Phase 2 (from 2025 to 2026) will focus on full implementation of the Committee's work program.

9. AUSTRALIA'S PARTICIPATION

As we noted in our pre-COP primer, this was the first COP since the Federal Government legislated Australia's updated 2030 and 2050 decarbonisation targets and, as was expected, there was a very positive step change in Australia's level of engagement at the conference, both inside and outside of the negotiation rooms.

Significantly, at the start of the COP, the Federal Government announced that Australia will bid to host COP31 in 2026, in partnership with Pacific nations, as part of efforts to enhance international engagement on climate change and energy, and to collaborate on climate action with our Pacific neighbours. Commentators have welcomed the announcement, however they have emphasised the need for the bid to be accompanied by real action in Australia to increase its support for Pacific climate action, including in respect of climate finance.

Once the conference was underway, the Australian Pavilion was used as a space to strengthen international partnerships, including in the Pacific, and to demonstrate Australia's plans to become a leader in renewable energy. The Pavilion hosted a range of events in collaboration with the public and private sectors, First Nations Australians and civil society. Events centred around Pacific climate priorities, the importance of First Nations Peoples' perspectives on climate change, the role of nature-based climate solutions and how to unlock finance for these solutions. The Pavilion also saw a number of discussions on renewable energy and finance, including the Clean Energy Council with respect to opportunities for Australia's offshore wind sector, and the Australian Renewable Energy Agency addressing Australia's potential to become a global leader in green hydrogen.

Crucially, the Pavilion offered (unofficially) the best coffee at the COP, with over 6,500 coffees delivered to delegates over the course of the conference.

In his statement at the COP27 High Level Segment last week, Minister for Climate Change and Energy Chris Bowen MP reaffirmed Australia's commitment to ambitious and necessary change, and pledged to be a 'strong and constructive partner' in driving what Minister Bowen said must be an inclusive climate agenda. Minister Bowen used the speech to highlight Australia's support for climate resilience in the Pacific and to call for multilateral development banks to step up their work on supporting developing countries to respond to climate change. Whist very well received internationally, some domestic commentators have highlighted the need for Australia's actions at home to match this more ambitious rhetoric and we can expect there to be close scrutiny of the Government as it continues to deploy its sector-focused decarbonisation policies over coming months, including the Rewiring the Nation fund, electric vehicle tax cuts and Safeguard Mechanism reforms (among others).

Having set the tone by signing up to the Global Methane Pledge just days before COP27 commenced, the Government committed to, or co-founded, a number of further decarbonisation and climate resilience-focused initiatives over the course of the conference across multiple sectors, including:

+ (Public service) the International Net Zero Government Initiative, which commits governments to achieve net zero

emissions across their operations by 2030 and will span all aspects of the Australian Public Service, except for defence and national security;

+ (Energy) the Global Offshore Wind Alliance, which aims to establish at least 380GW of offshore wind capacity by 2030;
+ (Forests and biodiversity) the Forests and Climate Leaders Partnership (of which Australia is a founding member), which seeks to halt and reverse forest loss and land degradation by 2030 whilst preserving sustainable development, and the International Mangrove Alliance for Climate, which aims to increase the conservation and restoration of mangrove ecosystems to act as carbon sinks;
+ (Agriculture) the Glasgow Breakthrough Agenda on Agriculture, which aims to mainstream climate resilient and sustainable agriculture globally by 2030; and
+ (Oceans) the Ocean Conservation Pledge, which calls on countries to conserve 30% of their ocean jurisdiction by 2030, and the Green Shipping Challenge, which encourages decarbonisation in the shipping industry.

While it remains to be seen how these initiatives will translate into domestic law and policy over coming months, businesses in these sectors should watch developments closely for opportunities to engage with Government measures operationalising these initiatives.

10. OPPORTUNITIES AND RESPONSIBILITIES FOR BUSINESSES EMERGE

The role of business and other non-state actors proved to be a focal point of the conference. Importantly, the COP27 cover decision explicitly welcomes the recommendations of the United Nations' High-Level Expert Group on the Net Zero Emissions Commitments of Non-State Entities (**Expert Group**), which are designed to enhance transparency and accountability of climate pledges of businesses, investors, cities and regions. The Expert Group's recommendations have been broadly well-received, particularly given the increasing prevalence of net-zero pledges among non-state actors and rising concerns about greenwashing.

Among other things, the Expert Group has recommended the use of high integrity carbon credits in voluntary markets for beyond value chain mitigation and has warned against non-state actors counting these credits toward their interim emissions reduction targets, a position supported by the Carbon Market Institute (**CMI**).

COP27 also saw the Australian branch of the Business Council for Sustainable Development (**BCSDA**) release its 'Triple A+: The Business Role in Accelerating Australia's Climate Recovery: Ambition, Action, Accountability' report. The report maps out a set of interventions aimed at advancing the international climate change agenda over the next five years through combining business leadership with government collaboration, and calls for both business leaders and policymakers to take immediate actions before COP28 next year.

Priority actions set out in the report aimed at enhancing decarbonisation ambition include (among other things) improving the credibility of corporate emissions reductions targets; facilitating widespread carbon pricing through partnering with the private sector; and embracing 'natural climate solutions'. The report also calls for improved business accountability in the leadup to COP28, through supporting the International Sustainability Standards Board (**ISSB**) standards, currently under development, as a mandatory global baseline for climate reporting; establishing a strong foundation for a carbon accounting system; and developing a mechanism to link corporate data with national emissions reduction progress reports. The report also identifies specific priorities across the electricity, transport, agriculture, resources, industrial and built environment sectors, aimed at enabling Australia to go to COP28 with greater ambition.

