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Implications of COVID-19 on the Australian Mining Industry

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Note: The content of this publication is current as at 29 May 2020. COVID-19 responses both internally within Australia and internationally are changing daily. It is important to regularly monitor and keep up to date with all relevant information and be prepared to respond as and when the social and economic landscape changes.

The impacts of COVID-19 have been felt globally, including in the Australia's mining industry. Travel restrictions for necessary personnel, interruptions to fieldwork and parties' difficulties in navigating their contractual or joint venture obligations are just some of the issues facing the industry.

This publication seeks to look at some of the major issues affecting participants in the Australian mining industry as a result of the COVID-19 pandemic. The publication is broken up into a number of areas that are likely to be affected by the pandemic and that participants within the Australian mining industry should be cognisant of at this time, as follows:

Supply Chains

Uncertainties across the supply chain are affecting commodity prices and are a cause of concern for many businesses in the mining industry. Although production and export of minerals are continuing, businesses have been faced with shipping and transport - both by road and air freight- delays in importing and exporting to other countries. These, coupled with delays at major shipping ports and travel restrictions have impacted on supply chains including causing supply chains to bottleneck. Industry practice for the past 20 to 30 years has been focussed on reducing inventory and supply chain optimisation. With this past drive for efficiency, companies have a reduced ability to cope with global shocks and delays to supply chains as a result of the issues caused by the COVID-19 pandemic.

Given mining operations are, generally, continuing production, it is important for businesses to consider key supply risks associated with having sole suppliers or a small supply base, supplier disruptions and supplier insolvency. These end-to-end supply chain risks may have to be adapted, balanced and moderated with production levels and market responses to minerals produced. Careful monitoring of supply chain impacts should allow businesses to have a clear understanding of its critical spares/materials and where a heightened risk of bottlenecks, equipment or supplier failure may occur. Companies should already be progressing with developing clear contingency plans to manage those risks.

Other work-arounds to supply chain disruptions include sourcing required components from different markets, sourcing supply from alternative domestic suppliers or, if possible, insourcing the production of required components.

Businesses should also be reviewing their supply contracts and, if possible, negotiating (or re-negotiating) terms relating to pricing, quantities supplied, finance and payment terms and if necessary or commercially sound, termination of contracts.

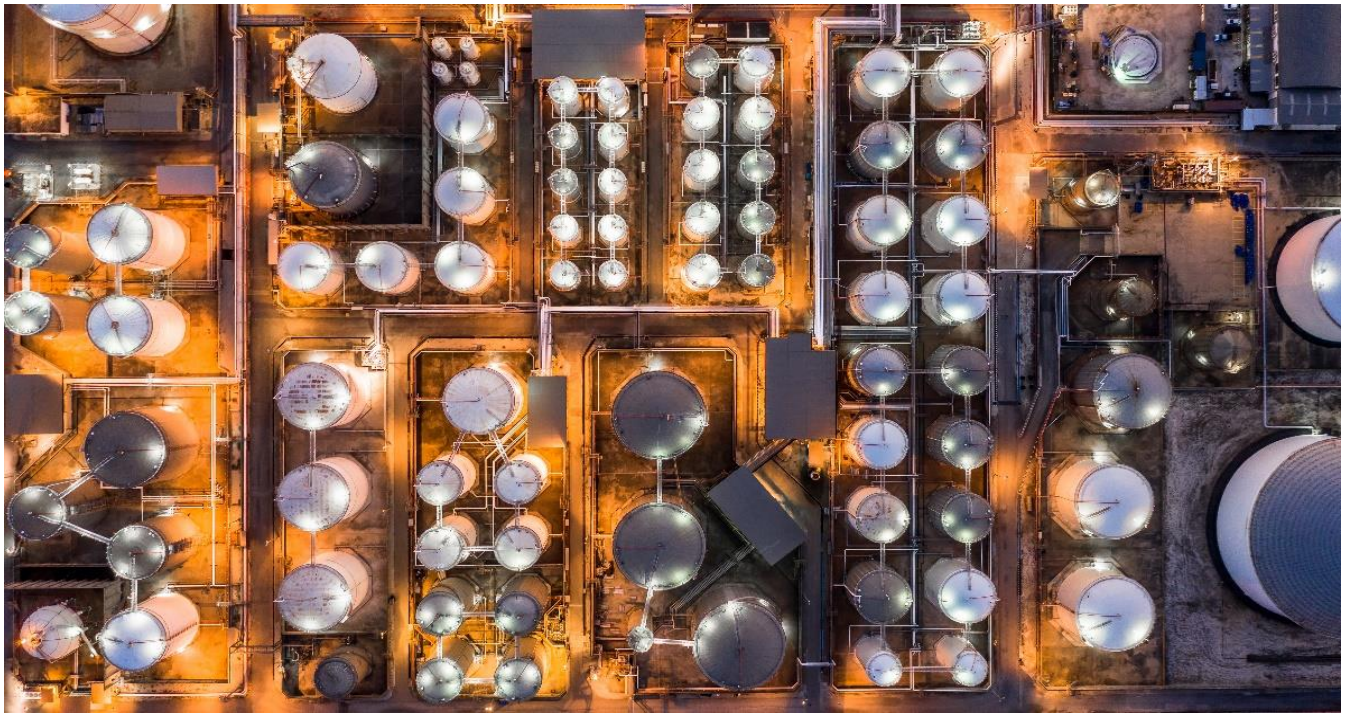
Supply Chains (continued)

ACCC Interim Authorisation

On 24 April 2020, the Australian Competition and Consumer Commission (ACCC) granted interim authorisation to members of the Minerals Council of Australia (MCA) and mining associations allowing those who have been notified to coordinate on the sourcing, purchase and distribution of crucial supplies and services such as health and safety equipment, logistics, equipment maintenance and consumables, like fuel and explosives. It should be noted that the coordination is limited to sharing stock or information that is not completely sensitive. Importantly, the approval does not allow companies to coordinate on the terms, conditions or prices in supply contracts.

