

New Energy Special Edition

Investment in Renewables

February 2024



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Editorial

‘Investment in Renewables’, a New Energy Special Edition by Hamilton Locke, showcases the abundance of renewable energy investment opportunities in Australia which are driven by declining generation costs, greater efficiencies and increased public interest.

From critical minerals, synergetic partnerships, modern slavery, project risk management, and community engagement issues, this Special Edition brings together a diverse range of topics that are integral to a comprehensive understanding of the new energy sector which will assist in capitalising on the numerous investment opportunities.

Renewable energy is predicted to make-up a third of the global energy supply for the first time in 2024. Investing in renewable energy is no longer viewed as a futuristic and highly uncertain venture, instead, it is increasingly being recognised as a standard component in investment portfolios. This shift is indicative of a commitment to achieving improved socio-economic outcomes and stakeholder value, prioritising these broader impacts over shareholder profits.

Last year, USD\$1.7 billion was invested globally into renewable energy¹, compared to the USD\$1 billion invested into fossil fuels. In Australia, 2023 saw major financial institutions such as Macquarie and Blackrock enter the energy market through the construction of batteries, namely Eku Energy² and Akaysha³ respectively, demonstrating the strengthening investment outlook in renewables. These investments underscore a shift towards renewable energy as a preferred choice for investors globally.



In line with these collaborations, this Special Edition provides market insights and tracks the flow of government funding and policy to help identify the factors shaping the renewable energy landscape. We explore the potential for Australia’s nascent green hydrogen industry and the efforts taken domestically and through international partnerships to propel Australia to become a hydrogen superpower.

Our Tax, Funds and Financial Services Team provides some useful insights into the growing investment interest in renewable energy projects, particularly by superfunds. The mitigation of environmental and climate risks and innovative financing models adopted in the renewable project financing is further explored in the context of offshore wind farms in Australia.

These articles highlight the role played by pragmatic yet innovative financing and business models in achieving the dual goals of purposeful investment and profit-making. In this vein, the discussion with Charmian Holmes about the utilisation of discretionary mutual funds to address decommissioning liabilities combines financial liabilities and the management of the social license with communities.

The Australian government’s amendments to the Foreign Investment Review Board (FIRB) legislation continues to impact the risk analysis undertaken by foreign investors. This is specifically true in relation to national security and critical infrastructure imperatives, which include projects in the renewable energy sector. Our analysis simplifies the impact of FIRB on renewable energy projects and provides guidance on determining the applicability of the FIRB regime on renewable energy projects.

There is little dispute that the mining sector is regularly maligned regarding its environmental impact and carbon footprint. However, concerns have been raised about the impacts on the Australian economy due to the energy transition’s effect on the mining sector with the role played by the mining sector in providing critical materials for renewable energy technologies often being overlooked.

This is why the two-part series, “The Birthplace of Batteries and Other Rare Minerals”, explores the evolution of mining to become an integral part of the net-zero energy landscape and the international investment relationships that are being forged in the sector.

All investments operate within the overarching environmental, social, and governance (ESG) framework, where factors such as environmental impact, social responsibility, and corporate governance are fundamental considerations in decision-making processes. While it might appear redundant to emphasise that

investments in renewable energy adhere to the ESG framework, the urgency surrounding the deployment of renewable energy often overshadows the importance of ESG considerations. The rise in ESG consideration being given statutory recognition, whether through disclosure requirements or investigations and penalties, also carries significant implications for the renewable energy investment landscape.

For instance, the prosecutions initiated by the Australian Securities and Investment Commission (ASIC) in 2023 are pivotal to our discussion on greenwashing where we also examine the essential qualifications for investments and financial products to carry the "green" label.

Additionally, in our take on modern slavery, we flag the importance of ensuring that investments do not inadvertently support modern slavery practices down the supply chain. This issue is particularly relevant in the context of renewable energy, where projects often rely on complex international supply chains. Identifying and addressing modern slavery practices within these chains is crucial to mitigate risks of penalties and potential reputational damage for both projects and investors.

The failure of investments in renewable energy jeopardise progress towards achieving net-zero goals, risks financial losses, undermines public trust, and hampers economic growth and innovation in the sector.

It is essential to recognise and avoid potential pitfalls in investment strategies to ensure the successful advancement of renewable energy initiatives. Our intention is for these topics to provide a comprehensive view of the renewable energy landscape and enable stakeholders to capitalise on the opportunities presented while navigating potential challenges effectively.

Matt Baumgurtel
Partner, New Energy Lead
[+61 459 900 080](tel:+61459900080)

Adriaan van der Merwe
Special Counsel
[+61 40 312 0410](tel:+61403120410)

Hannah Jones
Senior Associate
[+61 450 584 149](tel:+61450584149)

¹International Energy Agency (IEA)
²<https://www.macquarie.com/au/en/about/news/2022/macquarie-asset-managements-green-investment-group-launches-new-global-battery-storage-platform-eku-energy.html>
³<https://reneweconomy.com.au/blackrocks-akaysha-scores-coup-with-contract-to-build-worlds-most-powerful-battery/>

Watt's New at Hamilton Locke

► Hamilton Locke Tops National M&A and ECM Rankings!

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► Hamilton Locke recognised in The Legal 500 2024 Asia-Pacific Guide

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► Hamilton Locke Recognised in Chamber and Partners 2024 Asia-Pacific and FinTech Guides

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► Hamilton Locke and MA Financial Group host 2023 'Introduction to Capital' Speed Networking Event with Leading Sources of Capital and High Growth Companies

[Read more](#)

► Hamilton Locke advises Enel Green Power Australia on its partnership with QEM Limited (ASX: QEM) to deliver the Julia Creek Renewables Project

[Read more](#)

► Hamilton Locke Ranked in the 2023 Doyle's Guide

[Read more](#)

► Hamilton Locke Recognised in the Australasian Lawyer Best in Law 2023 Special Report

[Read more](#)

► Hamilton Locke attracts Michael Tooma and Kiri Jervis as partners, boosting ESG and WHS client offering.

[Read more](#)

► Hamilton Locke has again partnered with the [Australian Growth Company Awards](#) in 2023, proudly supporting the innovation, excellence and superb business leaders that are achieving great things in their respective industries.

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Market Insights

► The Clean Energy Council has released the Power Playbook – Accelerating Australia's Clean Energy Transformation, a strategic package of 45 recommendations to assist Australia achieve its goal of 82% renewables by 2030.

[Read more](#)

► The Australian Energy Regulator released the State of the Energy Market 2023 report.

[Read more](#)

► ARENA released its annual report 2022-23, indicating a record amount of funding since its inception in 2012.

[Read more](#)

► Public consultation opened for proposed offshore wind and other renewable projects in the Bass Strait until 31 January 2024.

[Read more](#)

► Registrations are open for the South Australia and Victoria Capacity Investment Scheme tender for renewable energy generation and storage projects, closing in February 2024.

[Read more](#)

► CIS announcement: Federal Government announces expansion of Capacity Investment Scheme, aiming to secure 32 GW of renewable generation and storage by 2030

[Read more](#)

Market Recognition

Hamilton Locke Lawyers Rank in IFLR1000. New Energy Lead, Matt Baumgurtel, ranked as 'Highly Regarded'.

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Hamilton Locke Ranks #1 in Refinitiv Global Capital Markets League Tables

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Hamilton Locke Secures Top 10 Rank in Mergermarket M&A League Tables

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5 Hamilton Locke Lawyers announced as finalists for Lawyers Weekly 30 under 30, including New Energy Lawyer, William Ryan, for Energy & Resources.

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Michele Levine and Jo Ruitenberg Listed as Australasian Lawyer's Elite Women of 2023.

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Hamilton Locke Selected as a Finalist in Blockchain Australia's 2023 Blockies Awards

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Australasian Lawyer Recognises Hamilton Locke in its 2023 Fast Firms Report

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Hamilton Locke Partner, Jo Ruitenberg, Finalist for the Lawyers Weekly Women in Law Awards 2023

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Hamilton Locke Recognised in Australasian Lawyer's 2023 5-Star Employer of Choice for Four Consecutive Years

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Hamilton Locke Partner Zina Edwards Named Finalist in the 2023 Women in Finance Awards

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Watt's next?



The next New Energy Quarterly
-Distributed Energy Resources

Hamilton Locke New Energy Team

Partners



Matt Baumgurtel
Partner, New Energy Lead
[+61 459 900 080](tel:+61459900080)




Veno Panicker
Partner, Construction & Infrastructure
[+61 409 495 242](tel:+61409495242)




Brit Ibanez
Partner, Litigation
[+61 421 355 503](tel:+61421355503)




Michael Boyce
Partner, Mining & Resources
[+61 400 142 494](tel:+61400142494)




Tricia Moloney
Partner, Finance
[+61 434 154 180](tel:+61434154180)




Margot King
Partner, Property
[+61 406 056 651](tel:+61406056651)




James Simpson
Partner, Employment
[+61 407 061 641](tel:+61407061641)




Adam Jeffrey
Partner, Finance
[+61 481 913 850](tel:+61481913850)




Andrew Vincent
Partner, Finance
[+61 417 544 925](tel:+61417544925)




Jo Ruitenberg
Partner, Corporate M&A
[+61 417 544 925](tel:+61417544925)


Special Counsel



Adriaan van der Merwe
Special Counsel
[+61 40 312 0410](tel:+61403120410)




Timothy Zahara
Special Counsel
[+61 7 3036 7886](tel:+61730367886)




Eliza Buchanan
Special Counsel
[+61 2 8072 8271](tel:+61280728271)




Kaday Conteh
Special Counsel
[+61 439 335 094](tel:+61439335094)


Senior Associates



David O'Carroll
Senior Associate
[+61 421 497 311](tel:+61421497311)




Hannah Jones
Senior Associate
[+61 450 584 149](tel:+61450584149)




Gareth Howard
Senior Associate
[+41 424 372 390](tel:+41424372390)




Cormac Foley
Senior Associate
[+61 2 8072 8271](tel:+61280728271)


Lawyers



William Ryan
Lawyer
[+61 2 8072 8271](tel:+61280728271)




Megan Chau
Lawyer
[+61 2 8072 8271](tel:+61280728271)




Ally Frizelle
Lawyer
[+61 2 8072 8271](tel:+61280728271)




Tariq Alardah
Lawyer




Jorja Sumner
Lawyer
[+61 8 6311 9160](tel:+61863119160)




Raymond Deng
Lawyer
[+61 430 813 873](tel:+61430813873)




Conor Bates
Consultant
[+61 431 958 212](tel:+61431958212)


Paralegals



Rahul Tijoriwala
Paralegal
[+61 2 8072 8271](tel:+61280728271)




Dhanushka Rajaratnam
Paralegal
[+61 2 8072 8271](tel:+61280728271)




Kusum K C
Paralegal
[+61 2 8072 8271](tel:+61280728271)




David Wan
Paralegal
[+61 2 8072 8271](tel:+61280728271)




Watt is ARENA Funding?