11. WHERE TO NEXT?

As the global community continues to digest the outcomes of COP27, and what it means for climate action going forward, there is one clear message that has emerged from Sharm-el Sheikh: that immediate and ambitious action by both government and businesses across all sectors is urgently required if the 1.5°C goal is to remain in sight.

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10 MARKET REFORMS

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SHIFTING THE FOCUS OF ECONOMIC REGULATION IN AUSTRALIA'S ENERGY NETWORKS

25/02/2022

Traditional frameworks for economic regulation of energy networks and pipelines are being fundamentally challenged by the transition to low carbon (or zero carbon) technologies.

A central objective of these regulatory schemes has been (and remains) the promotion of economic efficiency. Both the National Electricity Law and the National Gas Law seek to promote efficient investment in, and efficient operation and use of, energy services for the long term interests of consumers.

In pursuit of this objective, regulators have generally focused on encouraging efficient utilisation of existing infrastructure, as well as creating incentives for efficient investment in renewal and augmentation works required to maintain reliable and secure energy supply. In this context, greater use of energy services – including both natural gas and electricity services – has generally been seen as a positive. Increased use generally leads to more efficient utilisation of existing capacity, which in turn means lower energy prices for consumers.

Decarbonisation objectives have not featured prominently in instruments of economic regulation. When the National Electricity Law and the National Gas Law refer to the "*long term interests of consumers*" they speak of consumer interests with respect to price, quality, safety, reliability and security of supply. Thus, the statutory objectives address two limbs of the energy trilemma, but are silent on the third limb – there is no reference to decarbonisation or other environmental goals which might be important to consumers.

EVOLUTION OR REVOLUTION IN AUSTRALIA'S ENERGY LAWS?

Despite the absence of explicit decarbonisation objectives in our national energy laws, incremental changes continue to be made to the electricity and gas regulatory frameworks with these objectives squarely in mind.

Some examples of this evolutionary trend include:

1. Energy Ministers have recently agreed to make changes to the National Gas Law, National Energy Retail Law and subordinate instruments to bring hydrogen and other renewable gas blends within the ambit of the national regulatory framework. These will potentially include changes to the technical definitions of key terms such as 'natural gas'.
2. Over the past five years, a number of changes have been made to the transmission network planning framework (Chapter 5 of the National Electricity Rules) aimed at facilitating the development of transmission infrastructure required to support the energy system transition. Chapter 5 now includes a separate investment test process for "actionable ISP projects", which are projects identified in AEMO's Integrated System Plan as forming part of the "optimal development path" for the system transition.
3. Individual states have also introduced their own schemes to prioritise the development of infrastructure to support renewable energy zones. In some cases (NSW being one example) these schemes allow for explicit carveouts from the national regulatory framework for infrastructure within the designated zones(For example, regulations under section 41 of the Electricity Infrastructure Investment Act 2020 (NSW) may modify the application of, or disapply, a provision of the National Electricity Law or the National Electricity Rules to the extent reasonably necessary to achieve the objects of the Act and to enable a network operator to carry out a REZ network infrastructure project).
4. At the distribution level, various modifications have been made to the tariff rules and incentive frameworks, aimed at facilitating integration of (and providing appropriate charging mechanisms for) distributed energy resources such as rooftop solar.

However more fundamental questions are now being asked about the objectives of economic regulation, and whether these may come into conflict with decarbonisation policy.

In a recent paper focused on gas pipeline regulation, the Australian Energy Regulator (AER) asks whether decarbonisation policies aimed at reducing gas usage could soon come into conflict with the objectives of the national gas regulatory framework, which encourages more gas consumption to promote efficient utilisation of the gas network and to lower the prices paid by gas consumers.

The potential for conflict is most obvious and acute in the case of the gas pipeline regulatory framework, which applies to both transmission pipelines and distribution infrastructure. While in time some pipeline infrastructure may be put to other uses – such as transporting hydrogen – in the near term it has no alternative use. This means that reducing gas usage in pursuit of decarbonisation objectives is likely to mean increasing prices for use of this infrastructure, the cost of which is largely fixed.

In the case of electricity, decarbonisation objectives can be achieved through changes to the fuel mix rather than necessarily reducing usage. Indeed, we may see usage of electricity networks increasing as more sectors of the economy are electrified, particularly transport. However even changes to the fuel mix – as well as changes to the profile of usage – are likely to alter the economics of electricity networks, particularly if this comes with greater decentralisation and more usage moving behind the meter.

REVISITING THE REGULATORY COMPACT

The long-term regulatory compact with owners of essential network infrastructure has provided a degree of stability and certainty around recovery of long-lived sunk investments, in exchange for relatively low rates of return. For so long as usage has remained stable (or has been growing), regulators have been able to maintain this compact with investors while also ensuring affordability for consumers.

However the prospect of declining usage creates challenges for regulators in maintaining this regulatory compact. Regulators are likely to become increasingly concerned about increasing prices if usage patterns continue to change. At one extreme, there is the prospect of a 'last customer problem' emerging for some network and pipeline assets.

From the perspective of investors and asset owners, a combination of changing usage patterns and uncertainty around the future regulatory framework creates heightened risk around new investment. This in itself creates challenges for the energy market transition. Perceptions of increased risk are likely to place upward pressure on required rates of return, and may lead to necessary investment being delayed or abandoned.

The debate about how to resolve these challenges has really only just begun. The Information Paper released by the AER in

November is a step in the right direction. The AER has squarely acknowledged the challenges facing the gas pipeline regulatory framework and canvassed a range of thorny questions which will need to be addressed. However, for the moment, the AER has left many of these questions about the future direction of economic regulation unanswered.