For suppliers to participate in these authorised arrangements, they should establish protocols for the arrangement and its administration. It should also inform the MCA about the details of the arrangement and contact points in each participating company and keep both the MCA and ACCC updated on any changes to the arrangement (such as changes to parties or the critical supplies shared). A condition of the interim authorisation is that the MCA must notify the ACCC about these arrangements as soon as practicable after they are made.

Failure to meet these notification requirements will negate the authorisation. This means that participating suppliers should ensure the MCA is well-informed about the details of, and changes to, any arrangements. Allowing suppliers to work together to manage critical services and supplies during COVID-19 will help to ensure Australia's mining industry continues to operate safely and efficiently amidst shortages and supply chain disruptions. The ACCC, when appropriate, would decide when the authorisation would be revoked and is currently seeking feedback on an application to keep the authorisation in place for 12 months.



Contractual Performance

The international nature of the mining industry means that businesses will usually have one or more of the following: operations or transactions in multiple jurisdictions; contracts governed by differing jurisdictional laws and/or foreign counterparties. This section of the article focuses on the impact of COVID-19 on contractual performance by mining businesses and whether such businesses may rely on contractual provisions and/or the doctrine of frustration to excuse them from performance or liability. We consider the different contractual mechanisms that may be available to contracting parties where Australian laws apply. We recognise that there may be significant hurdles to excuse the performance of obligations in some instances. Hence, seeking advice at an early stage to assess individual circumstances will help to identify immediate and long-term measures that can be taken for businesses to be placed in the best position possible in these uncertain times.

Force Majeure

Force majeure clauses can excuse the non-performing party from liability where unforeseeable circumstances caused the failure to perform. Mining businesses should review all existing contracts- both customer and supply contracts- throughout its mining supply chain and stocktake whether their contracts contain a force majeure clause expressly worded as such or as "unforeseen events" or "acts of God". Whether COVID-19 and the issues associated with it fall within the force majeure provision and the events, restrictions and circumstances flowing from them depend on whether the provision expressly covers epidemics, pandemics or virus outbreaks or alternatively, whether the event can be argued to fall within a broader category (e.g. a natural disaster). In addition, parties considering relying on force majeure clauses must show that COVID-19 is the cause of the disruption.

For example, border restrictions have had a direct impact on supply chain disruptions. For new mining project developments, force majeure claims would be primarily based on an inability to secure human resources, services, goods and parts, including for construction. Whether the particular circumstances fall within the applicable force majeure provision will ultimately be an exercise of contractual interpretation.

The party claiming force majeure must demonstrate that it has made efforts to mitigate its losses, for example, by sourcing essential chemicals or mining equipment from alternative suppliers from other countries even if this has higher cost implications.

Contractual Performance (continued)

Force majeure clauses will only entitle parties to take the action or actions stipulated in the applicable contract which may encompass suspension of performance, extension of time to perform, some form of liquidated damages and/or termination of the contract (provided the party relying on the clause complies with contractual notice requirements). Any notice requirements should be complied with strictly in respect of any prescribed time periods and in providing any detailed information including documentary evidence supporting the claim as well as mitigation efforts.

Other Contractual Provisions

Hardship clauses or an adjustment of the commercial terms can afford protection where an unforeseeable event makes the performance of the contract excessively burdensome. Other useful clauses include material adverse change/effect, price adjustments, liability limitations and exclusions, extensions of time or variations or changes in laws. Parties should also consider whether performance of any obligations have become illegal during this period of time. Whether these provisions expand their scope to the business' current circumstances is dependent on the exact wording of the clause.

Frustration

If force majeure provisions do not apply or are not contained within the contract, parties may seek to rely on the doctrine of frustration. Under Australian common law, the doctrine of frustration applies where performance of the contract becomes illegal or impossible to perform or performance has become radically different from what the parties originally contemplated.

Where the doctrine of frustration applies, parties are automatically discharged from performance of the contract (but accrued rights and obligations are not affected). Along with being more difficult to prove than contractual provisions of relief, consequences of a frustrated contract can result in complicated and unfair outcomes as under the common law (which applies in Western Australia, Tasmania, Queensland, Northern Territory, Australian Capital Territory) all obligations, including payment obligations, cease for both sides from the point of frustration. In the other Australian jurisdictions, legislation regulates the operation of the doctrine of frustration in an effort to ameliorate the fairness of the outcome between the parties: New South Wales (*Frustrated Contracts Act* 1978 (NSW)), South Australia (*Frustrated Contracts Act* 1988 (SA)) and Victoria (*Australian Consumer Law and Fair Trading Act* 2012 (VIC)). Mining industry participants should seek further legal advice if they think one or more of their contracts have been frustrated.

Contractual Performance (continued)

Future Contracting

If considering entering or negotiating new contracts, businesses need to ensure that the obligations they are committing to can be lawfully performed in the current circumstances in light of present legislative restrictions and future restrictions that may be imposed by Commonwealth or State and Territory governments. Parties' obligations could be structured in new contracts by providing expressly what parties must do if a law impacts on the performance of that obligation. Enough flexibility should be incorporated in constructing these provisions so that they are not invalidated by future laws or events. Businesses will also need to consider what should be included in current force majeure and other contractual provisions being entered into whilst building resilience in their own operations and supply chains.