Program	Summary	Funding available	Closing Date
Advancing Renewables Program (ARP)	The ARP awards grants to a range of projects that seek to: - Optimise the transition to renewable electricity; - Commercialise clean hydrogen; and - Support the transition to low emission metals.	Up to AUD \$50 million	Ongoing
Powering the Regions Industrial Transformation Stream	The Industrial Transformation Stream seeks to support existing industrial facilities, and new clean energy developments, in regional areas to reduce their emissions, in line with Australia's 2030 targets and in support of reaching net zero by 2050.	AUD \$400 million	Register your interest
Industrial Energy Transformation Studies Program (IETS)	IETS looks to assist large energy users in undertaking engineering and feasibility to identify ways to lower energy costs and reduce carbon emissions. Funding is available to companies and organisations in agriculture, mining, manufacturing, gas supply, water supply, waste services and data centre sectors. Funding will be provided in two streams: - Feasibility Studies: to provide an independent assessment that examines all aspects of a project; and - Engineering Studies: to determine whether a EPC contract could be executed.	AUD \$43 Million	Open and ongoing Assessment of Applications will be undertaken on a quarterly basis, in the first week of March, June, September and December. You may submit an Application at any time.
Hydrogen Headstart	Hydrogen Headstart will underwrite the biggest green hydrogen projects to be built in Australia through a competitive process which will provide revenue support for ongoing operational costs in the form of a production credit.	AUD \$2 billion	Expressions of Interest closed on 10 November 2023. Full Application due date 27 June 2024.

Program	Summary	Funding available	Closing Date
Regional Microgrid Program (RMP)	The Regional Microgrids Program (the Program) seeks to support the development and deployment of renewable energy microgrids across regional Australia that contribute to the Program Outcomes. ARENA has allocated funding across two streams under the Program, and each stream has its own Outcomes. 1. Regional Australia Microgrid Pilots (Stream A); and 2. First Nations Community Microgrids (Stream B).	Up to AUD \$125 million	19 December 2025
Driving the Nation Program	The Program is focused on accelerating the uptake of Zero Emission Vehicles (ZEVs). ZEVs include Battery Electric Vehicles, Hydrogen Fuel Cell Vehicles and biofuel vehicles.	AUD \$500 million	Ongoing
Clean Energy Innovation Fund (CEIF)	Seeks to fund emerging Australian technologies and businesses to speed the nation's transition to a renewable economy.	Up to \$5 million	Ongoing

Check your eligibility
If one of the programs sparked your interest you can check your eligibility [here](#).



Watt's Happened in Renewables M&A?

Transaction	Timing	Comments
Inpex acquisition of a 50% stake in Enel Green Power Australia's solar assets	July 2023	Inpex Corporation acquired a 50% stake in Enel Green Power Australia at a value of A\$237.31 million.
JUWI Renewable Energy divestment of wind and solar project Hamilton Locke is pleased to have advised JUWI in this transaction. ✖	July 2023	JUWI Renewable Energy divested its 400 MW Hay Plains wind project in south-west NSW and 175 MW Ardandra solar project, with an anticipated 400 MWh of battery storage in south-west Queensland to Octopus Investments Australia.
Prime Super acquisition of Chepstowe and Maroona Wind Farms	August 2023	Prime Super acquired 100% of the Chepstowe and Maroona Wind Farms, which each have an export capacity of 6 MW and the 6.8 MW respectively.
Grok Ventures acquisition of SunCable assets	September 2023	Grok Ventures acquired all of SunCable's assets, which included a 20GW solar project and connected 36.43GWh storage in Australia's Northern Territory, an 800km high-voltage direct current (HVDC) overhead transmission line to bring power to the Australian port of Darwin and a 4,300km HVDC subsea cable to connect the Australian facilities to a converter site in Singapore.
Octopus Investments Australia acquisition of Blackstone BESS	October 2023	Octopus Investments Australia acquired the proposed 1 GWh Blackstone battery energy storage system (BESS) project, Queensland's largest proposed battery project, from Firm Power.
Aware Super invests in Birdwood Distributed Energy Platform Hamilton Locke is pleased to have advised Birdwood Energy in this transaction. ✖	October 2023	Hamilton Locke advised Birdwood Energy on the formation of the Birdwood Distributed Energy Platform and the investment in the platform by Aware Super. Aware Super has made an initial commitment of \$300 million to the platform which is expected to be deployed over the next one to two years. The investment by Aware Super is understood to be the first significant investment by an Australian superannuation fund into the distributed energy sector.

Transaction	Timing	Comments
Alinta Renewables Sale	November 2023	Alinta Energy sold 100% of its Pilbara assets to APA Group, which included 200km of high voltage powerlines, 210 MW Port Hedland Power Station, 238 MW Newman Power Station, 35 MW Newman Battery Energy Storage System, 60 MW Chichester Solar Farm, an 11.8% stake in 203 TJ/d Goldfields Gas Transmission Pipeline and 80 MW of further capacity under construction
APA Group acquisition of 100% of Alinta Energy Pilbara Holdings Pty Ltd and Alinta Energy (Newman Storage) Pty Ltd	November 2023	APA Group acquired 100% of Alinta Energy Pilbara Holdings Pty Ltd and Alinta Energy (Newman Storage) Pty Ltd for an enterprise value of A\$1.722 billion.
CleanPeak acquisition of Sentient Impact Group solar portfolio	November 2023	CleanPeak acquired 3 solar farms from Sentient Impact Group, including the Williamsdale Solar Farm, Mount Majura Solar Farm and the Karratha Solar Farm in Western Australia.
Blackstone and Vista Energy Partners acquisition of Energy Exemplar	November 2023	Blackstone and Vista Energy Partners acquired Energy Exemplar, an energy market simulation software provider, in a deal worth more than A\$1.6 billion.
Lightsource BP Australian solar portfolio sale	December 2023	Lightsource BP divested five utility-scale solar photovoltaic projects to Beijing Energy International Australia. With an equity value reaching A\$813 million, this sale encompasses a 1,037 MWdc solar portfolio with the Wellington, West Wyalong, and Woolsloga projects operational and the Wellington North and Wunghnu set to be operational in the latter half of 2024.
Julia Creek Renewables Project ✖ Hamilton Locke is pleased to have advised Enel Green Power Australia in this transaction.	January 2024	Hamilton Locke advised Enel Green Power Australia Pty Ltd (EGPA) on its partnership with QEM Limited (QEM) to deliver the Julia Creek Renewables Project. The Julia Creek Renewables Project is a hybrid wind and solar renewables project, targeted to generate around one gigawatt of energy to power QEM's vanadium mining and processing project.

2023 in Review: Investment in Hydrogen Projects

Authors: Matt Baumgurtel, Adriaan van der Merwe, Hannah Jones, Ally Frizelle and David Wan

In our previous iteration of this article, published in the “*Autumn 2023 New Energy Quarterly: Hydrogen – No Longer a Pipe Dream*” (accessible [here](#)), we gave an overview of investments in renewable energy in 2022 and early 2023 with a particular focus on:

- 1. increased funding in renewable energy industries;
- 2. the development of new legislation to formally enshrine Australia’s net zero and emissions reduction target; and
- 3. the establishment of international trade and supply partnerships between Australia and countries such as Singapore and Japan.

The focus of this article is on advancements in the hydrogen industry, as set out in further detail below.

Finance

In 2023, the Australian Government committed \$24.9 billion to invest in renewable energy up to 2030,¹ alongside contributions by the private sector.

Specifically, in May 2023,² the Australian Government declared that Australia will invest:

- \$2 billion to the “Hydrogen Headstart” program, which is proposed to scale up development of the renewable hydrogen industry and accelerate large-scale, clean energy projects through funding competitive hydrogen production contracts;
- \$4 billion into renewable energy projects – including existing State projects such as Tasmania’s Battery of the Nation project, Victoria’s offshore wind and Renewable Energy Zones and NSW’s development of critical infrastructure; as well as national initiatives such as the National Electric Vehicle Strategy and development of the Fuel Efficiency Standard;³
- \$2 million to support First Nations communities engaging with hydrogen projects and planning processes; and
- part of the \$15 billion National Reconstruction Fund to support green industries.⁴

Collectively, the 2023-24 federal budget embodied what is claimed to be the “*biggest ever investment in Australia’s energy transformation*.”⁵

Legislation

The South Australian government recently passed the world-first *Hydrogen and Renewable Energy Act 2023 (Act)* to support and streamline the process of investing into large-scale renewable energy projects. The Act emerged in response to the multiple acts currently regulating renewable energy projects such as the *Electricity Act 1996* and the *Landscapes SA Act 2019*, among others, and introduced a single licensing and regulatory system for the lifecycle of large-scale hydrogen and renewable energy projects in the State.

Accordingly, its provisions include fit-for-purpose licensing arrangements which enable the regulation of the whole project lifecycle, consideration of First Nations people’s rights early in the regulatory process and identification of government-owned land and waters that are eligible to host renewable energy projects.⁶

The South Australian Government will now draft proposed regulations to support the Act,⁷ which will be released for public consultation in early 2024.

Partnerships and Projects

Australia has also maintained strong ties with international partners such as Singapore and Japan, as covered in our previous article, and more recently, Germany. With Germany, Australia shares the German-Australian Hydrogen Innovation and Technology Incubator (HyGATE) initiative to reduce green hydrogen production costs and support the sharing of new, modern technology in the industry.

In line with this, the initiative supports the EGH2 project, a green hydrogen production facility stated to begin development in Queensland as a joint project between Australia’s Edify Energy and Germany’s Siemens Energy Global GmbH with the ultimate goal of exporting hydrogen globally through the Port of Townsville.⁸ An additional three projects initially planned as part of the HyGATE initiative and located in South Australia and New South Wales also saw development in 2023.⁹

Domestically, the Australian and Victorian governments are joint supporters of the Hydrogen Energy Supply Chain Pilot (HESC) Project. The HESC Project successfully completed its pilot phase in 2022 – being the successful extraction and shipment of clean liquid hydrogen from Australia to Japan – and is currently considering proceeding to a commercial phase. If approved, operations are targeted to begin in 2030 pending the obtainment of required regulatory approvals and licences and development of sustainable solutions to further streamline the extraction and shipping process.

Hydrogen Headstart

In the May 2023 Federal Budget, the Australian Government announced it would invest up to \$2 billion in the Hydrogen Headstart Program, to fund large-scale hydrogen production projects.¹⁰

The consultation period between July and August 2023 resulted in over 100 written submissions in response to the Consultation Paper, with feedback from a range of stakeholders which informed the design of the final Program parameters. The Expression of Interest stage of the program opened on 10 October 2023 and closed on 10 November 2023. Full application is planned to be due by 27 June 2024.