The good news is that the energy sector is not the first to face these types of regulatory challenges. Lessons can be drawn from other sectors that have faced similar disruptions, albeit on a different scale and from different sources. For example, in the telecommunications sector, regulators have been forced to grapple with the implications of declining usage of legacy network infrastructure as services have migrated to next generation networks.

A key question is whether regulators in the energy sector can continue to navigate these challenges within existing legal frameworks, or with only incremental changes to those frameworks. To date, our regulators and policy-makers have focused largely on adaptation. However there are some signs that a broader regulatory revolution may be brewing.

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KNOWLEDGE ARTICLES YOU MAY BE INTERESTED IN:

The Decade to Deliver: 2021 Clean Energy + Decarbonisation Yearbook

Clean Energy + Decarbonisation | Year in Review

Decarbonisation: is zero-emission energy a zero-sum game for governments?

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THE INFRASTRUCTURE SPEND CONTINUES – OVERVIEW OF INFRASTRUCTURE MEASURES IN FEDERAL BUDGET 2022-2023

29/03/2022

Notwithstanding the scale of the forecast Budget deficit, the Australian Government remains committed to significant spending on infrastructure and other reforms relevant to infrastructure.

OVERVIEW OF THE ECONOMY

The Budget Papers note that:

- the Australian economy has proved remarkably resilient to the ongoing impacts of the pandemic;
- a strong economic recovery is underway, notwithstanding the pandemic and new shocks, such as the recent floods in Queensland and New South Wales and the Russian invasion of Ukraine;
- economic growth forecasts have been revised upwards, driven by stronger-than-expected momentum in the labour market and consumer spending. Real GDP is expected to grow by 4.25% in 2021-22, 3.5% in 2022-23 and 2.5% in 2023-24;
- the unemployment rate reached 4% and the participation rate reached a record high of 66.4% in February 2022. The continued recovery in economic activity is expected to see the unemployment rate reach 3.75% in the September quarter of 2022, nearly 3 percentage points below the Budget forecast from 2 years ago and the lowest level in close to 50 years;
- Australia has been affected by global inflationary pressures such as elevated oil prices and supply chain disruptions, but domestic inflationary pressures are more moderate than in a number of other advanced economies. Headline inflation in Australia picked

up in 2021 to be 3.5% to the December quarter. Australia's inflation is expected to moderate from 4.25% in 2021-22 to 3% in 2022-23 and 2.75% in 2023-24; and

+ recent strength in the price of Australia's key export commodities, will see Australia's terms of trade reach a record high in 2021-22. This will support strong profitability in the mining and agricultural sectors, with some positive flow through to the broader economy.

INFRASTRUCTURE SPENDING

The focus of the "hard" infrastructure spend in this Budget is:

+ for States and Territories – A$17.9 billion of priority road and rail infrastructure as part of the A$120 billion 10-year infrastructure investment pipeline;
+ for regional Australia - targeted stimulus (spread across Northern Territory, Western Australia, Queensland and NSW) including A$7.1 billion for transformative infrastructure projects in 4 four regions identified as growth centres;
+ regional communications upgrade initiatives;
+ the national water grid; and
+ developing a circular waste economy.

Interestingly, the Budget also includes funding:

+ to support increased private sector investment in low emissions technologies including hydrogen, the continued development of a hydrogen Guarantee of Origin scheme, and the development of a Biodiversity Stewardship Trading Platform to support farmers to undertake biodiversity activities ahead of the introduction of a voluntary biodiversity stewardship market;
+ to support more investment in affordable and reliable power, including the development of community microgrid projects in regional and rural Australia;
+ to accelerate the development of priority gas infrastructure projects consistent with the Future Gas Infrastructure Investment Framework and support investment in carbon capture and storage pipeline infrastructure; and
+ funding to progress negotiations with the states and territories on bilateral agreements for single touch environmental approvals and remove duplication by accrediting states and territories to carry out environmental assessment and grant approvals for Commonwealth matters.

A summary of major initiatives is set out below.

STATE AND TERRITORY INFRASTRUCTURE COMMITMENTS

New South Wales

A$3.3 billion from 2021-22 to fund priority road and rail projects in New South Wales.

Increases the Government's total commitment to transport infrastructure in New South Wales to $48.5 billion since 2013-14.

Funding includes:

+ A$1.0 billion for the Sydney to Newcastle – Tuggerah to Wyong Faster Rail Upgrade;
+ A$352.0 million for the Milton Ulladulla Bypass;
+ A$336.0 million for the Pacific Highway, Wyong Town Centre;
+ A$300.0 million for Grade Separating Road Interfaces;
+ A$264.0 million for the Newell Highway Heavy Duty Pavement Upgrades – North Moree;
+ A$232.5 million for Mulgoa Road Stage 2 – Glenmore Parkway to Jeanette Street, Stage 5A Blaikie Road to Jamison Road and Stage 5B Jamison Road to Union Road;
+ A$100.0 million for the Southern Connector Road, Jindabyne;
+ A$95.6 million for Picton Bypass and Picton Road – Planning;
+ A$77.5 million for Sydney Metro – Western Sydney Airport – Stage 2 Business Case;
+ A$75.0 million for the Wakehurst Parkway;
+ A$65.0 million for the Hume Highway Intersection Upgrade, M5 Motorway – Moorebank Avenue;
+ A$51.2 million for the Central Coast Highway – Tumbi Road Intersection Upgrade;
+ A$30.0 million for the Tenterfield to Newcastle Corridor Upgrade;
+ A$25.0 million for Richmond Road Stage 1 – Elara Boulevard to Heritage Road, Marsden Park.