Joint Venture Arrangements

Joint ventures are common business structures used in the mining sector and as such, joint venture partners are faced with unique challenges of navigating liquidity issues and critical operational decision-making. In the face of developing solutions to these issues, joint venture partners are endeavouring to collaborate, think creatively and navigate disagreements. As each joint venture is unique and project-specific, the considerations outlined below are some general issues that have arisen as a result of the COVID-19 pandemic.

Liquidity and Financing

With COVID-19's adverse impact of the economy, joint ventures with debt leverage are faced with immediate and imminent liquidity challenges. Joint venturers are assessing their financial covenants and material adverse change provisions in loan agreements as well as taking proactive steps to engage with its lenders to maintain these relationships. Joint venture management are considering how to alleviate immediate liquidity concerns through increasing their overall working capital borrowing capacity, looking to their revolving loans or calling upon additional capital contributions. Joint venture participants are carefully evaluating the nature and magnitude of their capital contribution requirements under the joint venture against their current and future financial capabilities in addition to partner financing alternatives. Dispute and/or dilution provisions should be reviewed in the event of defaults on cash calls or payment obligations.

Key Decision-Making and Disagreements

Where major decisions concern key strategic or financial matters about the joint venture or its operations, these usually require unanimous approval from all joint venture partners. Joint venture participants are re-evaluating whether operating plans and budgets previously approved are no longer practical or possible in the future and even post-COVID-19. These may range from choosing to eliminate or adjust and/or defer major capital investments or expenditures, exercising force majeure or early termination rights under key commercial agreements or the disposal of assets. In some instances, joint venture partners may wish to dissolve and liquidate the joint venture due to the commerciality of the current operations or major disagreements between the partners.

Unincorporated and incorporated joint ventures differ in their method of termination in terms of: the treatment of joint venture parties, whether regulators are involved in the process and the consequences of termination. Under the joint venture agreement, whether incorporated or not, the joint venture can usually be terminated if there is only one party remaining or the parties mutually agree to withdraw from the joint venture.

Joint Venture Arrangements (continued)

Where there are disagreements resulting in deadlocks between joint venture parties, agreements customarily set out requirements for the partners to maintain the operational status quo by continuing to operate the business consistent with past practice. In some instances, however, it may not be beneficial for partners to maintain the status quo in the current economic environment. Hence, deadlocks should try to be resolved as soon as possible in accordance with the mechanisms in the applicable joint venture agreement. Such mechanisms can include mandated dispute resolution processes such as the use of third-party mediation or binding arbitral decisions, or ownership buyouts (sometimes with valuation mechanics) where disagreements are prolonged.

Joint venture partners have a number of mechanisms and routes open for them to work through these issues and resolve disagreements - thus helping them avoiding unintended outcomes flowing from extreme measures such as dissolution of the joint venture. From our observations, most joint venture partners are working more collaboratively during the current times. At this stage joint venture partners seem to be navigating these challenges and disagreements informally to a greater extent; navigating away from formal dispute resolution processes. However, we accept that resolution of conflicts between joint venture partners in this way may change moving forward.

M&A Transactions

As Australia begins to ease some of its restrictions, movement of expertise and key personnel remains a critical issue for deal flow and completion of deals. Unless key personnel and advisors are local to the relevant jurisdiction, M&A transactions will be slow to develop and execute. A solid appetite for deal-making (from both buyer and seller sides) and funds currently all backed up are ready for greater investment as entities increase deal flow in the near future. We are also seeing renewed interest from China in multiple assets in multiple jurisdictions, which is a positive sign for the mining sector in the longer-term. The outlook for the mining sector seems positive in the medium to long term, especially for some metals and minerals, though we expect M&A activity to remain patchy but rising in the short term. Increases in work flow will also likely be region-specific depending on the relaxation of border restrictions.

Parties in current M&A transactions should be prepared to navigate through a number of difficulties from the beginning to the end of the transaction execution process. Whatever stage of the transaction parties currently find themselves in, the effects of COVID-19 will have a significant impact on buyer/seller sentiment and deal negotiations in respect of the following aspects of a deal; some of the key considerations follow.

Valuation and Pricing

The Australian share market, like most global markets, has suffered a significant downfall; this has affected metrics used in M&A deal valuation and pricing. In recent times, valuation metrics have greatly contracted – these include unfavourable trading multiples and the incorporation of, currently low, market capitalisation (and share prices) into the purchase price. Valuation methods such as Net Present/Asset Value and Discounted Cash Flows accounting for projected cash flows will suffer not only due to generally low commodity prices but also decreased levels of production and export quantities. Other factors influencing reductions of bid pricing include the status of current operations along with estimated costs of resuming activity where production or processing has halted or remains in care and maintenance.

The target company's current financial position also plays a role in deal valuation especially where it has faced difficulties in generating cash flow or obtaining financing. In conditions where a target company's share price is trading below the bid price, boards of bidder companies may face difficulties in pursuing transactions where share prices are highly volatile and valuations are difficult to determine. We have seen the economic detriments of COVID-19 causing bid pricing for M&A deals to be reviewed and for many deals to fall over or be put on hold. Buyers with private capital are seen to stay put or withdraw from deals whilst waiting until an opportunistic investment arises which may prompt them into buying companies, assets or a stake in either at discounted pricing. Many funds or investors have chosen to wait until clearer financial and other assessments can be made. These buyers are in prime positions to create investment opportunities and in doing so, can choose to leverage their position to negotiate very favourable terms.