The Guarantee of Origin scheme

The Department of Climate Change, Energy, the Environment and Water opened consultations on the design of Australia’s Guarantee of Origin (GO) scheme between 20 September and 14 November 2023. The GO scheme will provide a framework to track and verify emissions associated with hydrogen, renewable electricity and potentially other energy sources produced in Australia. Initiated as part of the National Hydrogen Strategy in November 2019, the GO scheme has undergone stakeholder consultations between 2020 and 2023, with legislation expected to be in place in 2024.

Challenges

Going forward, a key challenge for Australia is throughput. According to the State of Hydrogen 2022 report, published by the Department of Climate Change, Energy, the Environment and Water, Australia has a large pipeline of announced hydrogen projects but falls behind many other OECD nations in terms of projects proceeding to deployment. Australia also has comparatively less private funding than public, and particularly in comparison to other OECD countries.¹¹

Only time will tell as to whether the new funding, partnerships and projects and potential for legislative reform as covered above will overcome these challenges to establish Australia as a key player and leader in the renewable energy and hydrogen space.

Advancing into 2024

As the powerhouse for institutional investment in renewables, Australia announced a Capacity Investment Scheme (CIS) in December 2023, which should prove tempting to many investors over the coming years. Macquarie Asset Management (MAM) announced the launch of its own \$10 billion Australia-focused platform, Aula Energy¹², around the same time as the government’s CIS announcement. This leaves MAM well-positioned to take advantage of whatever opportunities might arise. The energy transition remains a potent investment thematic in Australia, with the tailwinds even more attractive in 2024.

Overall, 2023 proved to be a positive year for renewable energy and specifically, the hydrogen industry in Australia. Investment of both finances and resources remained high and a surge of new projects, partnerships and proposed legislative reform bolstered Australia’s efforts to reach its net zero emissions target by 2030.

For more information, please contact:

	Matt Baumgurtel Partner, New Energy Lead +61 459 900 080		
	Adriaan van der Merwe Special Counsel +61 40 312 0410		
	Hannah Jones Senior Associate +61 450 584 149		
	Ally Frizelle Lawyer +61 2 8072 8271		
	David Wan Paralegal +61 2 8072 8271		

¹Australian Government, Australian Trade and Investment Commission, ‘Transition to net zero’: <https://www.globalaustralia.gov.au/industries/net-zero>

²Praveen Menon, ‘Australia to invest \$1.4 bln to scale up renewable hydrogen industry’ (9 May 2023): <https://www.reuters.com/world/asia-pacific/australia-invest-14-bln-scale-up-renewable-hydrogen-industry-2023-05-09/>

³Department of the Treasury, ‘Crowding the Economy: Modernising our economy and maximising our strengths’ (May 2023): <https://budget.gov.au/content/03-economy.htm>

⁴Department of the Treasury, ‘Hydrogen Headstart to power new jobs & industry’ (May 2023): <https://ministers.treasury.gov.au/ministers/jim-chalmers-2022/media-releases/hydrogen-headstart-power-new-jobs-industry>

⁵Praveen Menon, ‘Australia to invest \$1.4 bln to scale up renewable hydrogen industry’ (9 May 2023): <https://www.reuters.com/world/asia-pacific/australia-invest-14-bln-scale-up-renewable-hydrogen-industry-2023-05-09/>

⁶Tayla Oates, ‘SA proposes world-first Hydrogen and Renewable Energy Act’ (15 May 2023): <https://www.energymagazine.com.au/sa-proposes-world-first-hydrogen-and-renewable-energy-act/>

⁷Government of South Australia, Energy & Mining, ‘Hydrogen and Renewable Energy Act’: <https://www.energymining.sa.gov.au/public-consultations/hydrogen-and-renewable-energy-act>

⁸Edify, ‘HyGATE Green Hydrogen Funding’ (29 January 2023): <https://edifyenergy.com/green-hydrogen/hygate-green-hydrogen-funding/>

⁹ARENA, ‘Recipients announced for Australia-Germany HyGATE Initiative’ (27 January 2023): <https://arena.gov.au/news/recipients-announced-for-australia-germany-hygate-initiative/>

¹⁰ARENA, ‘Hydrogen Headstart’: <https://arena.gov.au/funding/hydrogen-headstart/>

¹¹Department of Climate Change, Energy, the Environment and Water, ‘State of Hydrogen 2022’ (2022): <https://www.dcccew.gov.au/sites/default/files/documents/state-of-hydrogen-2022.pdf>

¹²<https://www.macquarie.com/au/en/about/news/2023/macquarie-asset-management-launches-onshore-renewable-energy-business-aula-energy.html>

(Super)funding Renewable Energy Projects

Authors: Matt Baumgurtel, Seema Sandhu, Erik Setio, Hannah Jones and Nick Huett

Recent developments in the renewable energy industry mean that the appetite for the construction, development, and operation of renewable energy projects is stronger than ever and super funds are emerging as key participants.

Developments include the recent establishment of a regulatory framework for offshore renewable energy projects which has led to many opportunities for potential developments, and continued commitments to expanding the hydrogen and energy storage markets in Australia.

In this article, our Tax team and Funds and Financial Services team discuss the importance of fund structuring and methods to make a potential renewable energy project more attractive for super fund investors.

Importance of Structure

Careful consideration should be taken when designing the structure of a new fund. Particularly for renewable energy projects (**REP(s)**), each asset is generally held separately via a special purpose vehicle established for the sole purpose of acquiring and completing a specific REP.

These divided structures are often preferred over structures where various assets are subject to, and controlled by, a single agreement. This is firstly because REPs tend to carry an asset from the development process (including planning and construction), through to the operational phases. Each phase can carry a different return profile, project specific risk, and differential tax treatment, and so it makes practical sense to divide and manage each asset separately (to the extent possible).

Secondly, holding several risky assets within a single structure can pose risks with limitation of liability clauses and limited recourse finance facilities, where a single failed REP could carry the risk of cross default that prevents the completion of the remainder of projects in the portfolio. In these circumstances, a receiver may be entitled to liquidate all the assets held within the structure.

Attracting superannuation fund investment

Recently, superannuation funds have shown a growing appetite to invest in long-term REPs considered to generate long term returns and provides green investment. This aligns well with a superannuation fund's main purpose to provide retirement benefits to members.

[Hamilton Locke recently advised Birdwood Energy on the formation of the 'Birdwood Distributed Energy Platform' in which Aware Super made an initial investment commitment of \\$300 million.](#) The investment by Aware Super is understood to be the first significant investment by an Australian superannuation fund into the distributed energy sector.

REST Super, whose renewable energy investments include ownership of Collgar Renewables, Western Australia's largest wind farm, also plans to expand into the solar energy market.¹

Key tips to attract a superannuation fund

Tax structuring

As outlined above, one of the main considerations when investing in a REP is the suitability of the REP ownership structure. Each ownership structure will have

its advantages and disadvantages, but superannuation funds are likely to be attracted to tax transparent structures.

These structures can include unincorporated joint ventures, partnerships, trusts or corporate collective investment vehicles. Investments into these types of entities can provide superannuation funds with a tax efficient structure, as the funds can flow from the project without the imposition of tax at the project level, which provides investors with an opportunity to structure their own tax affairs.

These structures can also facilitate distributions of cash from a REP in advance of recognising accounting or tax profit which is beneficial where the project has significant non-cash expenses (such as depreciation).

Utilise C-Notes

Convertible notes, or 'C-Notes', are short-term hybrid debt and equity instruments that allow investors to front up capital in the form of interest-accruing loans that will eventually convert into company shares following a trigger event. They allow for 'bridging' capital with lower risk until completion of the relevant development project and also enable superannuation funds to meet the detailed requirements to disclose fees and costs in a consistent and transparent way, all of which can be highly attractive to potential superannuation fund investors.

Distribute risk

As discussed above, the design of the fund structure used to hold assets can mitigate cross default risk for a leveraged portfolio of assets. Superannuation funds may be unlikely to invest where the structure used doesn't meet required parameters established by their investment or governance committee. Risk should be distributed appropriately across the portfolio of assets and minimised

through preventative measures where possible to provide investors with comfort in the project and management of the project.

Be licensed

Most institutional investors, including super funds, will expect the sponsors of new energy investment funds to be appropriately regulated under financial services laws. Our team can assist you to develop fund structures in accordance with these requirements, including the requirement to hold an Australian financial services licence (**AFSL**).

Other considerations

Developers should keep in mind the specific fees, costs and disclosure requirements of their institutional and superannuation fund investors under ASIC's Regulatory Guide 97 Disclosing fees and costs in PDSs and periodic statements (**RG 97**), and expect to provide the information that they need to include in the relevant product disclosure statements and periodic statements.

Future Market Development

In the future, the market may see superannuation funds develop further in-house capabilities for large deployments of capital in REPs. Combined with the predominant view within the superannuation fund industry that environmental factors are important to the investment thesis, this is likely to mean that superannuation funds will have a stronghold in the sector as they consider mitigating risks to their members' retirement outcomes.

For more information, please contact:

- 

Matt Baumgurtel
Partner, New Energy Lead
[+61 459 900 080](#)


- 

Seema Sandhu
Partner
[+61 2 8072 8271](#)


- 

Erik Setio
Partner
[+61 434 651 167](#)


- 

Hannah Jones
Senior Associate
[+61 450 584 149](#)


- 

Nick Huett
Senior Associate
[+61 3 8676 7735](#)





A Collective Breeze: Joint Ventures in Offshore Wind Projects

Authors: Matt Baumgurtel, Adriaan van der Merwe, Hannah Jones, Kusum KC and Rahul Tijoriwala

Joint ventures (**JVs**) are common in the offshore wind industry due to the scale, complexity, and capital required for such projects. This is because JVs enable players to pool their resources, share risks and leverage complementary expertise to enter this high barrier market.¹

There has been a whirlwind of activity in Australia following the incumbent Government's policy commitment to net zero targets² and the Minister for Climate Change and Energy's announcement of six offshore wind priority areas in August 2022.³ The Gippsland (VIC) and Hunter (NSW) regions have already been declared offshore wind areas while the Southern Ocean (VIC & SA), Illawara (NSW) and Bass Strait (Tas) regions are at various stages of public consultation.⁴

Strategic JVs are especially important in the Australian context, as the offshore wind industry is in its infancy. There are currently no operational offshore windfarms in Australia despite Australia having abundant offshore wind resources.