Builds on the 2021-22 MYEFO measure titled *Infrastructure Investment* and the 2021-22 Budget measure titled *Infrastructure Investment – New South Wales*.

Victoria

A$3.4 billion from 2021-22 to fund priority road and rail projects in Victoria.

Increases the Government's total commitment to transport infrastructure in Victoria to A$35.5 billion since 2013-14.

Funding includes:

+ A$1.2 billion for delivery of the Beveridge Interstate Freight Terminal;
+ A$920.0 million for the Outer Metropolitan Ring Rail South;
+ A$740.0 million for the delivery of the Western Interstate Freight Terminal;
+ A$280.0 million for the Beveridge Interstate Freight Terminal road connections, including Camerons Lane;
+ A$109.5 million for the Mickleham Road Upgrade;
+ A$45.0 million for Ballarat to Ouyen Corridor Upgrade;

+ A$23.1 million for the Canterbury Road Upgrade.

Builds on the 2021-22 MYEFO measure titled *Infrastructure Investment* and the 2021-22 Budget measure titled *Infrastructure Investment – Victoria*.

Queensland

A$3.3 billion from 2021-22 to fund priority road and rail infrastructure projects in Queensland.

Increases the Government's total commitment to transport infrastructure in Queensland to over A$35.9 billion since 2013-14.

Funding includes:

+ A$1.6 billion for the Brisbane to the Sunshine Coast – Beerwah-Maroochydore Rail Extension;
+ A$1.1 billion for the Brisbane to the Gold Coast – Kuraby-Beenleigh Faster Rail Upgrade;
+ A$190.0 million for the Mount Isa to Rockhampton Corridor Upgrade;
+ A$114.4 million for the Tennant Creek to Townsville Corridor Upgrade
+ A$68.5 million for the Cooktown to Weipa Corridor Upgrade
+ A$36.2 million for the Wyaga Creek Flood Improvement Project
+ A$31.6 million for the Cairns to Northern Territory Border Corridor Upgrade
+ A$27.2 million for Bruce Highway Upgrade – Business Cases, including Anzac Avenue to Uhlmann Road, Buchanan Road to Caboolture Bribie Island Road, and Uhlmann Road to Buchanan Road
+ A$22.5 million for the Brisbane Olympic and Paralympic Games 2032 – Business Case Development
+ A$19.1 million for the Townsville to Roma Corridor Upgrade
+ A$14.4 million for the Phillips Creek Bridge Replacement Project
+ A$11.0 million for the Coomera Connector Future Stages Business Case.

This is in addition to funding provided to Queensland through the measure titled Infrastructure Investment.

Builds on the 2021-22 MYEFO measure titled *Infrastructure Investment* and the 2021-22 Budget measure titled *Infrastructure Investment – Queensland*.

Western Australia

A$1.7 billion over from 2021-22 to fund priority road and rail projects in Western Australia.

Increases the Government's total commitment to transport infrastructure in Western Australia to A$20.2 billion since 2013-14.

Funding includes:

+ A$441.2 million for the METRONET, including the Thornlie-Cockburn Link, High Capacity Signalling, Morrison Road Level Crossing Removal and the Yanchep Rail Extension projects;
+ A$320.0 million for Stages 2 and 3 of the Bunbury Outer Ring Road;
+ A$200.0 million for Stage 3 of the Tonkin Highway Extension;
+ A$178.0 million for Stages 1 and 2 of the Pinjarra Heavy Haulage Deviation;
+ A$145.0 million for the Thomas Road Dual Carriageway, South Western Highway to Tonkin Highway and the Interchange at Tonkin Highway;
+ A$140.0 million for Regional Road Safety Upgrades;
+ A$50.0 million for the Tonkin Highway – North Ellenbrook Interchange;
+ A$48.0 million for Moorine Rock to Mount Holland Road Upgrades;
+ A$40.0 million for Newman to Katherine Corridor Upgrade – Great Northern Highway Upgrade – Newman to Port Headland Overtaking Lanes;
+ A$25.0 million for the Fremantle Traffic Bridge – Swan River Crossing;
+ A$25.0 million for the Perth CBD Transport Plan – Causeway Bridge;
+ A$22.4 million for the Mid-West Secondary Freight Network.

This is in addition to funding provided to Western Australia through the measure titled *Infrastructure Investment*.

Builds on the 2021-22 MYEFO measure titled Infrastructure Investment and the 2021-22 Budget measure titled *Infrastructure Investment – Western Australia*.

South Australia

A$2.8 billion from 2021-22 to fund priority road projects in South Australia.

Increases the Government's total commitment to transport infrastructure in South Australia to A$13.7 billion since 2013-14.

Funding includes:

+ A$2.3 billion for the North-South Corridor – Darlington to Anzac Highway;
+ A$200.0 million for Marion Road – Anzac Highway to Cross Road;
+ A$120.0 million for the Adelaide Hills Productivity and Road Safety Package;
+ A$60.0 million for South East Freeway Managed Motorways – Stage 2;
+ A$60.0 million for Targeted Investments to Improve National Supply Chain Resilience;

- A$50.0 million for the Rural Roads Package including the Horrocks Highway Corridor and Safety Package;
- A$20.0 million for the Marion Road and Sir Donald Bradman Drive Intersection Upgrade;
- A$16.2 million for the Port Augusta to Perth Corridor Upgrade;
- A$16.0 million for the Main South Road Productivity Package;
- A$9.6 million for the South Eastern Freeway Safety Upgrade.