M&A Transactions (continued)

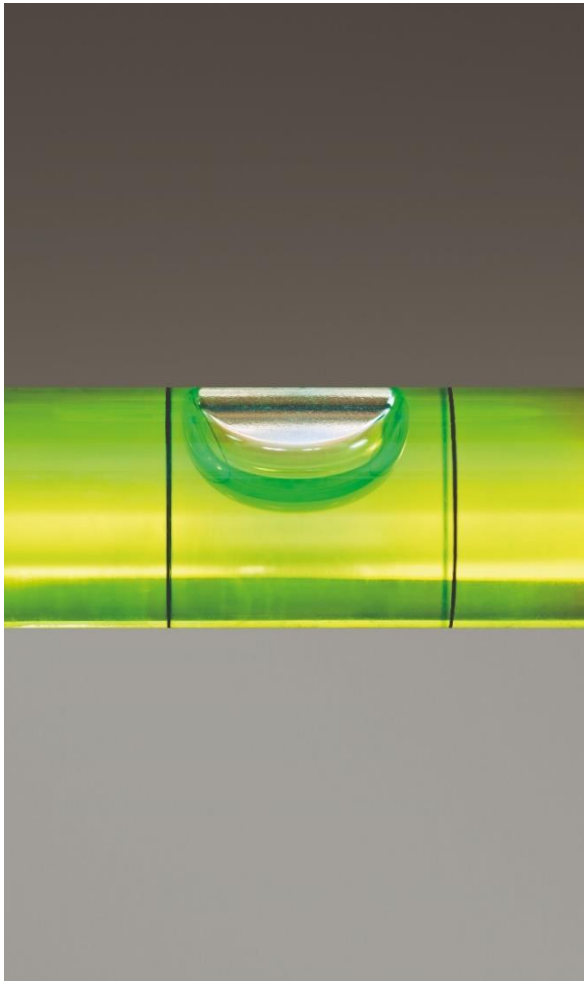
Financing

In the current environment, raising finance through debt or equity presents many challenges. Hence, it is expected that new capital expenditure and construction projects will be put on hold in the short term as mining businesses take precautions to preserve cash and facilities. At present, equity is more likely to be raised from institutional placements and debt facilities will likely be more expensive than before with more stringent due diligence processes. Banks and lenders seem to have limited appetite for project funding opportunities due to the inherent risks in mining project development and desire to maintain their balance sheets. There have been speculations that high levels of liquidity exist in the finance market, in particular for private equity, paving the way for an increase in appetites for investment at appropriately opportunistic times.

Due Diligence

In light of the COVID-19 pandemic the ability to conduct logistical aspects of the due diligence process are hampered and hence, must be reconsidered. Although a significant part of the due diligence process is typically conducted remotely through virtual data rooms, these challenges may cause deals to be delayed, put on hold or terminated especially where these logistical aspects continue to be considerations vital to the transaction going ahead. Such logistical aspects encompass travel restrictions hindering the holding of management presentations, mine site visits or asset inspections, and in other cases, the target company may have shut down its operations.

Many of the focus areas for review in the due diligence process are akin to the matters raised throughout this article. This includes whether the target company's supply chain has been disrupted and the corresponding consequences of its inability to meet customer obligations, rights under material contracts, compliance with employment, health and safety, coverage under the target company's policies, employment contracts and risks of data privacy breaches where many employees work remotely. The buyer should also be looking through the target company's business continuity and crisis management procedures, along with its reputation for taking appropriate measures to mitigate the effects of COVID-19. An exercise which was likely conducted early in the transaction process, buyer companies should be comparing the impacts and future implications of COVID-19 on the mining industry in general, the target company's commodity market – globally and in key export nations- as well as its competitors.



M&A Transactions (continued)

Indemnities and warranties

Usual M&A transactions will consist of typical warranties such as compliance with laws, financial standing and no litigation or subsisting claims. However, potential buyers may also be seeking warranties and indemnities associated with COVID-19 such as the viability of material supplier and customer contracts and that there can be no termination of contract on the basis of force majeure. There remains the ability for both the buyer and seller sides to obtain warranty and indemnity insurance policies for M&A deals. In some cases and depending on policies, losses relating to COVID-19 have been excluded. This results in buyers considering whether they should advocate for a stronger position of additional warranties and indemnities tailored to COVID-19 issues. As warranties and indemnities are generally stated as being true as at (or near) the date of completion, the seller in agreeing to these additional provisions may be tying itself to future, and perhaps unpredictable, consequences of COVID-19. In the same vein, buyers may want contractual provisions or in some cases, a separate agreement (e.g. Transition Services Agreement), that impose continuing obligations on the target or seller for a short period of time after the transaction closes. These obligations are intended to allow the buyer to continue operations or re-start suspended operations and may involve, for example, the seller arranging for all necessary personnel, equipment and supplies to a mine site post-completion.

Completion Periods

With many deals taking longer to complete due to delays in fulfilling all conditions precedent, parties in a transaction will likely be closely reviewing longstop dates and extending such dates rather than the agreement being automatically terminated or one of the parties withdrawing. Specifically, there have been delays relating to obtaining third-party consents or waivers and financing. There have also been delays in meeting condition precedents requiring regulatory approval such as from the ACCC, Foreign Investment Review Board (FIRB) (who have had review times extended to up to 6 months) or the relevant Mines Minister for consents to transfers or dealings in tenements. Where a transaction is debt-financed, the longstop date in the financing agreement should be adjusted accordingly to ensure purchasing and financial obligations are aligned.

For more information about the key issues to consider when negotiating M&A transactions in the COVID-19 era and how buyer and seller approaches differ from those taken previously, see our publication Negotiating M&A transactions in the COVID-19 era: considerations for navigating new opportunities in uncertain waters.

Resources Industry Workforce

The mining sector is presented with a unique set of challenges in its workplaces with physical distancing measures impacting on inter-state flights, on-the-ground transport and tight work and living spaces.