As expected, many of the feasibility licence applications currently under assessment for the Gippsland declared area (covering 15,000 square kilometres) have been received from JVs.⁵ Feasibility licences allow the licence holder to assess the feasibility of an offshore infrastructure project and in the future apply for a commercial licence “to construct, install, commission, operate, maintain and decommission offshore renewable energy infrastructure in the licence area”.⁶

JV Examples

Examples of recent JVs include:

- **Ocean Winds**, a 50-50 JV between Engie (French energy giant) and EDP (Spanish renewables company)⁷ with projects located in 7 countries; and
- **Poseidon** a JV between SSE (UK energy giant) and Equis Developments (Singapore based, Australian managed). Notably, SSE is already engaged to build one of the world's largest offshore wind farms in England (3.6GW Dogger Bank). ‘Poseidon’ has been reported as applying for a feasibility licence to build a wind project in Victoria's Gippsland region.⁸

Why use a JV?

JVs typically take the form of a special purpose vehicle, known as a project company. This entity is formed with the specific purpose of entering the main contracts for the project and retaining

ownership of the JV's assets. Companies often seek JV opportunities to gain a competitive advantage by capitalising on the value that comes from leveraging complementary capabilities to enter new markets.

In addition to intensive capital financing, the offshore wind industry requires expertise in renewables technologies, local regulatory requirements, offshore deep-water operations, and floating structures. Collaboration with partners are therefore more appealing than embarking on solo ventures.

While the initial high costs may deter new entrants, the current market demand for offshore wind projects underscores the potential for substantial returns on investment. Oil and gas companies (especially those with offshore operations) are uniquely positioned to collaborate with partners to provide specialised expertise and financial support, all the while protecting their market share in the energy sector.

Phases of a JV

The composition of a JV will largely depend on the project's maturity and scale. Typically, one party bears the responsibility for the operations, allowing financial investors or new entrants to participate without needing the full skillset and resources for the wind farm's development, commissioning, and maintenance.

The success of the JV will depend on the participating companies' ability to address weaknesses, capability gaps, strategy and financials during the different phases of the JV.

In the initial phases of the project, the involved parties may consist of a developer scouting potential sites, accompanied by either a financial investor or a larger developer seeking to broaden its renewable energy portfolio.

As projects grow in scale and complexity, multinational utilities are integrated to combine financial and operational resources and jointly manage substantial project risks. The financials of the participants will become pivotal in securing project finance upon reaching financial close.

In some jurisdictions, subsidy regimes may require local participation in the JV, while in regions with less advanced renewable technology, partnering with experienced developers can accelerate technology adoption and advancement.



Key considerations in JVs

While JVs are a useful vehicle for realising new market opportunities, there is a tendency for JVs to fail where there is a strategic misalignment between parties, as parties also need to cater to their own goals, market pressures and shareholders.

To ensure the success of a JV it is critical for companies to be strategically and financially aligned and establish clear protocols for decision making and conflict resolution at the outset.

Key considerations include:

- **Composition** – carefully selecting the JV participants to ensure the correct mix of complementary capabilities are obtained;
- **Control** - establishing clear control provisions for the day-to-day management of the project and giving the JV decision making authority to meet objectives;
- **Organisation** - creating a strong value proposition to retain key employees and manage cross-cultural differences in cross-border projects;
- **Economics** - specifying the services the JV will provide and establish clear and fair transfer-pricing schemes whilst establishing good risk and performance management systems;
- **Selling interest** - addressing transfer rights and minimum financial criteria for new JV members and contemplating extenuating circumstances where the project requires additional funding;
- **Timeframe** - negotiating the commitment period for finance given the discord with financial entities preferences for short term investment and the long operational life of offshore wind projects;

- **Exit Provisions** - contemplating exit provisions for both investors and minority owners due to potential issues with retaining specialised knowledge brought by the departing party; and
- **Jurisdiction** - carefully determining the most suitable jurisdiction for the JV as local laws and regulations and tax considerations can make certain jurisdictions more attractive.

Offshore wind is an established industry in many regions around the world and is rapidly gaining momentum due to advancements in technology, favourable regulatory frameworks and the increasing role of renewable energy in addressing climate change.

Australia needs to urgently attract global energy giants and renewable companies to develop its offshore wind resources, and JVs (especially those involving Australian based companies) are the perfect vehicle to ensure the transfer of specialised skills and knowledge to help build Australia's future renewable workforce and fulfill its commitment to net zero targets.

For more information, please contact:



Matt Baumgurtel
Partner, New Energy Lead
[+61 459 900 080](tel:+61459900080)





Adriaan van der Merwe
Special Counsel
[+61 40 312 0410](tel:+61403120410)





Hannah Jones
Senior Associate
[+61 450 584 149](tel:+61450584149)



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²Paris Agreement, opened for signature 22 April 2016, 1155 UNTS 146 (entered into force 4 November 2016).

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⁴Ibid.

⁵Gippsland, Victoria declared offshore wind area', Department of Climate Change, Energy, the Environment and Water (Webpage) <https://www.dcccew.gov.au/energy/renewable/offshore-wind/areas/gippsland>

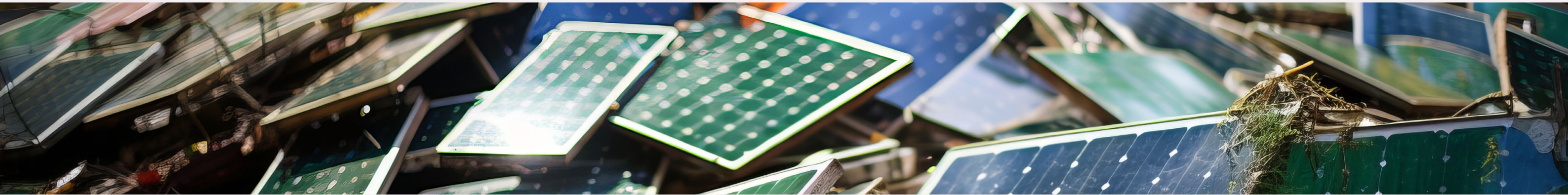
⁶Guideline: Offshore Electricity Infrastructure Licence Administration – Feasibility Licences, Department of Climate Change, Energy, the Environment and Water (Webpage) https://www.dcccew.gov.au/sites/default/files/documents/Guideline_OEI_Licence_Administration_Feasibility_Licences_Dec_2022.pdf

⁷Alex Donaldson, ‘Ocean Winds joint venture to develop offshore wind projects in Australia’, Power Technology.(Webpage, July 2023) <https://www.power-technology.com/news/ocean-winds-joint-venture-to-develop-offshore-wind-projects-in-australia/>

⁸Giles Parkinson, ‘Powerful new consortium joins rush for offshore wind with massive project in Victoria’, Renew Economy (Webpage, April 2023) <https://reneweconomy.com.au/powerful-new-consortium-joins-rush-for-offshore-wind-with-massive-project-in-victoria/>

How to Solve the Problem of Decommissioning?

Authors: Matt Baumgurtel, Margot King, Charmian Holmes and Megan Chau



What are the issues?

Project proponents for wind, solar and battery projects are in a race to secure optimal land near transmission infrastructure for projects as the new energy transition and the race to net zero speeds up.

Often, negotiations to secure the land are with individual landowners who have been farming on the land as a family business for some time.

A key concern for landowners is to ensure that project infrastructure is removed at the end of the lease. Landowners are concerned that, in the worst case scenario, a project company might go bankrupt, leaving the landowner with decommissioning and make good costs.

Negotiations to solve this issue usually focus on bank guarantees, parent company guarantees or some form of decommissioning fund. See the Clean Energy Council's page on decommissioning - www.cleanenergycouncil.org.au/advocacy-initiatives/community-engagement/decommissioning

Bank guarantees are not suitable because of the cost and the long term of a project lease (e.g. 30 years with a 10 year further term). Parent company guarantees are not suitable because they add too much to the cost of capital and make the project unviable. Internationally, there are insurance products available to cover the risks but these are not available in Australia. In other contexts, councils impose a development bond or similar type of security as a development condition. This is also difficult in the context of a long project life.

Generally, parties end up agreeing to:

- make good and undertake decommissioning obligations without security; or
- make good and undertake decommissioning obligations with a decommissioning fund as security.

The decommissioning fund works so that, for example, 5 years prior to the end of the term, the cost of decommissioning is assessed by an independent person, and the project proponent contributes 20% per year into an escrow fund that the landowner can call on at the end of the term if the project proponent has not met its decommissioning obligations.

This solution is also not entirely satisfactory since it ties up capital, requires fees and administration by a third party and does not give complete assurance as the arrangements are not established at the time the documents are signed. There is a risk that the process is not followed properly when it is set up.

How does the renewables industry avoid an unfunded decommissioning liability in 30 years time? How do we ensure that landowners feel assured about projects on their land? How do we continue with social licence by addressing community concerns about visual pollution from 'rusty windmills' in the future?

All of this made partners in the New Energy and Real Estate teams, Matt Baumgurtel and Margot King start to think about better solutions. Matt and Margot recently talked with Charmian Holmes, Partner in the Financial Services team about how a Discretionary Mutual Fund might play a role in solving this issue.

What is a Mutual Fund?

Discretionary Mutual Funds – often just called 'Discretionary Mutuals' – are usually set up by industry or professional groups, or by businesses or corporate groups, to cover common or similar property or liability risks.

Discretionary mutuals are similar to insurance, but members contribute to capitalising the fund, and members may claim on the fund to cover certain risks that are protected by them. It is a genuine peer-to-peer model where the members can share the risks and the costs of operating the mutual fund.

For example, the Australian Federation of Travel Agents set up a discretionary mutual to protect against 'chargeback costs' – i.e., costs that a credit card company passes on to the supplier when a customer cancels or disputes a transaction. This happens in the travel industry for example, when a travel service provider, like a tour company goes insolvent or for some other reason does not honour a pre-paid booking. Typically, the travel agent would bear those costs but the AFTA mutual was set up to allow the travel agents to address that risk by coming together to form a mutual that could protect its members for that cost.

There are many other examples where people use discretionary mutuals because of 'hard to place' risks or where there is no appetite at all in the local insurance market or because they need to create a product that is more innovative than what the local insurance market can support now.

Discretionary mutuals are often set up by an industry for their industry – as such, the advantages of them include:

- having those with experience in a particular sector consider and approve protection claims which may result in a fairer outcome for the community in line with their industry standards;
- providing products which cater to specific concerns and risks unique to a particular industry compared to what would be available from the traditional insurance market; and
- reinforcing positive and communal methods of risk management which encourages the active participation of mutual members.

Discretionary mutuals can be a good alternative because:

- discretionary mutuals are generally simpler and less expensive to set up and capitalise than an insurance company and do not require an insurance licence (although do require a financial services licence);

- the discretionary power means that the mutual can manage their exposures in terms of structuring a risk program to maximise their buying power for excess of loss and stop loss (re) insurance – reaching beyond primary markets to access capital that is not normally available to them;
- they have a lower tax burden than an insurance company or captive insurer and there are tax advantages because GST is payable but income tax and insurance taxes like stamp duty are not; and
- mutuals can raise equity by issuing Mutual Capital Instruments (which are similar to shares) to investors.

