Next.

Business, the Environment and Safety today

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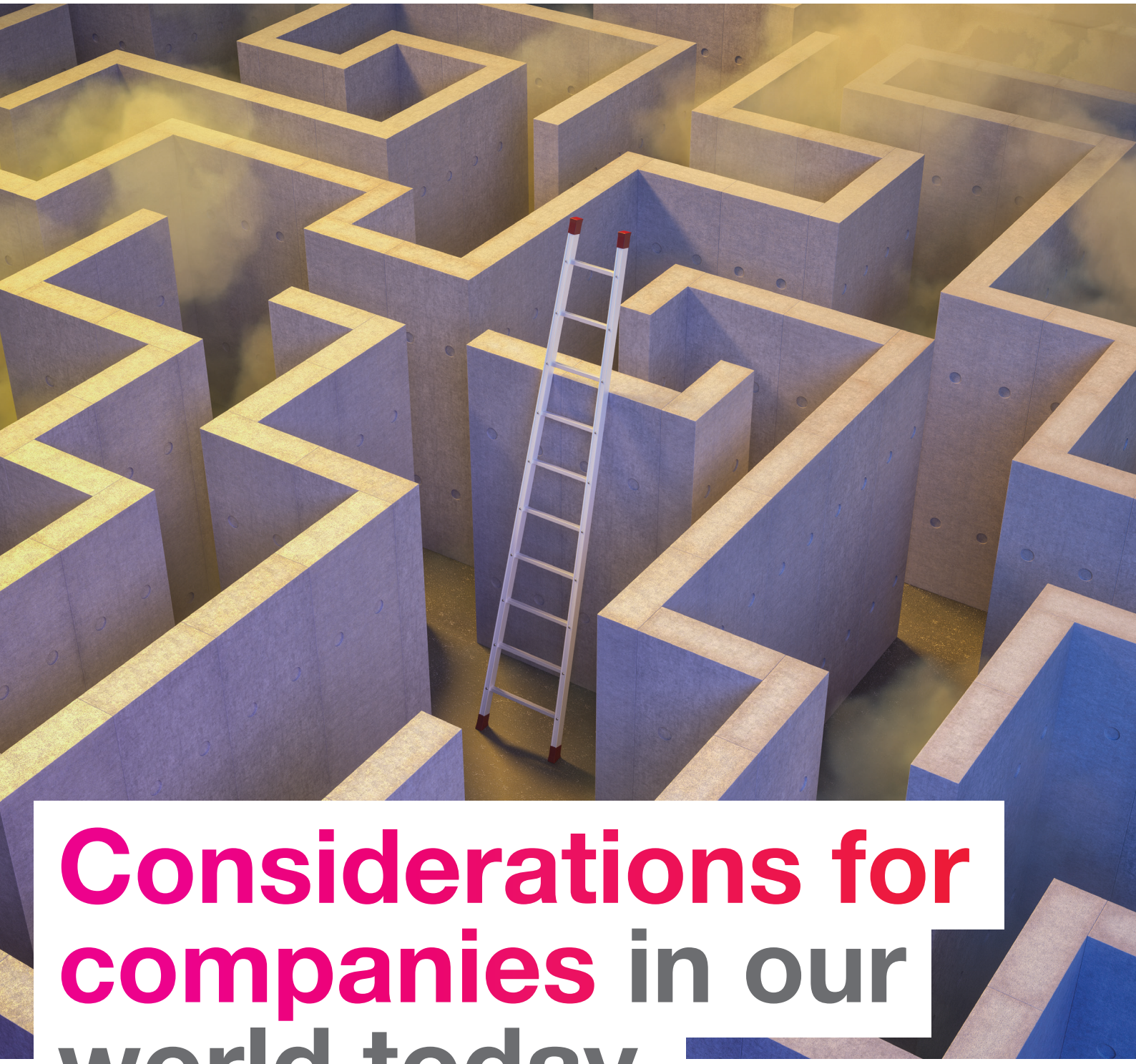

Considerations for companies in our world today.

- Climate change litigation and COVID-19
- Responding to corporate crises - managing accountability through remuneration

Contributors

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Justin McDonnell is a senior partner with 30+ years' experience in commercial litigation. He is sought out by clients for his particular expertise in anti-bribery & corruption. Justin has a long track record advising clients in this space, particularly at Board level. A frequent contributor to thought leadership on ABC issues, Justin contributed the Australian chapter to the Global Legal Insights publication on global Bribery & Corruption. As part of his practice, Justin has liaised with the Queensland Fraud Squad and the Australian Federal Police. He has drafted submissions to Commonwealth Government reviews into ABC and lectured both in Australia and overseas in the area – equipping him with important insights into the machinery of regulatory bodies.