Travel Restrictions

Western Australia, South Australia, Tasmania and the Northern Territory have effectively closed their borders, requiring any arrivals to undertake a 14-day period of self-quarantine. In Western Australia, workers in the energy and resources sector are exempt from these periods as well as the restrictions on travel to remote communities for work purposes. The measures in response to COVID-19 mean that interstate flights and travel from fly-in fly-out (FIFO) workers have been greatly curtailed. South Australia has introduced restrictions on non-essential travel, providing exemptions to people required to fly or drive into the state for jobs in mining and resources. In the Northern Territory FIFO workers must apply for an exemption from travel restrictions requiring arrivals to isolate for 14 days. The exemption is granted based on whether the person is governed by a COVID-19 management plan that is imposed by their employer to prevent transmission of COVID-19. In Queensland FIFO and drive-in drive-out (DIDO) workers are not required to undertake isolation periods but were encouraged to reduce FIFO and DIDO to minimise mass movements of people.

All mines in Queensland and Western Australia were also requested to provide a COVID-19 plan that details the measures undertaken to improve hygiene on-site, tailored to the specific location, resources and facilities of the site. Companies have also implemented new screening measures at airports to reduce the risk of transmission by its employees.

Health and Safety

Health and safety is one of the most important commitments of those in the Australian mining industry. Australia's resource sector has implemented strict national COVID-19 health and safety protocols in partnership with Australian governments. The Minerals Council of Australia (MCA), state resource chambers and the Australian Petroleum Production & Exploration Association (APPEA) continue to implement national COVID-19 resources industry protocols to protect the workforce and jobs by ensuring the highest levels of health and safety. The protocols have received broad support from the Commonwealth and all states and territories. The protocols cover health and safety matters including those that relate to education and communication to employees, mental health and wellbeing, travel and accommodation, safety at work, indigenous communities and critical suppliers and contractors. For supporting guidance on implementing each element of the protocol and resources for managing COVID-19, see the Minerals Council of Australia website.

Mining businesses should ensure that their controls, procedures and contingency plans are up-to-date to reduce the risk of COVID-19 entering mine sites. Businesses should also have plans of action for containing its spread in the event it enters into mine sites. At a global scale, some mining companies have been innovative in adopting autonomous technology to keep production flowing amid worldwide shutdowns. At present, social distancing measures mean that mine sites, accommodation, travel and living spaces are adequately managed in terms of limits on personnel at any given time and timing for the use of such areas are spaced out. With the inherent dangers associated with mining and during the COVID-19 pandemic, many mining companies and technology manufacturers have invested in remotely operated technology and automated systems to reduce risks.

Exploration

Many mining companies with exploration tenements have halted or curtailed exploration. This has not only been due to the travel restrictions imposed and health and safety concerns but also because of the steep losses many have sustained on the stock exchange and loss of investment. Exploration companies should be evaluating the feasibility and commerciality of their ongoing operations against their access to investment and current financial capabilities. Some businesses have decided to move their operations into temporary care and maintenance with demobilisation plans being put in place to ensure longevity of these projects so that they may be ready to rebound when the global situation improves.

Insurance

Mining businesses should review and understand the terms and conditions of their insurance arrangements. Businesses should be considering the currency and sufficiency of the insurance coverage for matters such as public liability, building and contents, travel, business interruption, employees and directors and officers' insurance cover. As policies can differ significantly depending on their individual wording, these details determine whether events caused by COVID-19 are covered by such insurance policies. Businesses should be aware of any excesses payable, the indemnity period and limits of cover for these insurance policies as well as ensuring businesses provide insurers with prompt notice and adequate information. Mining businesses must also be aware of any exclusions of liability that may apply. A large number of general insurance policies and products specifically exclude claims relating to loss or damage resulting from outbreaks of infectious diseases, pandemics, epidemics and/or known events that could lead to a claim. However, certain insurance policies such as trade credit liability, workers' compensation or corporate travel policies can potentially cover losses suffered. In the event a worker contracts COVID-19 due to their work or within their workplace, a claim for workers' compensation could be lodged. Such a claim requires the business to establish that COVID-19 was contracted in the course of employment and that it meets the requirements of the relevant workers' compensation legislation- which differs for each state.

Directors' Duties and Insolvency

The Australian Federal Government has introduced new, urgent laws intended to avoid unnecessary corporate insolvencies during the course of the COVID-19 pandemic. The new laws came into effect on 25 March 2020 with the changes being in force for an initial period of six months, with the ability to be extended if needed. Firstly, under these new laws directors are given relief from personal liability for debts incurred by the company when trading whilst insolvent if the debt is incurred "in the ordinary course of business" and during the six month period starting on 25 March 2020. The temporary relief in effect operates as an additional safe harbour regime which is intended to give directors greater confidence to continue trading during the course of COVID-19, with the aim of retaining viability once business returns to normal. The relief may allow businesses to properly review its position and consider various measures during the safe harbour period. These measures include reviewing and renegotiating trade terms, debt facilities and lease terms. It may also allow businesses to consider and proceed with undertaking a debt and/or equity restructuring, operational or work-force restructuring, selling non-core or underperforming assets, reviewing and changing production lines or levels and seeking professional advice.

Under the new laws the threshold for the issue of a statutory demand has been temporarily raised from $2,000 to $20,000 along with a temporary increase of the time for compliance from 21 days to 6 months. This applies to all statutory demands served on or after 25 March 2020. The statutory demand regime is often used by creditors as a way to pressure debtors to pay outstanding debts. Non-compliance with a statutory demand can result in the creditor seeking a court order that the debtor be wound up on the grounds of insolvency. It is anticipated that the new changes will result in a significant decrease in the number of statutory demands being issued. To find out more on the operation of these temporary insolvency laws, refer to our article titled COVID-19 – Temporary emergency changes to Australian insolvency laws.