Builds on the 2021-22 MYEFO measure titled *Infrastructure Investment* and the 2021-22 Budget measure titled *Infrastructure Investment – South Australia*.

Tasmania

A$639.9 million from 2022-23 to fund priority road and rail projects in Tasmania

Increases the Government's total commitment to transport infrastructure in Tasmania to over A$4.5 billion since 2013-14.

Funding includes:

- A$336.0 million for the Tasmanian Roads Package – Northern Roads Package – Stage 2;
- A$100.0 million for Great Eastern Drive Tourism Support – Additional Packages;
- A$96.0 million for the Tasmanian Freight Rail Revitalisation Program – Tranche 4;
- A$56.0 million for the Tasmanian Roads Package – Tasman Highway Sideling Upgrade – Stage 2;
- A$24.0 million for the Bell Bay Line – reconnection to the Bell Bay Wharf;
- A$14.4 million for the Melba Line Bulk Minerals Rail Hub;
- A$13.5 million for the Hobart – Northern Transit Corridor Solution.

Builds on the 2021-22 MYEFO measure titled *Infrastructure Investment* and the 2021-22 Budget measure titled *Infrastructure Investment – Tasmania*.

Northern Territory

A$237.0 million from 2022-23 to fund priority road projects in the Northern Territory

Increases the Government's total commitment to transport infrastructure in the Northern Territory to A$3.7 billion since 2013-14.

Funding includes:

- A$132.0 million for Central Australian Tourism Roads;
- A$55.0 million for the Tiger Brennan Drive and Berrimah Road Intersection Upgrade;
- A$50.0 million for Alice Springs to Halls Creek Corridor Upgrade.

This is in addition to funding provided to the Northern Territory through the measure titled *Infrastructure Investment*.

Builds on the 2021-22 Budget measure titled *Infrastructure Investment – Northern Territory*.

Australian Capital Territory

A$51.0 million from 2022-23 to fund priority road projects in the Australian Capital Territory.

Increases the Government's total commitment to transport infrastructure in the Australian Capital Territory to over A$1.3 billion since 2013-14.

Funding includes:

- A$46.7 million for the Athllon Drive Duplication;
- A$2.8 million for Kent Street and Novar Street Intersection Upgrades;
- A$1.5 million for the Inner Canberra Corridor Planning Package.

Builds on the 2021-22 MYEFO measure titled *Infrastructure Investment* and the 2021-22 Budget measure titled *Infrastructure Investment – Australian Capital Territory*.

REGIONAL INFRASTRUCTURE INITIATIVES

Regional stimulus

A$7.1 billion over 11 years from 2022-23 to support existing programs and provide stimulus to the economies of four key regional hubs across Australia.

The four regions are:

- Northern Territory: Funding for infrastructure projects that support the manufacturing industry, promote the onshore processing of critical minerals and to strengthen the region's position as an industrial and renewable energy hub;
- North and Central Queensland: Funding for investment in water infrastructure and supply chain projects that promote water security and open up agriculture and industry growth opportunities;
- Pilbara region (Western Australia): Funding for infrastructure projects that support the mining, mineral processing and manufacturing sectors and accelerate growth in the hydrogen and renewable energy industries;
- Hunter region (New South Wales): to fund transport infrastructure projects that will improve supply chain efficiencies and help diversify the economy, building on the region's existing strengths and facilitating the development of new industries.

Investment will be targeted at strategic infrastructure projects that drive economic and jobs growth in existing and emerging

industries. Program funding will focus on connecting infrastructure and developing supply chains to ensure long-term economic and national security.

Priority regional infrastructure initiatives

A$1.5 billion over 10 years from 2021-22 to fund priority infrastructure projects across Australia.

Funding includes:

+ A$678.0 million in additional funding for the Outback Way in the Northern Territory, Queensland and Western Australia;
+ A$385.4 million in additional funding for the Northern Australia Roads Program;
+ A$180.1 million to establish the Regional Australia Level Crossing Safety Program and support activities under the National Railway Level Crossing Safety Strategy to improve level crossing safety in regional Australia;
+ A$150.0 million for the Inland Rail Interface Improvement Program;
+ A$40.0 million in additional funding for the Bridges Renewal Program;
+ A$6.5 million for the Australian Automobile Association to conduct on-road emissions testing of light vehicles
+ A$6.0 million for the Amy Gillett Foundation Program to improve road safety for cyclists.

Builds on the 2021-22 MYEFO measure titled Infrastructure Investment.

South East Queensland City Deal

A$680.6 million over 11 years from 2022-23 to support projects under the South East Queensland (SEQ) City Deal that enhance transport and digital infrastructure to deliver a better connected region, create jobs and improve liveability in the SEQ region. Project approvals are dependent on agreements with the Queensland State Government and applicable councils. Australia Government funding includes transport, waste and recycling, housing, liveability, pedestrian infrastructure, digital connectivity and innovation projects.

Albury-Wodonga Regional Deal

An additional A$83.2 million over 5 years from 2022-23 to support projects under the Albury Wodonga Regional Deal to unlock economic benefits and opportunities in the region

Northern Australia Infrastructure Fund

A further A$2.0 billion will be provided to the Northern Australia Infrastructure Facility (NAIF) to finance critical infrastructure projects that drive economic development and investment in Northern Australia. This brings total Commonwealth funding for the NAIF to A$7.0 billion.

The Government will also expand the NAIF's geographic boundaries to enable it to provide financing to the Indian Ocean Territories of Christmas Island and the Cocos (Keeling) Islands.