Sally Audeyev is a projects partner focussed on achieving long lasting, commercial and socially responsible outcomes for her clients. She has 20 years experience managing native title, heritage, tenure, regulatory and environment aspects of project development, implementation and closure. Sally enjoys working to achieve native title agreements, access agreements, land tenure, environment and project approvals that enable projects to proceed and succeed.

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Angela Weber is a senior associate who is recognised as a trusted advisor to a diverse range of clients in the infrastructure, financial services, mining, government and utilities sectors. Her practice spans the full range of WHS and industrial relations work. In recent years, Angela has acted in prosecutions in both NSW and Victoria, and in various regulatory investigations. Angela's practice incorporates both advisory and litigious work in New South Wales, Victoria, Australian Capital Territory, Western Australia and Queensland.

Michael Ashforth is a senior associate in the Environment, Planning and Native Title team. Michael advises public and private sector clients on a range of environmental, planning, regulatory and governance matters across all Australian jurisdictions. His experience includes planning litigation, pollution and environmental licensing, due diligence, contaminated land, local government, heritage and environmental regulatory compliance. Michael is assisting a number of clients prepare for the transition to the new Victorian environment protection regime, across a number of sectors including mining, energy, forestry freight, manufacturing and retail.

Daniel Fielding is a senior associate specialising in international arbitration, trade and investment disputes. He acts for a number of clients in disputes before the Australian courts and before international arbitration tribunals. Daniel practices in civil and commercial litigation and dispute resolution in New Zealand and Australia. In addition, Daniel regularly advises clients on cross-border risk mitigation strategies and modern slavery and anti-bribery and corruption compliance.

Sati Nagra is an associate in the Dispute Resolution team who specialises in international arbitration disputes (commercial and investment) and advising on public international law, including climate change, anti-bribery and corruption, and modern slavery risks. Sati was a member of several Pacific Island delegations to the United Nations Climate Change Conference of the Parties (UNFCCC COP), including negotiations which culminated in the production of the Paris Rulebook. She also advises UNICEF (on a pro bono basis) on children's rights in the context of the environment and climate change. Sati practices in England & Wales, and Australia.

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Foreword

Few, if any, eventualities more powerfully highlight the value of preparedness than pandemic.

Concluding a year of extraordinary operational challenges, quick decisions and reflexive change, business leaders are now on the cusp of an opportunity – and perhaps expectation – that they'll step back and consider their organisation's trajectory anew.

NEXT provides food for that thought.

Born of KWM's major incidents team, we take the lessons from crises and apply them to the strategic challenges – environmental, organisational, technological – business leaders are facing in 2021. Our objective is to track the moves of investors, consumers, regulators and the courts to provide decision-makers fresh commercial and legal context.

We know forward planning is top-of-mind. A majority (almost 60%) of respondents to KWM's Pandemic Pulse-check survey selected scenario planning for future business disruption risks as their number one issue emerging from COVID-19.

For boards and management teams, the challenge is translating awareness of this imperative into better risk-evaluation and decision-making.

In this, our second edition of *NEXT*, we create that bridge – drawing actionable insights from real-world problems.

Exploring the future of Australia's environmental and planning systems, climate change litigation trends, modern slavery implications for supply chains, remuneration policy and the consequences of the Juukan caves incident we ask**: How do decision-makers assess and guide their organisations towards a more prosperous future?**

Enjoy,

Adrian Perkins
Sector Lead
Industrials & Consumer

The lessons learnt

As Australia emerges from a series of lockdowns to control the COVID-19 pandemic and vaccines are deployed in the UK and US, we look to a 2021 with more hope and stability. However, there is no doubt that shock and disruption are part of our global and interconnected world. This requires preparedness and resilience.

Two important lessons from the pandemic are to be **prepared for what is coming next** and to **trust science**. Crisis preparedness and response, environmental shocks and health and safety are all ongoing challenges and priorities. The EHS and ESG business functions have never been more important.

As many organisations look to reset, there is a clear opportunity to approach contemporary concerns differently. We are already seeing that with how many organisations are now approaching climate change and decarbonisation.

NEXT is KWM's publication dedicated to the environmental, social and organisational issues shaping the decisions leaders must make – for now and for the future.