How might a discretionary mutual work in a renewable industry and decommissioning context?

The potential liability for decommissioning of infrastructure in the future sounds like a good example of a risk that a discretionary mutual might be established to cover – it is industry wide, affects a number of stakeholders and it is not currently protected by a local insurance product.

Setting up a discretionary mutual does require industry co-ordination and co-operation. Generally, an industry body would drive the process by having some of the major participants commit in-principle. There would need to be an actuarial study to work out the feasibility of the pricing for the protection and to ensure it is appropriately capitalised to meet the potential liability.

How is a discretionary mutual structured?

A discretionary mutual can be set up as a public company limited by guarantee or a unit trust.

A public company limited by guarantee is useful where membership is to be offered to a larger number of similar businesses or industry stakeholders and not one corporate group. Instead of issuing shares, members apply for membership. Their rights are contained in a Constitution or a set of Rules (or both).

This structure is particularly efficient where the group membership will not change regularly or if the mutual is being managed by a leadership team which drawn from a not-for-profit entity.

Unit trust structures are more commonly used by commercial providers, such as trustee companies and insurance brokers, where there are smaller member numbers and no need for members to have management/leadership responsibilities. There are taxation advantages for both structures due to the operation of the principles of mutuality.

Are there any disadvantages?

The claimant may not be entitled to 100% recovery on the claim. The claimant in this case would be the member, not the landowner. The landowner would need to be assigned the rights of the member to the proceeds of any claim in the relevant project documents.

The key difference between insurance on the one hand and discretionary protection on the other is that:

- an insurance policyholder has an absolute contractual right to have their claim paid if it is covered under the terms and conditions of the insurance policy.
- a person protected by a discretionary mutual has the right to have their claim considered and for a decision to be made about the exercise their discretion - either in favour or against the payment of a claim. The governing body of the Mutual Fund (i.e., the board or the trustee) makes the decision and might have regard to the interests of all the members. For example, the Board might decide to pay out a percentage of every claim if the industry was hit by an industry wide event that triggered a lot of claims (for example, COVID-19 or a mass weather event) and they can't make sufficient (re)insurance recoveries to fund a claim payment of 100%.

Both discretionary mutuals and insurance products offer a legitimate way of protecting someone against the occurrence of an 'insurable' event or risk.

Discretionary protection is recognised by case law as a valid legal alternative to insurance.¹

Although it is not necessary to have an insurance licence from the Australian Prudential Regulation Authority, because discretionary mutuals are a facility for managing financial risk, they are regulated as a financial product under Chapter 7 of the Corporations Act 2001 (Cth). In most cases, this means an Australian financial services (AFS) licence will be required.

Wrap Up

A discretionary mutual fund might be one way of driving some certainty on the decommissioning risk. If the risk could be minimised, this would alleviate concerns from landowners that are often the most difficult to resolve adequately in negotiations. It would also contribute to social licence and relationships with communities and ensure that future decommissioning liability is not left unfunded. In our view, if a full solution is not found, legislation or approval conditions will step in to fill the void. It would be great to see the industry develop its own solution in this space using more innovative alternatives to the traditional insurance market.

For more information, please contact:



Matt Baumgurtel
Partner, New Energy Lead
[+61 459 900 080](tel:+61459900080)





Margot King
Partner
[+61 406 056 651](tel:+61406056651)





Charmian Holmes
Partner
[+61 408 244 736](tel:+61408244736)





Megan Chau
Lawyer
[+61 2 8072 8271](tel:+61280728271)



¹ Medical Defence Union Ltd v Department of Trade [1980] 1 CH 82. This English case was confirmed and considered in the Australian decisions of Bailey v Medical Defence Union (1995) 184 CLR 399 and The Barclay MIS Group of Companies v ASIC [2002] FCAT 606



Navigating the New Landscape: How Recent Changes to Australia's Foreign Investment Impact Renewable Energy Developers

Authors: Matt Baumgurtel, Joshua Bell, Hannah Jones, Hayley Cummings and Ally Frizelle
First published: 29 September 2023

The regulation of investment by foreign individuals and entities in Australia, including in the energy sector, is regulated by the Treasurer of the Commonwealth (through the *Foreign Investment Review Board (FIRB)*) under a framework governed by the *Foreign Acquisitions and Takeovers Act 1975 (Cth)* and the *Foreign Acquisitions and Takeovers Regulation 2015 (Cth)*.

Recent changes to the FIRB landscape have shifted FIRB considerations from a compliance obligation to a key transaction and business issue. It is now even more important for foreign owned renewable energy project developers and investors to:

- consider the current FIRB requirements as early as possible in any proposed transaction; and
- reset their development methods to comply with the revised FIRB landscape.

The FIRB game has changed, and developers need to adapt business strategy to comply – otherwise put at risk millions spent on project development.

The end of “land banking”?

FIRB released Guidance Note 4 in July 2021 which, at the time, heralded significant changes to the application of the Foreign Investment Regime to renewable energy developments, including imposing conditions requiring construction to commence within five years and prohibiting the disposal of the land until construction is complete. This regime presents challenges to foreign renewable energy project developers, particularly those that intend to seek third party investment in the projects they develop.

Does the Foreign Investment Regime apply?

The Foreign Investment Regime will apply to most renewable energy projects and businesses. However, determining if applies or not is a critical first step (and one that is sometimes incorrectly assumed).In summary, investments by foreign persons in Australian entities, businesses or land will be captured by Australia's foreign investment framework if

the investment is a notifiable action, a notifiable national security action, a significant action, or a reviewable national security action (which is referred to as the ‘call-in power’). If an investment or action does not fall within one of these categories, then it is not subject to the regime.

There are important differences between these categories, including that:

- notifiable actions and notifiable national security actions require mandatory approval before undertaking the investment or transaction, whereas significant actions and reviewable national security actions do not require approval. However, FIRB can review the transaction later and, if the action is found to contravene the national interest or national security (as applicable), then FIRB can make orders including divestment orders; and
- notifiable actions and significant actions are based on a broad national interest test, whereas notifiable national security actions and reviewable national security actions are tested against a narrower national security test.

Land Development Conditions

Guidance Note 4, which was last updated in January 2024, makes it clear that the Treasurer will generally seek to ensure that agricultural land and vacant commercial land, acquired for the purpose of operating a wind or solar farm, is put to productive use within a reasonable timeframe and ‘land banking’ does not occur.

If an application to FIRB for such an investment is approved, it will generally be approved subject to the following conditions:

- a wind or solar farm being developed on the land;
- continuous construction of the proposed development commencing within five years of completing the purchase of the land; and
- the land not being sold, transferred, or otherwise disposed of, prior to the development being completed.

However, the Treasurer can impose any condition(s) that are considered necessary to protect the national interest. ‘National interest’ is viewed through the lens of the broad,

seemingly limitless national interest test which considers factors such as the impact on the economy, competition, tax, the investor’s character and national security. Helpfully, FIRB has indicated that it will endeavour to ensure that any conditions that it imposes strike a balance between enabling commercial objectives to be realised while ensuring that the land is put to productive use.

Zero thresholds for “national security” actions

There is a \$0 monetary screening threshold that applies to any investment that constitutes a notifiable national security action or a reviewable national security action. This means that any investment that falls within one of those categories will be captured by the Foreign Investment Regime.





What is a notifiable national security action?

A notifiable national security action is one of the following actions:

Category	Comment
Starting a ‘national security business’	Renewable energy projects will most likely be national security businesses.
Acquiring a direct interest (usually 10%+) in a ‘national security business’ or in an entity that carries on a ‘national security business’	A ‘National Security Business’ is a business which if disrupted or carried out in a particular way may cause a national security risk. Generally, this involves a ‘critical infrastructure asset’ which covers assets in 11 sectors as set out in the Security of Critical Infrastructure Act 2018 (Cth) (which was amended in December 2021). These sectors include electricity, gas, water and sewerage, energy, communications, data storage or processing, higher education, and defence. The ‘National Security Business’ must be publicly known or known to the public upon the making of reasonable inquiries.
Acquiring an interest in ‘national security land’	National security land is generally land which is owned or occupied by defence, including buildings and structures. It also includes defence prohibited areas and land in which an agency in the national intelligence community has an interest if the existence of the interest is publicly known or could be known upon the making of reasonable inquiries.

What is a reviewable national security action?

A reviewable national security action is one expected to give a foreign person potential influence and rights of an entity or business or the right to occupy land. In general terms, it captures investments where an interest of more than 10% is being acquired which is not otherwise caught by one of the other categories. There are approximately nine scenarios where this arises and, in practice, the outcome of this category is to give the Treasurer a default ability to review investments in sensitive sectors that may pose national security concerns, such as New Energy.

A person is not required to notify the Treasurer before taking a reviewable national security action. However, the Treasurer can exercise its ‘call-in’ power for up to 10 years after the transaction which allows the Treasurer to make orders where the action is contrary to national security. This ‘call-in’ power can be extinguished by voluntarily applying for FIRB approval, in which case the transaction cannot proceed until that approval has been obtained or the statutory timeframe for making a decision has otherwise lapsed.

Mandatory or voluntary notification?

There are various mandatory and voluntary notifications to consider in the New Energy sector. FIRB’s Guidance Note 8, which was last updated in July 2023, explains how FIRB will look to exercise its powers under the national security actions.

In the Renewable Energy sector, FIRB has provided guidance that the following investments will either trigger a mandatory requirement to notify FIRB or will be on their radar for exercising the call-in power, in which case they encourage voluntary notification:

Mandatory Notification	Voluntary Notification
A foreign person must seek foreign investment approval prior to starting a business, or acquiring a direct interest in an entity that owns or operates a: • network, system or interconnector for the transmission or distribution of electricity to ultimately service at least 100,000 customers; or • an electricity generation station that provides a system restart ancillary service in a state or territory or has a nameplate generation capacity of at least 30MW and is connected to a wholesale electricity market. Note that this threshold has decreased since 2021.	Foreign persons proposing to invest in an energy retailer (gas or electricity) where the foreign person would subsequently hold interests in energy retailers with more than 100,000 customers are also encouraged to seek foreign investment approval.

For more information, please contact:



Matt Baumgurtel
Partner, New Energy Lead
[+61 459 900 080](tel:+61459900080)
@



Joshua Bell
Special Counsel
[+61 2 8072 8271](tel:+61280728271)
@



Hannah Jones
Senior Associate
[+61 450 584 149](tel:+61450584149)
@

Investing in Batteries and Rare Minerals: Opportunities for Australia – Part 1

Authors: Matt Baumgurtel, Michael Boyce, David O’Carroll and Megan Chau
First published: 08 April 2022

Increasing demand for New Energy technologies – predominantly battery storage – is an ongoing, common trend in many industries including electric vehicles (EVs), heavy haulage, public transport and renewable generation projects. As this demand increases, so too does the demand for the metals and minerals which form these technologies, and the pressure on the mining sector to provide a constant supply.