WATER INFRASTRUCTURE INITIATIVES

National Water Grid Funding

A$6.9 billion from 2021-22 to expand the investment in nationally significant, transformational water infrastructure projects to assist in developing regional communities.

Funding includes:

+ A$5.4 billion for Hells Gates Dam, Queensland
+ A$600.0 million for Paradise Dam Improvement, Queensland
+ A$433.0 million for Dungowan Dam and Pipeline, New South Wales
+ A$300.6 million for the Darwin Region Water Supply Infrastructure Program – Stage 1, Northern Territory
+ A$126.5 million for Emu Swamp Dam and Pipeline, Queensland
+ A$13.7 million for the Don Irrigation Scheme, Tasmania
+ A$7.1 million for the Adelaide River Catchment Water Allocation Plan, Northern Territory
+ A$5.0 million for the Northern Water Supply Business Case, South Australia
+ A$0.8 million for the Collie to Coast Business Case, Western Australia
+ A$0.5 million for the McLaren Vale Irrigation Water Security Business Case, South Australia.

Costs of the measure will be partially met from unallocated funds within the National Water Grid Fund.

Increases the total funding provided for the National Water Grid Fund to A$8.9 billion.

Builds on the 2021-22 MYEFO measure titled National Water Grid Fund – project funding and the 2021-22 Budget measure titled National Water Grid – new projects.

Water –the Murray-Darling Basin

A further A$139.9 million over 3 years from 2021-22 to continue investments to achieve a sustainable Murray-Darling Basin (Basin) by improving river health, enhancing environmental water outcomes and stimulating economic activity in Basin communities.

Funding includes:

+ A$97.0 million over 2 years from 2022-23 for community-driven infrastructure projects to improve river health, promote agricultural productivity, and support adaptation to changing water demands;

- A$35.1 million over 3 years from 2021-22 to better deliver environmental water to high value ecosystems in the Edward-Wakool region;
- A$3.2 million over 2 years from 2022-23 to improve water compliance, through the Office of the Inspector General for Water Compliance field officers network; and
- A$2.1 million in 2022-23 to deliver the water market reform roadmap to improve governance and integrity of Basin water markets, and market information, in response to the ACCC's Murray-Darling Basin Water Markets inquiry.

Builds on the 2021-22 MYEFO measure titled Murray-Darling Basin – improving infrastructure and environmental outcomes and the 2021-22 Budget measure titled Murray-Darling Basin – managing water resources.

North Queensland Water Infrastructure Authority

A$11.6 million over 5 years from 2022-23 to continue to fund the North Queensland Water Infrastructure Authority and expand its remit to support the development and delivery of water infrastructure in North Queensland.

Energy and Emissions Reduction

A further A$446.1 million over 5 years from 2021-22 to increase energy security, maintain affordable and reliable power for households and businesses and reduce the cost of deploying low emissions technologies, consistent with Australia's Long Term Emissions Reduction Plan.

Funding includes:

- A$247.1 million over 5 years from 2021-22 (and A$0.3 million per year ongoing) to support increased private sector investment in low emissions technologies including hydrogen, the continued development of a hydrogen Guarantee of Origin scheme, and the development of a Biodiversity Stewardship Trading Platform to support farmers to undertake biodiversity activities ahead of the introduction of a voluntary biodiversity stewardship market;
- A$148.6 million over 5 years from 2022-23 to support more investment in affordable and reliable power, including the development of community microgrid projects in regional and rural Australia; and
- A$50.3 million over 2 years from 2022-23 to accelerate the development of priority gas infrastructure projects consistent with the Future Gas Infrastructure Investment Framework and support investment in carbon capture and storage pipeline infrastructure.

To support market confidence, the Clean Energy Regulator will streamline the process for existing Emissions Reduction Fund (ERF) fixed delivery contract holders seeking to take advantage of higher voluntary private market prices, with no change to the quantum of funding available under the Emissions Reduction Fund or Climate Solutions Fund.

The Government will also release Australian crude oil stocks held in the United States Strategic Petroleum Reserve in response to an International Energy Agency declared collective action, and seek to replenish storage of refined products (petrol, diesel and jet fuel) and purchase replacement oil stocks at a later date.

Circular waste economy

A$83.1 million over 5 years from 2022-23 to support the transformation of Australia's waste and recycling sector and expedite Australia's transition to a more circular waste economy.

Funding includes:

- A$60.4 million over 4 years from 2022-23 to boost Australia's plastics recycling capabilities through state-of-the-art technologies and advanced recycling solutions for problematic plastics under the Recycling Modernisation Fund;
- A$18.2 million over 5 years from 2021-22 to develop and promote a 'ReMade in Australia' brand and certification scheme that supports Australians to buy quality, locally-recycled products; and
- A$4.4 million over 2 years from 2022-23 to support the delivery of the Government's waste export ban by reducing licence assessment timeframes and helping industry to meet regulatory requirements.

Large Vessel Infrastructure and Submarine Basing

A$4.3 billion to deliver Western Australia's first large-vessel dry berth, which will support the construction and sustainment of naval vessels in Australia and support a stronger commercial shipbuilding and sustainment industry in Western Australia.

Other measures include:

- a commitment to build a new submarine base on the east coast of Australia to support Australia's future nuclear-powered submarines and has identified Brisbane, Newcastle and Port Kembla as the preferred sites. The Department of Defence will engage with state and local governments to determine the optimal site, informed by the work of the Nuclear-Powered Submarine Taskforce; and
- Steps are being taken to secure additional land in Adelaide on which to build the Nuclear-Powered Submarine Construction Yard, in particular land adjacent to the existing Osborne North Shipyard.