Amidst these recent changes, directors must still continue to comply with their existing duties under the Corporations Act 2001. These statutory obligations include the duties to act with care and diligence, in good faith in the best interests of the company and to not improperly use their position or information they receive for personal gain. Directors, however, could still be exposed to the risk of personal liability if they engage in conduct that is dishonest, fraudulent or other illegal activities potentially carrying criminal consequences (e.g. illegal phoenix activities). Even with the temporary measures in place, if a company is close to being insolvent, directors should exercise careful judgment in deciding whether the company should be accruing additional expenses or liabilities where its current financial viability is questionable.

Funding and Foreign Investment

For many listed entities, Australian mining share prices have fallen; impacting on existing lending or investment covenants which businesses should be dealing with, alongside capital raisings. Management of mining businesses should be considering whether debt or equity raising mechanisms are appropriate in the current circumstances, having regard to future control, gearing, interest and other implications.

To date, the ASX has implemented a number of measures that relax certain rules to address the equity fundraising needs of ASX-listed companies. Outlined below are some of the key measures that may affect listed mining businesses:

An important note, entities must meet all necessary requirements (e.g. notice, processes, etc.) and prerequisites to be entitled to take part in these temporary measures.

- ASX will permit entities to request two consecutive trading halts, allowing up to four trading days in halt to consider, plan for and complete a capital raising;
- ASX has granted a class waiver temporarily lifting the 15% limit on placements under ASX Listing Rule 7.1 to 25% (**Temporary Extra Placement Capacity**), provided the entity follows on with a pro-rata entitlement offer or Share Purchase Plan (SPP) offer. The entitlement offer or SPP price must be the same or less than the placement price;
- ASX has granted a class waiver to permit a ratio of greater than 1:1 for non-renounceable entitlement offers; and
- ASX has released a compliance update relating to entities' continuous disclosure obligations, providing practical guidance on, amongst other matters, earnings guidance and financial difficulty.
    - Entities are encouraged to review their published earnings guidance in light of COVID-19 and should withdraw such guidance if it is no longer current.
    - An entity must immediately disclose information: if there is an adverse development affecting the financial condition/prospects of an entity that falls outside the carve-outs to immediate disclosure in Listing Rule 3.1A; and a reasonable person would expect information about that development to have a material effect on the price or value of its securities.

The ASX has provided a compliance update dated 22 April 2020 on these matters such as requirements to inform ASIC if intending to rely on the below class waivers, the ASX's ability to withdraw the class waivers and prescribed actions within five business days of completing a placement under the Temporary Extra Placement Capacity and the expanded requirements relating to an SPP offer. For further details on these and other ASX measures refer to the ASX website.

Funding and Foreign Investment (continued)

ASIC has published a media release in response to ASX's compliance update, generally indicating its support of ASX's new measures. In efforts to help listed companies raise capital quickly by giving temporary relief to enable certain 'low doc' offers (including rights offers, placements and share purchase plans) to be made to investors where the listed company has been suspended for a total of up to ten days in the previous 12-month period. Entities may rely on the relief if they have been suspended for up to ten days in the 12 months before the offer; and they were not suspended for more than five days in the period commencing 12 months before the offer and ending 19 March 2020. Entities that do not meet either of the above conditions will need to apply to ASIC for individual relief to conduct a 'low doc' capital raising. This relief does not currently have a set end date and can be revoked by ASIC with 30 days' notice. A decision to revoke will be based on an assessment of the market and in consultation with key stakeholders.

In response to COVID-19, the Treasurer announced temporary changes to the Australian foreign investment regime on 29 March 2020. Under these temporary changes all proposed foreign investments subject to the *Foreign Acquisitions and Takeovers Act 1975* (Cth) require approval, regardless of value. To ensure there is sufficient time for screening, under these changes, the Foreign Investment Review Board would work with existing and new applicants to extend timeframes for reviewing applications from 30 days up to six months.

To deal with the expected substantial increase in applications, FIRB is prioritising cases using a risk-based approach and have brought on additional staff to manage workload. A major outcome of the threshold changes is that many investments that do not require screening now do. FIRB has published Guidance Note 53: Temporary measures in response to the coronavirus, which addresses the effects of the temporary changes alongside with setting out examples of how the changes apply for different acquisitions. Investors should ensure they understand how and if the current framework applies to them and what they must do to comply with it; seeking advice to ensure they are aware of how these changes will impact of their legal obligations.

For more information on Australian and global regulatory responses to COVID-19 by governments and other bodies, see our publications on the Hogan Lovells Coronavirus Information Hub and our updates on the measures taken by FIRB and ASIC and the ASX. For a guide on developments, COVID-19 challenges on the infrastructure and energy sector and critical drivers of growth and sustainability around the world, see our Comparative Guide: Impact of COVID-19 on the Infrastructure and Energy Sector.

Stakeholder Engagement

During these uncertain times, the need to engage with key stakeholders is more important than ever. As outlined above, businesses should be considering their approach to mitigating disruptions or delays and co-operating on imminent contractual or operational issues. These stakeholders include employees, suppliers, customers, financiers, shareholders, the community and regulators. Other stakeholders include tenement or land-related parties, native title parties, surrounding regional native title parties, pastoral lease holders or local communities. Businesses should ensure that it remains proactive in its engagement with these key stakeholders, regularly communicating formally and informally and ensuring that all necessary reporting is timely and adequately detailed. Businesses should also consider determining and implementing triggers for when issues or milestones are not progressing with the relevant stakeholder as well as suggestions for recommended plans of action once triggers are realised. Where planning for these triggers and appropriate courses of action for issues which may occur, it is desirable and recommended that businesses consult and obtain advice from advisors- technical, legal and financial.