In this article, we identify the materials that are in high demand and the fundamental role played by the mining sector in the New Energy transition. We also consider the key issues facing this transition, mainly in the form of supply chain shortages, and look at some of the steps to achieve market balance for these materials in the future.

While steel will be crucial as an infrastructure enabler for all technological transition, specific elements will play an important role in each technology.

Materials critical for transition to a low-carbon economy, by technology type



The Building Blocks of the New Energy Transition

Several raw materials are at the core of enabling the New Energy transition. Copper is a valuable material in bioenergy, electricity networks, wind power and solar photovoltaic technologies and in the manufacture of EVs. Wind, solar and electricity-powered technologies are also highly reliant on a range of other raw materials including aluminium, and neodymium. The required pace of transition means that the availability of these materials will need to be scaled up within a relatively short time scale and, in certain cases, at volumes ten times or more than the current market size to prevent shortages and keep new technology costs competitive.



Certain metals and raw materials increase the performance of these technologies for longer periods of time, which in turn maximises efficiency and sustainability while reducing waste. Lithium metal anode, for example, is used to boost energy density in batteries, allowing the battery to perform better and for longer compared to a graphite anode alternative.

Battery Manufacturing

The following minerals are used in battery manufacturing:

Lithium – a key ingredient to produce traction batteries used in EVs and other consumer electronics; it is also used in energy storage and air mobility technology.

Cobalt and nickel – cobalt prices peaked at \$100,000 / metric ton in 2018, leading to a switch to nickel, which similarly grew more expensive and proved ineffective in facilitating maximum design capacity. Currently, both materials are less commonly used.

Manganese – a useful alternative to cobalt and nickel for its sheer abundance in global production and supply (4-5x greater than nickel production and 140x greater than cobalt production), plus reserves.

Supply Chain Issues

In the short-term, the outbreak of war in Ukraine and the ongoing energy crisis have forced countries around the world to reassess

their reliance on fossil fuels, particularly when imported from overseas. Renewables, most notably in the form of wind and solar power coupled with battery storage and/or green hydrogen production, are going to be increasingly important in providing energy security.

Therefore, while increasing renewable energy capacity seems an obvious solution, high prices, the challenges in bringing projects to production, the cost of new technology and uncertainty in the supply chain are growing concerns for the New Energy sector.

These supply issues may also be exacerbated due to other factors such as:

- Environmental trends favouring certain means renewable energy generation – for example, where solar panels may not be performing well due to weather or seasonal changes, there may be a shift towards wind-generated power and accordingly, an increased demand for neodymium; and
- Greater volume of raw materials for sustainable technologies compared to fossil fuel-based alternatives – renewable energy capacity is generally lower than its fossil fuel-based counterpart (e.g. an EV needs about six times more minerals than a petrol-powered car), therefore more raw materials are needed to generate the same amount of energy.

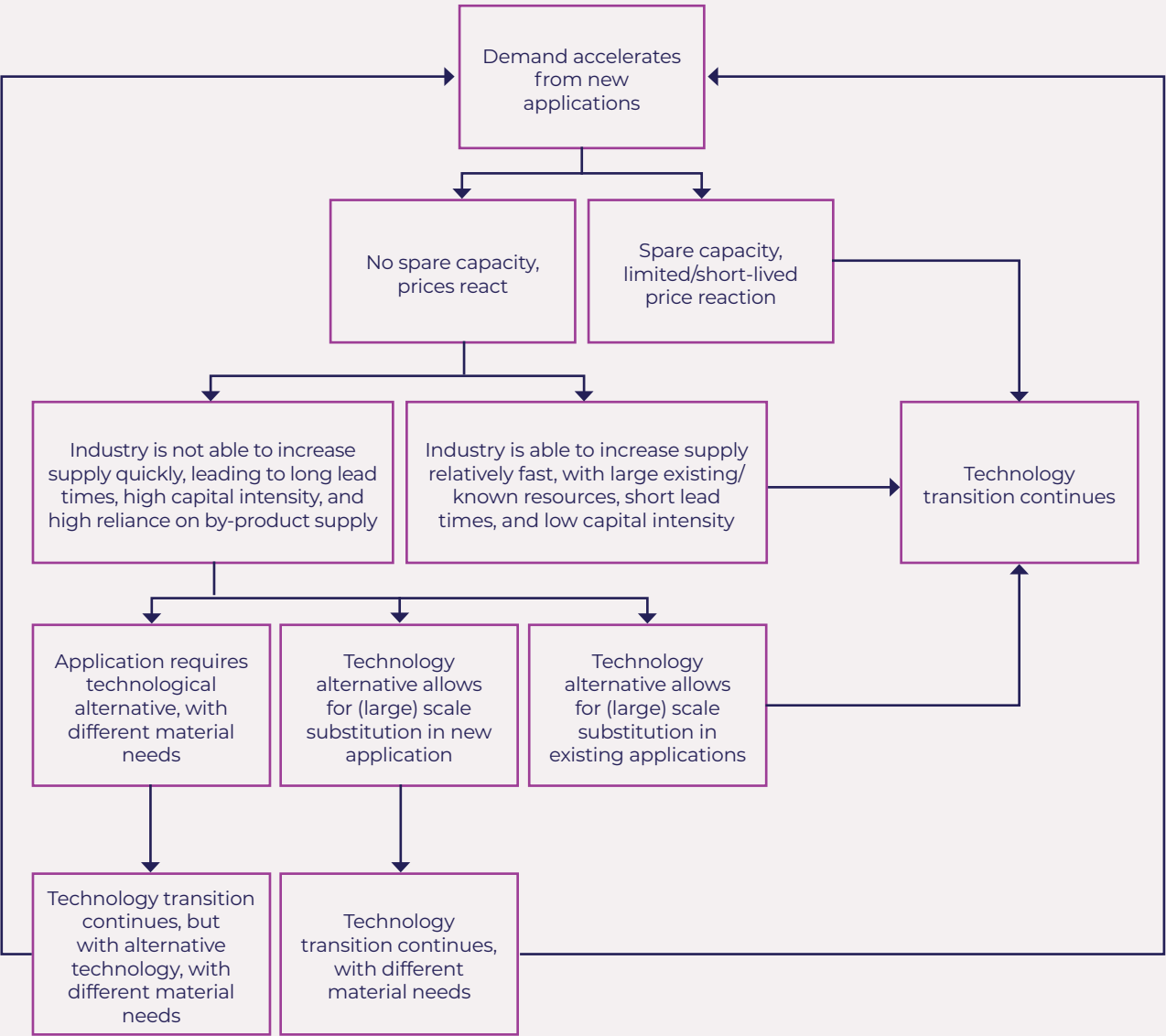
One method of achieving future market balance in supply and demand is refining the existing methods for extracting raw materials and being willing to explore alternative extraction sites. This method can help to balance future supply and demand by maximising the safe intake of raw materials from each site and reducing supply time delays, leading to lower financial and environmental costs in the long-term. However, this depends on a number of factors including the location of the relevant sites and the technology required to be applied, which is often new and developing. An example of this is in China, where companies have invested in new hard rock and brine lithium projects over the past

few years, but there remains a question mark as to the quality of these resources and their ability to produce battery-grade product.

Alternatively, technological innovation may accelerate to the point of being able to make material substitutions in the case of any deficit, reducing the pressure to supply one specific material altogether. In either case, sufficient capital investments both at Government and industry level will be necessary for these innovative measures.

The table below illustrates the supply and demand imbalance issue in more detail, including potential solutions:

Supply, demand, and price reactions will lead to feedback loops, resulting in supply reactions, technology shifts, and material substitution.



Source: <https://www.mckinsey.com/industries/metals-and-mining/our-insights/the-raw-materials-challenge-how-the-metals-and-mining-sector-will-be-at-the-core-of-enabling-the-energy-transition>

Australia’s Prime Position

The supply chains for critical minerals will be dominated by the switch to renewables. The International Energy Agency’s most conservative forecasts expect demand for lithium to grow 13-fold in the 20 years to 2040, rare earth demand to triple, copper to double and cobalt is expected to increase at least six times.

Whilst acknowledging the recent press from some of the investment banks in relation to a lithium over-supply as a result of the number of projects potentially being brought to production, the broader industry view appears to reflect a position that any balance in the supply and demand of lithium, and in particular battery-grade product, is more likely to be some years away.

Australia is well positioned to supply these critical minerals and in doing so can make a huge contribution to combat climate change globally. For instance, Australia has rapidly become the world’s biggest exporter of lithium by producing almost half of the worldwide supply.

As Australia still exports the majority of its critical minerals overseas, there is an opportunity for midstream processing to be undertaken locally. At present, particularly in rare earths, this midstream processing market is heavily dominated by China. Countries including Australia have begun to make a concerted effort to encourage midstream processing onshore, with grants and other incentives being offered in a bid to create an industry and additional jobs. For instance, a \$120 million deal for a commercial-scale processing facility was recently struck between Australia’s Lynas Rare Earths and the U.S Department of Defence, to operate in Texas by 2025. This deal is particularly significant as it creates a secondary supply chain for the processing of heavy rare earths elements outside of China.

Australia’s mining industry also has a strong incentive to adhere to strict environmental standards and technological advancement is on foot to develop new methods that allow us to mine these important minerals sustainably.

Government Assistance

On 4 April 2022, the Federal Government approved a \$1.25 billion loan to Iluka Resources to develop Australia’s first integrated rare earths refinery in Western Australia. This is a crucial step under the Government’s Critical Minerals Strategy, which aims to turn Australia into a global critical minerals powerhouse by 2030.

The refinery will produce rare earth oxide products such as neodymium and terbium, which are used in the manufacture of EVs, clean energy generation and defence technologies. The refinery project is projected

to secure Australia’s manufacturing capability and provide a range of job and economic opportunities in the New Energy space.

In the future, the refinery project will be further supported and sustained under the Government’s Modern Manufacturing Strategy, which will seek to explore potential offtake and investment opportunities to continue meeting the increasing global demand for critical minerals. As part of this strategy, the Federal Government has announced a series of grants through its \$1.3 billion Modern Manufacturing Initiative which aims to support midstream projects.

A Sustainable Transition

The transition to a net-zero, clean energy-based economy will be heavily reliant on rare earths and critical minerals. A rush to make the switch will place a strain on critical mineral reserves, resulting in a range of issues from disproportionate supply and demand to material shortages and high costs for products. However, with technological innovation, advances in extraction methods and sufficient Government and private capital investment, the transition to a New Energy society should be secured.