Airport initiatives

There are a series of measures relevant to airports including:

- an additional A$25.2 million over 2 years from 2022-23 to maintain appropriate oversight and environmental

management at Commonwealth leased airports to ensure compliance with airport building control and environmental regulations. Funding includes A$16.3 million over 2 years from 2022-23 to support airport building control services, including during peak construction at Western Sydney Airport and A$8.9 million over 2 years from 2022-23 to continue to support airport compliance with environmental standards; and

+ an additional A$543.5 million over 2 years from 2021-22 to continue to support the aviation sector as part of the Government's response to the sector's recovery from the COVID-19 pandemic. This will continue essential services to regional communities and other operations across the sector. Funding includes:
+ A$495.0 million in 2022-23 as an equity investment to Airservices Australia to continue to provide critical air navigation, air traffic control, aviation, and fire and rescue services at major Australian airports;
+ A$28.5 million over 2 years from 2021-22 to extend the Regional Airports Screening Infrastructure program to assist regional airports to meet the costs of mandatory security screening requirements until 31 December 2022;
+ A$20.0 million in 2021-22 to support the Civil Aviation Safety Authority's critical safety regulatory functions and services for the aviation industry; and
+ extending the Regional Airline Network Support program to 30 June 2022 to ensure regional communities continue to receive essential air services.

Telecommunications

A$1.3 billion over 6 years from 2021-22 to improve regional telecommunications, including through providing greater mobile coverage and targeted solutions to address issues such as mobile congestion. This initiative is part of the Government's response to the 2021 Regional Telecommunications Review.

Funding includes:

+ A$811.8 million over 5 years from 2022-23 to the Department of Infrastructure, Transport, Regional Development and Communications to expand mobile coverage, connectivity, resilience and affordability in regional Australia, building on existing programs including the Mobile Black Spot Program and the Regional Connectivity Program;
+ A$480.0 million for NBN Co to upgrade its fixed wireless and satellite networks to improve services in regional, remote and peri-urban Australia;
+ A$1.8 million in 2022-23 to the Australian Competition and Consumer Commission (ACCC) to conduct a review of mobile tower access fees; and
+ A$4.8 million in 2022-23 to extend the Mobile Network Hardening Program to fund telecommunications network resilience upgrades in regional Australia.

STREAMLINING ENVIRONMENTAL PROTECTIONS AND MODERNISING INDIGENOUS CULTURAL HERITAGE PROTECTIONS

A$139.6 million over 4 years from 2022-23 (and A$3.2 million per year ongoing from 2026-27) to progress reforms and maintain timely assessments and approvals under the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) and modernise cultural Indigenous heritage protections under the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (ATSIHP Act).

Funding includes:

+ A$62.3 million over 4 years from 2022-23 (and A$0.7 million per year ongoing) to establish and administer up to 10 bioregional plans under the EPBC Act at priority regional locations;
+ A$27.9 million in 2022-23 to maintain timely environmental assessments and approvals under the EPBC Act:
+ A$11.0 million over 2 years from 2022-23 to modernise Indigenous cultural heritage protections and maintain timely decisions under the ATSIHP Act;
+ A$10.0 million in 2022-23 to progress negotiations with the states and territories on bilateral agreements for single touch environmental approvals and remove duplication by accrediting states and territories to carry out environmental assessment and grant approvals for Commonwealth matters; and
+ A$9.5 million over 4 years from 2022-23 (and A$2.5 million ongoing) to enhance environmental compliance and enforcement capabilities under the EPBC Act.

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GOVERNMENT SUPPORT FOR THE CRITICAL MINERALS SECTOR

05/04/2022

A NEW ERA OF GOVERNMENT SUPPORT

We are experiencing a renaissance of interventionist industry policy in Australia, which is designed to secure the future success of industries considered critical to the nation's economic growth and sovereign capability. There are now more Government funding programmes available than ever before, with flexibility to invest across nearly the entire financial spectrum, from grant funding to equity, debt, and bond-like products.

Historically, Government support of Australian industry has taken several forms:

+ Protection: tariffs, targeted foreign investment restrictions (eg in the domain of "critical infrastructure" under the *Foreign Acquisitions and Takeovers Act and the Security of Critical Infrastructure Act*)
+ In-kind support and collaboration: such as through Co-operative Research Centres, Industry Growth Centres, and the Critical Minerals Facilitation Office (**CMFO**)
+ Procurement policy and Australian Industry Participation Plans: by directing Government spending to achieve desired industry policy outcomes
+ Fiscal support: in the form of tax concessions such as the Research and Development Tax Incentive
+ Grants: of which there are now over 130 Commonwealth programmes alone, including ARENA, the Modern Manufacturing Initiative, and most recently the Critical Minerals Accelerator Initiative (**CMAI**)
+ Debt or equity funding: which can be directly administered by Commonwealth departments such as Industry, Science, Energy and resources, or delivered through corporate Commonwealth entities such as Clean Energy Finance Corporation (**CEFC**), Export Finance Australia (**EFA**) or the Northern Australia Infrastructure Facility (**NAIF**)

The vast array of Government support programmes available can be a challenge for proponents to navigate, thanks to differing governance structures, probity requirements and the complexity of mandatory investment criteria and opportunity guidelines proponents need to digest and respond to. And it can also be challenging for private sector proponents, who are understandably focused on their own business rather than lofty policy goals, to articulate the case for support in a manner which both dovetails with the policy priorities of the government of the day and provides a convincing rationale for taxpayer support, without undermining the fundamentals of the project involved – particularly in the eyes of investors. Yet this balancing act is key to unlocking the substantial benefits that government funding can bring.