Foreign Counterparties

Obviously every jurisdiction is dealing with the effects of the COVID-19 pandemic differently. Businesses within the Energy & Resources sector should not only be cognizant of restrictions, and other measures put in place that impact upon their business, but should also be mindful that foreign counterparties or business partners will have their own sets of restrictions, measures and difficulties to navigate through. In order to try and understand and navigate through this, open and honest communication is required as well as parties educating each other on the issues facing them so that commercially reasonable outcomes can be achieved in the short term to keep business moving.

Access to Justice

Courts and tribunals across Australia have changed how they operate in response to the COVID-19 pandemic. These changes have meant that many courts are restricting or temporarily closing in-person services at court registries and instead, encouraging contact by phone or email. Courts have moved to conducting hearings through electronic means; increasingly by telephone or video-conferencing and encouraging online filing of documents. Where hearings are not considered urgent, courts and tribunals have decided to postpone hearings. Companies should expect significant delays in initiating proceedings or if proceedings are on foot as courts and tribunals adapt to court staff working remotely and the increased use of technology. Where possible and for matter prioritised as urgent, parties are permitted to have court make decisions 'on the papers', meaning that such decisions are based on written materials filed by all parties. Although courts and tribunals across Australia are implementing different approaches, many Australian courts are facing a backlog of cases which will likely increase as a result of the challenges posed by COVID-19.

Arbitration, as an alternative to litigation, has swiftly moved to telephone and/or video-conferencing especially since many arbitration decisions or awards are made without a hearing or in-person meetings with the arbitration expert(s). Parties to arbitration continue to maintain control in tailoring arbitration processes and timetables to parties' specific requirements or circumstances. Arbitration is expected to continue without much change in the current environment since arbitral institutions (e.g. the Australian Centre for International Commercial Arbitration and the ICC International Court of Arbitration) remain operational whilst working remotely. Mediation has now moved to being conducted virtually through online teleconferencing platforms. Like arbitration, the current environment has had minor impacts on the successful resolution of disputes online with the assistance of a mediator. In any event, the greater impacts of COVID-19 on undergoing litigation means that using litigation as a tactic or to leverage negotiations in disputes will not be as forceful as before. The impact of COVID-19 on litigation suggests that parties should perhaps make greater efforts to amicably resolve disputes rather than push ahead with litigation.

For more information about the impact of COVID-19 on dispute resolution processes including litigation and arbitration refer to the Hogan Lovells COVID-19 Information Hub.

Native Title Tribunal

All future act hearings, conference lists and mediations will continue to be held by the National Native Title Tribunal with all matters convened by teleconference as all members and staff work remotely. As part of its response to COVID-19, the National Native Title Tribunal has issued an interim direction[1] applying to all future act inquiries in Western Australia, including expedited procedure directions. The direction recognises the difficulties all parties to future act inquiries, particularly native title parties, may face in complying with direction in light of the current measures in place around social distancing and access to remote communities. The direction applies to proceedings currently before the Tribunal which was commenced on or before that date of the direction (24 March 2020) or is commenced on or prior to 31 May 2020. In summary, the direction provides that where a native title party to a proceeding is required by a direction of the Tribunal to take a step in that proceeding, the native title party is excused from compliance with such requirement provided it satisfies requirements under the direction. The direction requires that on or before the due date for taking such step or 8 April 2020, whichever is later:

1. the native title party provides the Tribunal with a written statement to the effect that the step to be taken is not reasonably practicable or would offend legislation and/or regulation; or
2. the native title party supplies the Tribunal with a written statement by an officer or employee of the Commonwealth or State that taking the step would be inconsistent with the adoption of such advice.

For specific requirements for either course of action or more information about the applicability of the direction, see the National Native Title Tribunal website.[2] For cases not covered by the direction, the Tribunal may still consider requests for extension in accordance with ordinary processes. Directions will continue to be issued for new native title objections where the future act notice has a closing date on or after 1 June 2020. The Tribunal will not automatically set directions for new objections if the closing date is before 1 June 2020. Instead, these matters will be listed for case management at a later date. The National Native Title Tribunal will continue to hold case management conferences and settlement lists by teleconference.

1 http://www.nntt.gov.au/Documents/20200324%20-%20NNTT%20-%20Direction%20on%20the%20conduct%20of%20future%20act%20proceedings.pdf

2 http://www.nntt.gov.au/Pages/Home-Page.aspx

Relief from Expenditure and Other Requirements

State and territory governments have implemented measures designed to support energy and mining businesses to continue operations as far as practicable in the current circumstances. Varying across state and territories, these range from relief for expenditure commitments, deferrals of licence fees to relief from tenement rent and travel restrictions.[3] For details of the measures taken by the Western Australian government in relation to the state's mining industry, see our article on the **'Implications of COVID-19 on the Western Australian Mining Industry'**.

The South Australian Government has deferred costs linked to exploration and licence fees for the minerals and petroleum sectors to alleviate the impact of COVID-19 containment measures on industry. South Australian Minister for Energy and Mining, Dan van Holst Pellekaan said there has been a significant impact of travel restrictions on the operation of the state's resources sector. To meet these challenges, the South Australian Government implemented an immediate deferral on mineral exploration licence fees and annual petroleum and geothermal licence fees due in the next six months. These licence fees will now only be due by 31 December 2020. There has also been a 12-month waiver of committed expenditure for all mineral exploration licence holders.