For more information, please contact:

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Matt Baumgurtel
Partner, New Energy Lead
[+61 459 900 080](tel:+61459900080)


- 

Michael Boyce
Partner
[+61 400 142 494](tel:+61400142494)


- 

Iveta Sceales
Special Counsel
[+61 8 6311 9160](tel:+61863119160)


- 

David O'Carroll
Senior Associate
[+61 421 497 311](tel:+61421497311)


- 

Megan Chau
Lawyer
[+61 2 8072 8271](tel:+61280728271)



Marcelo Azevedo, Magdalena Baczyńska, Ken Hoffman, Patricia Bingoto, Greg Callaway and Oliver Ramsbottom, “The Raw-Materials Challenge: How the Metals and Mining Sector will be at the Core of Enabling the Energy Transition” (10 January 2021), <https://www.mckinsey.com/industries/metals-and-mining/our-insights/the-raw-materials-challenge-how-the-metals-and-mining-sector-will-be-at-the-core-of-enabling-the-energy-transition>

Investing in Batteries and Rare Minerals: Opportunities for Australia – Part 2

Authors: Matt Baumgurtel and David O’Carroll
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Recent Rare Mineral Capital Raisings Global Lithium Resources Limited

Hamilton Locke recently acted as counsel for the joint lead managers for Global Lithium Resources Limited’s **(Global Lithium)** placement of approximately A\$121.5 million **(Global Lithium Placement)**. Proceeds from the Global Lithium Placement will be used for the cash costs associated with Global Lithium’s acquisition of the underlying tenements and remaining 20% in the Manna Lithium Project.

Global Lithium is a lithium exploration, development and production company with a focus on two highly prospective 100%-owned Western Australian projects – the Marble Bar Lithium Project in the Pilbara region and the Manna Lithium Project in the Goldfields region. Global Lithium produces high quality and consistent lithium that is made from spodumene concentrate.¹

Lithium, unsurprisingly, is a critical component of lithium-ion batteries due its reactivity, lightness and ability to be recharged. Lithium batteries are used to power a range of devices from phones and laptops to electric vehicles **(EVs)**. Lithium batteries are capable of storing energy created by renewable sources during high production times and releasing this stored energy according to demand if power production drops.

Mincor Resources NL

Hamilton Locke recently acted as counsel for the lead manager for Mincor Resources NL’s **(Mincor)** placement of approximately A\$55 million **(Mincor Placement)** in addition to a share purchase plan of an additional A\$5 million. Part of the proceeds from the Mincor Placement will be used by Mincor to discover additional nickel mineralisation within its Gold Mile Development and accelerate its Kambalda Nickel Operations.

Mincor is involved in the exploration, development and production of mineral deposits. In 2020, Mincor completed a Definitive Feasibility Study, which confirmed its potential to develop a 5-year operation producing 63,000 tonnes of recovered nickel-in-concentrate

through its Kambalda Nickel Operation. Mincor seeks to produce sustainable, high-grade nickel.

Nickel is a good conductor of heat and electricity. Products containing nickel have more strength at high and low temperatures and have greater corrosion resistance compared with other materials. The vast majority of nickel produced is used to manufacture stainless and heat-resistant steels though nickel is increasingly being used in lithium-ion batteries for EVs and energy storage.

According to the International Energy Agency, approximately half of the growth in demand for critical minerals like lithium or nickel will be the result of the further deployment of New Energy technologies over the next two decades and will be driven by demand for EVs and battery storage.² Lithium and nickel’s critical role in relation to EVs and energy storage means these critical minerals will be crucial to the New Energy transition.

Expected Critical Minerals Capital Raisings Future Trends

These two successful capital raisings are indicative of in the increasing importance industry is placing on the acquisition and allocation of rare minerals. With several European countries already signalling future bans on the sale of new internal combustion engine vehicles and the switch by policymakers from fossil fuels to renewable energy, the demand for New Energy technologies is only expected to rise over the next few decades.

Indeed, the International Energy Association argues that, for the globe to meet the sustainable development scenarios stemming from the Paris Agreement, consumption of copper must rise 40%, nickel and cobalt production between 60 – 70%, and lithium nearly 90%.

This dramatic rise stems from the tremendous amount of rare minerals required to facilitate the clean energy transition. According to the International Energy Association, a typical electric car requires six times the amount of mineral inputs required by a conventional combustion vehicle. For its part, a turbine wind farm requires nine times more mineral resources than a gas-fired power plant. For this reason, investors agree that the demand for critical minerals, including lithium and nickel, is

likely remain strong for the foreseeable future due to the baked-in needs of end-users of these materials amid a shift to EVs and more renewable energy.

We’re already seeing that demand play out in Australia. According to the Commonwealth Minister for Resources, the value of lithium exports are due to increase more than 10-fold over the next two years with almost \$14 billion in lithium slated for export over the course of this fiscal year. Further, in the 2022/23 budget, the Albanese government allocated \$50.1 million over three years to the Critical Minerals Development Program for competitive grants to support early and mid-stage critical minerals projects. This builds on the \$49.7 million committed in September 2022 to various projects already in development across the country.

In light of the above, we anticipate larger volumes and increases in the value of capital raisings in the critical minerals sector which Australian companies and ASX listed entities will be able to take advantage of with their significant experience in the sector.

For more information, please contact:



Matt Baumgurtel
Partner, New Energy Lead
[+61 459 900 080](tel:+61459900080)





David O’Carroll
Senior Associate
[+61 421 497 311](tel:+61421497311)





¹Spodumene is a mineral that contains one of the highest lithium contents. SGS Minerals Services, “Hard Rock Lithium Processing”: <https://www.sgs.com/-/media/sgscorp/documents/corporate/brochures/sgs-min-wal09-hard-rock-lithium-processing-en.cdn.en.pdf>

²International Energy Agency, “Mineral requirements for clean energy transition”: <https://www.iea.org/reports/the-role-of-critical-minerals-in-clean-energy-transitions/mineral-requirements-for-clean-energy-transitions>.

Australia's Green Financing Market: Financing Empowerment or Facilitating Greenwashing?

Author: Matt Baumgurtel and Adam Jeffrey

In the rapidly evolving world of sustainable finance, Australia's green financing market has the potential to drive the nation towards a more sustainable future. However, a critical question emerges - is this burgeoning sector genuinely empowering environmentally friendly initiatives, or is it merely presenting a superficial image of sustainability? There is a delicate balance between genuine green financing that empowers individuals and communities and the potential pitfalls of greenwashing.

“Green” Finance

Green financing, also known as sustainable or environmental finance, is a broad term that encompasses a variety of financial activities designed to support and promote the development of a sustainable, low-carbon, and climate-resilient economy. It involves directing financial investments towards projects, products, and companies that contribute to environmental sustainability.

However, the scope of green financing extends beyond the environmental aspect, touching on social and governance factors as well. This includes ensuring that projects and companies adhere to fair labour practices, promote social equity, and contribute to the overall well-being of communities. This aspect of green financing aligns with the broader concept of social responsibility in business, which emphasizes the need for companies to operate in a manner that benefits society.

Examples of green financing include green or sustainability-linked bonds or loans, sustainable funds and impact investing. The effectiveness of these financial instruments in achieving their intended benefits often depends on clear and transparent criteria for what counts as "green" or "sustainable", robust reporting standards, and effective oversight and enforcement mechanisms.

Empowerment

Green financing can empower in a number of ways:

- **Economic Empowerment:** Green financing has the potential to stimulate economic growth by generating employment opportunities in industries such as renewable energy, sustainable agriculture, and green construction. This can result in increased income levels and improved living standards for both individuals and communities. For instance, the Australian government's Clean Energy Finance Corporation (CEFC) has invested in various renewable energy projects, such as wind farms and solar power plants, which have created thousands of job opportunities and contributed to the economic development of local communities.
- **Environmental Protection:** By investing in projects that promote environmental sustainability, green financing plays a crucial role in protecting and restoring ecosystems. This, in turn, leads to improved health outcomes for communities and nations, as well as the preservation of biodiversity. An example of this is the Australian government's proposal to commit over \$3.2 billion of the budget to the Reef Trust, being the government's flagship investment program to protect and ensure the long-term, sustainable management of the Great Barrier Reef.
- **Social Equity:** Green financing initiatives often prioritise social equity, ensuring that the benefits of sustainable development are spread widely and reach marginalized and under-resourced communities. This focus helps reduce inequality and promote social cohesion. For instance, the Aboriginal Carbon Foundation is driving transformative changes within communities by advocating for carbon farming. Their primary objective is to foster economic prosperity for both Indigenous landowners and non-Indigenous carbon farmers.
- **Resilience Building:** Green finance investments in climate-resilient infrastructure and adaptation measures enhance communities' and nations' ability to withstand the impacts of climate change. This reduces vulnerability to climate-related disasters and ensures the continuity of essential services. In Australia, the CEFC has invested in projects like battery storage systems and microgrids, which enhance the resilience of remote communities by providing reliable and sustainable energy sources, even during extreme weather events.

- **Policy and Governance:** Green financing can also influence policy and governance by encouraging governments to implement sustainable policies and practices. This leads to improved environmental regulation, increased transparency, and better management of natural resources. This can be seen via the National Waste Policy Action Plan, which was implemented in 2019 to promote more efficient and sustainable waste management practices by state and territory governments, as well as local governments, businesses and industries. As part of this action plan, among other commitments, the Australian government proposed to ban the export of waste plastic, paper, glass and tyres.

Greenwashing Risks

While green financing has the potential to bring about significant positive change, it's important to consider the risks associated with greenwashing.

Greenwashing refers to the deceptive or misleading practice of presenting a company, product, or initiative as environmentally friendly, sustainable, or socially responsible when it may not be the case. It involves making exaggerated or false claims about the sustainability benefits or impact of a product or service, often with the intention of boosting the company's reputation and sales. In the context of green financing, this could involve funds being directed towards projects that are not genuinely sustainable or companies misrepresenting their environmental impact to attract investment.

Green financing, while intended to support environmentally friendly and sustainable projects, can inadvertently facilitate greenwashing.

Investors, driven by the desire to be part of the green movement, may not conduct thorough due diligence before investing in a project. For instance, an investor might be swayed by a company's marketing efforts that highlight a single green project, without looking into the company's overall environmental footprint. This can allow companies with less-than-green practices to receive green financing. Even when a project is genuinely environmentally or socially friendly, there is a risk that the funds received through green financing could be used for other, less sustainable activities within the company. As a result, the company appears more sustainable than it truly is due to the presence of a few green projects.

Some green financing focuses on the potential future benefits of a project, rather than its current environmental impact. This can allow companies to receive green financing for projects that promise long-term sustainability but are currently harmful to the environment. In addition, without regular and transparent reporting of a project's environmental impact, it is difficult for investors to verify whether their funds are being used in a truly sustainable way. This lack of transparency can facilitate greenwashing as it allows companies to portray themselves as more environmentally friendly than they might actually be.