SUPPORT FOR THE CRITICAL MINERALS SECTOR IN AUSTRALIA

One area in which the Commonwealth Government continues to demonstrate serious intent is in relation to the development of Australia's critical minerals sector. Its support here is notable in that it recognises that, despite deep pools of both expertise and funding in the Australian mining and metals sector, there are still aspects of critical minerals exploration, development and processing that evidence the need for Government intervention.

Chief amongst these is the requirement to spend a disproportionate amount of project capex in the development of downstream processing capacity to deliver a saleable product, in comparison to (say) Australia's largest export commodities iron ore and coal, which require little more than crushing, screening and washing prior to shipping to end users. While ample capacity may exist in debt and equity markets servicing the mining and metals sector, this is frequently not of the tenor or at the rates of return required to support critical minerals processes through the pilot plant and optimisaton phases of development, which may run to the years, or possible even decades.

Typical of the challenge faced by the sector is the new breed of Australian lithium miners, almost all of whom are investing in or investigating downstream capacity to convert spodumene concentrate into lithium carbonate or hydroxide (or some other precursor material) for integration into the battery minerals value chain.

In the domain of rare earths, a critical component of magnets incorporated into everything from wind turbines to electric vehicles to fighter jets, the complexity of downstream processing required to meet market specifications has stymied all but a handful of proponents, the most well-known of which is Lynas Corporation.

THE COMMONWEALTH'S CRITICAL MINERALS STRATEGY: REPLACING THE STICK WITH THE CARROT

Anyone with a passing knowledge of industry policy in Australia will know that Government attempts to "force" value-adding efforts in the mining sector have met with mixed success at best. In this context the Commonwealth's recently announced initiatives in the critical minerals space are notable in replacing the figurative stick with a financial carrot.

In 2019, the Commonwealth Government released its first Critical Minerals Strategy, outlining the government's vision that by 2030, Australia is a global critical minerals powerhouse, integral to international critical minerals supply chains and technologies crucial to the global economy. A centrepiece of the 2019 strategy was the establishment of a $2 billion loan facility, known as the Critical Minerals Facility, to be administered by EFA.

On 16 March 2022, the same day it announced a total of $243 million in funding for a range of battery metals projects under the Modern Manufacturing Initiative, the Government released its updated Critical Minerals Strategy. Two key planks of the revised 2022 Critical Minerals Strategy involve the establishment of a $200m accelerator programme (the **CMAI**) and the establishment of a $50 million virtual National Critical Minerals Research and Development Centre, which will draw together expertise from CSIRO, Geoscience Australia, and the Australian Nuclear Science and Technology Organisation.

The Commonwealth Government's determination to support the critical minerals sector was most recently evidenced in the form of a $1.05 billion non-recourse loan under the Critical Minerals Facility to mineral sands miner Iluka Resources, for the construction of a rare earths refinery at Eneabba. Importantly, the refinery will be capable of producing rare earth oxides from a range of feedstocks sourced not only from Iluka's portfolio but also third party suppliers, aligning the project with the Government's broader policy objective to "crowd in" and incentivize further investment in the sector,

The loan follows suggestions in that the Biden Administration will soon move to invoke the provisions of the US Defence Production Act to spur greater domestic production of critical minerals, providing a fillip to the defence and clean energy industries and reducing reliance on foreign imports.

ACCESSING GOVERNMENT FUNDING

Going forward, it can be seen that Government support can potentially play a role not only in major capital developments but also in M&A transactions (as shown by the Commonwealth's backing of Telstra's acquisition of Digicel) and refinancing (such as CEFC's participation in Pilbara Minerals bond refinancing).

While Government support could make the difference in marginal projects or transactions, there are several considerations that applicants need to bear in mind when seeking support. These include:

+ The identity and investment mandate of the administering authority – who is the decision maker and what are the constraints (if any) on their decision making powers? What kind of support is needed (debt, equity, grant or some other form of support) and is this within the mandate of the relevant authority?
+ Government policy – how does the applicant's project align with relevant Commonwealth Government policy objectives including on matters such as sovereign capability, energy security and Australian industry participation? Is there a risk that government support will "crowd out" or otherwise complicate private investment in the sector?
+ The extent of public benefit that can be achieved outside the proponent – this can include jobs, technology transfer, regional development, enhanced sovereign capability in key sectors, and other social objectives such as indigenous engagement.

Careful review of the terms or reference or empowering legislation for the relevant programme is required, along with the grant opportunity guidelines (GoGs) produced by the administering authority for the information of applicants. Early engagement with the relevant government departments is essential.

The figure below sets out a simplified step list for applicants seeking government support.

Figure 1

Applicants also need to be conscious of commercial confidentiality issues and the potential for disclosure of details of an application through Parliamentary processes or Freedom of Information applications (albeit the "commercial-in-confidence" exception will often be available in respect of the latter).

OPPORTUNITY REMAINS IN THE CRITICAL MINERAL SECTOR

Whether the paucity of critical minerals projects in Australia evidences market failure is open to debate. There are credible arguments to the contrary. However, in our experience, policy makers, particularly at the Commonwealth level, are increasingly motivated by the broader strategic and security context in which Australia now finds itself and prepared to back their judgment to accelerate investment in the critical minerals sector even at the risk of "crowding out" of private capital.

In fact, evidence from several NAIF and CEFC commitments suggests that tapping pools of Government liquidity can be a useful means of de-risking the proposition for debt or enhancing

In simple terms, with such powerful momentum behind it, the opportunity for government to play a role in funding the development of critical minerals projects is one proponents in the sector cannot afford to ignore.

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