The New South Wales government has also joined other governments in providing relief to support the mining exploration sector. The New South Wales Government deferred payments for exploration licences and assessment lease applicants by up to six months whilst also extending commencement dates for new licences, providing explorers additional time to secure funding. Recently announced by the New South Wales Government, $2.2 million in drilling grants would be available for explorers looking for new deposits of gold, copper and high-tech minerals such as cobalt and platinum in regional areas of the state. New South Wales Deputy Premier, John Barilaro said that the state was looking to the resources sector to support the economy through the payment of royalties and the creation of jobs and business opportunities.

The Queensland Government has extended financial support to mineral explorers in an effort to increase job opportunities in the resources sector. The Queensland Government will be waiving rents on exploration tenure due between 1 April and 1 September 2020 for a period of 12 months. It has also placed a freeze on fees and charges imposed until 1 July 2021. The Queensland Government has announced it will be releasing 7000 square kilometres of land for mineral and gas exploration.

This has accompanied the announcement that funds from the Collaborative Exploration Initiative grant, totalling $2.8 million, have been brought forward to 2020-21 from a $13.8 million investment package announced at the end of 2019. The package is intended to stimulate exploration to sustain mineral explorers by allowing explorers to apply for grants of up to $2 million for new and innovative exploration activities. The tender and grant stimulus is intended to provide exploration companies an opportunity to develop bids whilst waiting for the economy to recover, capital to become available and fieldwork to resume.

From the measures and relief provided by state governments across Australia, continued activity in the mining sector, especially exploration, is seen as crucial to Australia's future mineral projects, employment and business opportunities.

[3] For more information about the measures governments have implemented to support businesses see the relevant government department website:
WA (https://www.wa.gov.au/organisation/department-of-the-premier-and-cabinet/covid-19-coronavirus-business-and-industry-advice);
SA (http://energymining.sa.gov.au/latest_updates); NSW (https://www.nsw.gov.au/news); QLD (https://www.business.qld.gov.au/industries/mining-energy-water/resources/covid-19-information).

Road to Recovery

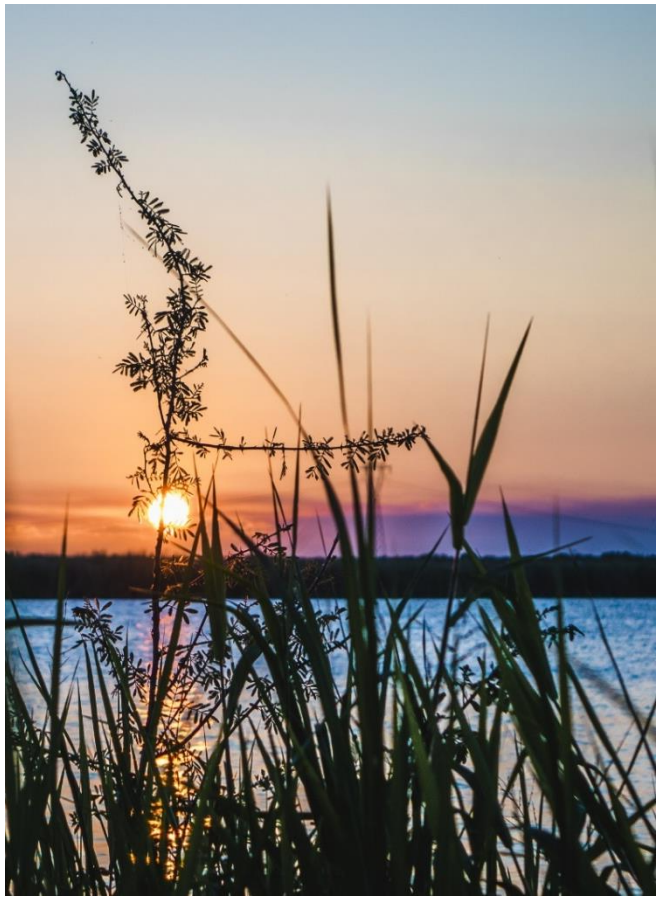
Federal and State Government measures implemented to prevent the spread of COVID-19 have allowed Australia's national infection rate to fall from a peak of about 25% to now below 1%. Western Australia has successfully stopped almost all new infections and is expected to lead the recovery of Australia's national economy. This is in part due to the Western Australian Government deeming mining as an essential service even whilst imposing restrictions on the rest of the state; allowing mine sites to remain open and the WA mining sector to remain strong. Even as the wider Australian economy faces its first recession since the global financial crisis, the commodities sector, in response to the global demand for food and iron ore will mark a return to prosperity.

Western Australia, specifically, its Wheatbelt region, is carving a road to recovery with strong demand for iron ore allowing prices to remain resilient and shipments to proceed in full at Australia's Pilbara Ports (which channels the world's biggest iron ore exports). Prices are expected to hold as governments are spending on projects that are steel-heavy to revive growth. With a generally positive outlook for Australia's future, there remain a number of risks to recovery such as a possible second wave of infections, the push for an international inquiry into COVID-19 drawing threats of a trade backlash and a potential fall in iron ore prices if a prolonged global slump in steel demand continues.

From its current position, Australia's export demand, particularly for iron ore, has been supported by China's careful emergence from its economic standstill caused by the COVID-19 outbreak. While public finances in other states and at a federal level are predicted to deteriorate, Western Australia is expected to help maintain a balanced national budget in Australia's road to recovery.

Despite facing many challenges in navigating through these uncertain and challenging times, the Australian mining industry continues to support Australia's economy. Australia has recently reported an increase in resources export revenue which includes growth in Australia's iron ore exports and the rise in the value of gold, coal and petroleum exports. This highlights the importance of WA's mining sector and ensuring Australia's mining industry continues to operate during COVID-19 and its related economic challenges.

Should any of the matters raised in this article be applicable to your business, seeking appropriate advice to navigate through the issues is recommended.



Want to know more

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