Addressing greenwashing risks

There are several mechanisms and policies in place which help mitigate the risks of greenwashing in the context of green financing (and more broadly).

Both main regulators in Australian (the Australian Securities and Investments Commission (**ASIC**) and the Australian Competition and Consumer Commission (**ACCC**)) have made it clear that greenwashing is a key focus, and that there is a mandate to bring enforcement against greenwashing. ASIC and the ACCC have been increasingly vigilant in monitoring green claims made by companies, including those seeking to attract investment through green financing, and infringement notices and fines have been issued in a number of cases. In February 2023, ASIC commenced its first prosecution in relation to alleged greenwashing (against Mercer Superannuation (Australia) Ltd). ASIC has followed this with actions against Vanguard Investments Australia (in July 2023) and Active Super (in August 2023).

Both ASIC and the ACCC have issued regulatory guidance that outline steps companies can take to minimise the risks of greenwashing and they have been proactive in investigating and taking action against companies that make misleading green claims, reinforcing the importance of transparency and honesty in the green financing sector and elsewhere. These efforts, along with other regulatory measures, are crucial in maintaining the integrity of the

green financing market and ensuring that it truly contributes to a sustainable future.

There has also been a focus on the development of green financing taxonomies. These taxonomies provide a classification system for environmentally sustainable economic activities, helping investors, companies, and policymakers to navigate the green finance market. They set out clear criteria for what can be considered an environmentally sustainable investment, thereby reducing ambiguity and the potential for greenwashing. For instance, the European Union has developed a detailed taxonomy for sustainable activities, which serves as a guide for determining whether an economic activity is environmentally sustainable. It includes thresholds for various sectors and activities, such as energy, transport, and agriculture, and covers key environmental objectives like climate change mitigation and adaptation, water protection, and biodiversity conservation. Australia is currently working to develop its own taxonomy. The development of such taxonomies is an ongoing process, with efforts being made to refine and expand them to cover more sectors and environmental objectives. These taxonomies are not only instrumental in guiding green investments but also in shaping regulatory and policy decisions related to green finance.

Climate-related finance reporting is another essential aspect of sustainable finance, providing transparency and accountability in the financial

sector’s response to climate change. It involves companies disclosing their financial risks and opportunities related to climate change, as well as their strategies for managing these risks and capitalising on opportunities. This type of reporting is guided by frameworks such as the Task Force on Climate-related Financial Disclosures, which provides recommendations for consistent, comparable, and reliable disclosure of climate-related financial information. These disclosures not only help companies to manage their climate-related risks and opportunities better, but they also provide investors with the information they need to make informed decisions, contributing to more resilient and efficient markets.

In January 2024 (after a period of industry consultation), the Australian government released an exposure draft of the Treasury Laws Amendment Bill 2024: Climate related financial disclosure which proposes to introduce mandatory climate-related financial disclosures from the 2024/25 financial year. The new laws will, if enacted, require companies and other disclosing entities to prepare an annual sustainability report outlining various environmental matters, including climate-related financial risks and opportunities and scope 1, 2 and 3 greenhouse gas emissions. These requirements will be introduced in a phased approach over a number of years.

While green financing is a crucial tool for promoting sustainability, it's important for investors and financiers to be vigilant and for companies to be transparent to ensure that these funds are used effectively and don't contribute to greenwashing. Increasing efforts are being made to make it easier for investors and companies alike to meet these obligations – including the proposed mandatory reporting requirements alongside existing regulatory frameworks enforced by ASIC and ACCC. As these practices continue to be implemented, it is hopeful that green finance can become truly “green”.

For more information, please contact:



Matt Baumgartel
Partner, New Energy Lead
[+61 459 900 080](tel:+61459900080)





Adam Jeffrey
Partner
[+61 481 913 850](tel:+61481913850)



Investing for change: Combating Modern Slavery in the Renewable Energy Sector

Authors: Matt Baumgurtel, William Ryan, Rahul Tijoriwala and Dhanushka Rajaratnam

There is a growing concern that the clean energy transition is facilitating a rise in modern slavery.

The renewable energy sector relies on complex and extended supply chains where the length and complexity of these supply chains makes it difficult for businesses to accurately assess the prevalence of modern slavery practices. The supply chains in the renewable energy sector often commence in developing nations (where many raw materials are extracted and converted into products) and the labour force may be susceptible to exploitation, including long hours, low pay, and hazardous working conditions.

This article considers the Australian legislative backdrop which addresses modern slavery (including upcoming reforms) and sets out measures that companies may take to minimise the risk of modern slavery in renewable energy supply chains.

Modern slavery globally

The most recent “Global Estimates of Modern Slavery” report prepared by the International Labour Organization, Walk Free Foundation and the International Organization for Migration estimated that 50 million people were living under conditions of modern slavery in 2021.¹

Although there is no globally agreed definition for “modern slavery”, the Walk Free Foundation (an Australian human rights organisation) defines modern slavery as “*situations where one person has taken away another person’s freedom – their freedom to control their body, their freedom to choose to refuse certain work or to stop working – so that they can be exploited. Freedom is taken away by threats, violence, coercion, abuse of power and deception. The net result is that a person cannot refuse or leave the situation*”.²

Australian legislative framework

In Australia, modern slavery is addressed by the *Modern Slavery Act 2018* (Cth) (**MSA**), *Modern Slavery Act 2018* (NSW) and the *Criminal Code Act 1995* (Cth) (**Criminal Code**). The Criminal Code criminalizes what is considered ‘traditional’ slavery - chattel slavery, and slavery like practices. Practices involving the sale or ownership of a person, or the assertion of ownership of a person (whether by debt or contract), or the purchase of a slave, or the capture or transport or disposal of a person to be a slave are criminal offences under the Criminal Code. The MSA is a transparency

reporting law which attempts to promote a race-to-the top to eradicate modern slavery from supply chains. It defines ‘modern slavery’ to include slavery and slavery-like offenses, the trafficking of persons and the worst forms of child labour.

The MSA creates annual mandatory reporting requirements through the filing of a Modern Slavery Statement (**MSS**) for entities based or operating in Australia which have an annual consolidated revenue of more than \$100 million. A publicly accessible [Modern Slavery Statement Register](#) houses filed MSSs and attempts to promote public scrutiny and engagement. Reporting entities must set out the risks of modern slavery in their operations and supply chains, and actions to address those risks in the MSS. Other entities based, or operating, in Australia may report voluntarily. The Commonwealth Government also has reporting obligations under the MSA.

While some argue that ‘paper-based’ reporting obligations do not significantly influence business practices, the creation of a regulatory risk for businesses may incentivise businesses to scrutinise their supply networks and relationships to comply with the obligations imposed by the MSA.

Upcoming reforms

The ‘[Report of the statutory review of the Modern Slavery Act 2018 \(Cth\): The first three years](#)’ was released in May 2023 and made 30 recommendations as to the regime’s effectiveness.³ These recommendations included:

- expanding the application and scope of reporting obligations (including by lowering reporting threshold from companies with a \$100 million consolidated revenue to those with a to \$50 million consolidated revenue);
- introducing penalties for specific non-compliances (including failing to submit an MSS or making a materially false statement);
- mandating that reporting entities have due diligence processes;
- grievance and complaints reporting mechanisms; and
- empowering the Minister or Commissioner of a region, location, industry, product, supplier, or supply chain to make declarations as to high modern slavery risks.



It remains to be seen whether these reforms will be considered for formal adoption. There are concerns that Australia’s modern slavery regime will become too prescriptive and cause excessive administrative burden, particularly for the smaller businesses that would fall within the scope of the MSA.

How to ensure compliance

Addressing modern slavery requires a multi-stakeholder approach that involves governments, businesses, civil society, and consumers working together to identify and eliminate exploitative practices from supply chains. Organisations operating in the renewable energy sector must assess their supply chains, engage with suppliers, and implement policies and processes to prevent and address modern slavery risks.

Specifically, renewable energy companies (alongside sponsors and financiers) should,

1. **conduct due diligence on their supply chains to identify and mitigate the risk of modern slavery practices:** this includes mapping out supply chains, identifying the origin of raw materials, and assessing suppliers’ labour practices prior to formalising contractual arrangements;
2. **create robust policies and procedures to prevent the use of modern slavery in their supply chains:** including establishing a code of conduct that suppliers must adhere to (with contractual warranties of compliance and indemnities for breach), implementing training programs for employees and suppliers on labour rights and modern slavery risks, establishing reporting obligations and performing periodic audits on suppliers’ compliance with the code of conduct;

3. **build strong relationships with suppliers based on transparency and a carrot-and-stick approaches:** including by proactively monitoring supplier compliance with mandatory MSA reporting obligations to improve accountability and promote a culture of compliance and best practice; and
4. **increase collaboration with government:** including by sharing best practices and advocating for policy changes.

Looking forward

It is important that the path to achieving net-zero is not undermined by human rights violations and environmental damage. Companies in the renewable energy sector should scrutinise supply chains to ensure modern slavery compliance. Alongside human rights benefits, doing so will ensure that companies do not fall afoul of ESG obligations, and that investor confidence and public reputation remains intact. The legislative trend is for obligations to become more stringent (and penalties more severe), so now is the time for companies to assess and ensure compliance.

For more information, please contact:



Matt Baumgurtel
Partner, New Energy Lead
[+61 459 900 080](#)





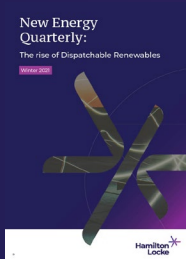
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Lawyer
[+61 2 8072 8271](#)



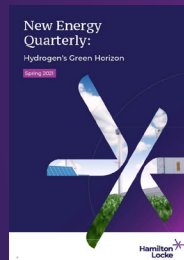
¹[Global Estimates of Modern Slavery: Forced Labour and Forced Marriage](#) (12 September 2022).
²[Walk Free Foundation Submission - Inquiry into an Australian Modern Slavery Act](#) (28 April 2017).
³[Report of the statutory review of the Modern Slavery Act 2018 \(Cth\)](#), Professor John McMillan, AO (May 2023).

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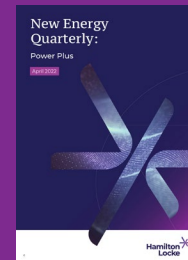
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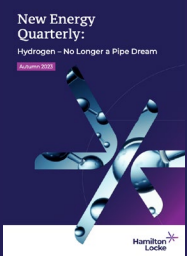
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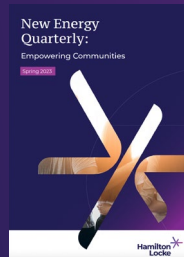
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