In this edition, our thought leaders bring you the following insights:

- **Daisy Mallett, Will Heath Sati Nagra** and **Lauren Taylor** examine the latest climate change litigation and shareholder activism trends, to understand the impact climate risk considerations are having on company directors' duties.
- **Justin McDonnell, Daisy Mallett** and **Daniel Fielding** explain modern slavery and how the legal obligations to prevent it also represent opportunities - to better know and understand suppliers, embrace technology and ultimately improve trust.
- **Sally Audeyev** walks through the fallout from Rio Tinto's Juukan caves incident and considers the lessons for boards in ensuring company culture and actions live up to its values.
- **Andrew Gray** and **Angela Weber** discuss consequence management, in particular the use of remuneration policy as part of a company's incident response.
- **Myself** and **Michael Ashforth** dig into State and Federal Governments efforts to fast track the assessment and approval of priority projects, to stimulate economic recovery.

We trust you will find these articles insightful reading, and wish you a safe and recuperative break.

Mark Beaufoy
Partner, Melbourne
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58%
of respondents to KWM's Pandemic Pulse-check survey ranked,
scenario planning for future business disruption risks as their
#1 issue emerging from COVID-19.

Spotlight

Climate change litigation and COVID-19: a fresh understanding of climate risk

Daisy Mallett / Will Heath / Sati Nagra / Lauren Taylor

The COVID-19 pandemic has disrupted almost every aspect of society, including the business risks associated with climate change. >>

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A fresh understanding of climate risk

The COVID-19 pandemic has disrupted almost every aspect of society, including the business risks associated with climate change. By presenting a preview of the economic and social shocks caused by global disaster, the pandemic has provided new insights into how severe the impact of climate shocks will be with continued global warming. With a world in lockdown, we have witnessed some of the biggest falls in global fossil fuel demand this century[1] and experienced just how deeply interconnected global economies are – relying upon each other and being impacted by events elsewhere.

Recent political, legislative and legal developments are increasing the pressure on governments and large businesses to act. The recent election of President-elect Joe Biden in the United States is driving renewed public interest on the issue of climate change policy and targets globally. Australia has recently seen fresh debate around climate policy with the long-awaited introduction of the *Climate Change (National Framework for Adaptation and Mitigation) Bill 2020* (**Climate Change Bill**) into Federal Parliament by Independent MP Zali Steggall. The appetite for climate change litigation remains strong despite global attention diverting to the emergency response to the pandemic.

Where businesses do not reassess, disclose and act on revised understandings of climate change risk, they may be susceptible to climate change litigation, which is increasingly being used to catalyse climate action by governments and large businesses.

Climate change litigation trends

Climate change litigation continues to be widespread, with cases being filed across six continents in the last eighteen months.[2] As we have noted previously, Australia continues to be a global destination for climate change litigation, being the second most active jurisdiction for such litigation after the United States.[3]

Several landmark climate change cases have been issued across Australia in recent months, all of which have been brought by activists against government or government decision-making to compel action on climate change, including:

- **April 2020:** bushfire survivors in New South Wales (**NSW**) launched proceedings to compel the NSW Environmental Protection Authority to develop policies to regulate the State's greenhouse gas emissions,[4]
- **May 2020:** a youth advocacy group in Queensland launched Australia's first human rights based challenge to a mining project to object to Waratah Coal's Galilee Coal Project,[5]
- **July 2020:** in a world first, a university student from Victoria sued the Australian Government for failing to disclose material climate change risks in sovereign bonds,[6] and
- **September 2020:** a group of teenagers from across Australia brought an action via their litigation guardian to prevent the Australian Government from approving Whitehaven Coal's Vickery Extension Project in NSW.[7]

Climate change litigation is not solely aimed at forcing action from government, as corporations have also been subject to suits. Global trends over the last year indicate a growing focus on litigation against fossil fuel companies and the financial sector.[8]

In Australia, the latest litigation focusing on fossil fuel companies has largely targeted government decision-making on approving coal mine expansions or projects.[9] Cases focusing on the financial sector include a complaint filed by bushfire survivors with the Australian National Contact Point for Responsible Business Conduct alleging a breach by ANZ Bank of the OECD Guidelines for Multinational Enterprises,[10] and a landmark case brought by a university student against his superannuation fund, Retail Employees Superannuation Pty Ltd (**Rest**), which we discuss further.

McVeigh v Rest

The latest development in Australian climate change litigation is the settlement in *McVeigh v Rest*.[11] The litigation was brought by a university student against his superannuation fund, **Rest**, alleging a breach of corporate law and trustee obligations to adequately disclose climate risk in its investments. The case settled this month, with Rest releasing a media statement detailing that

> *"climate change is a material, direct and current financial risk to the superannuation fund"*

and committing to specific initiatives to manage and address the financial risks of climate change on behalf of its members.[12]

Although litigation to date has been focused on claims against companies, litigants and indeed regulators could equally seek to take action against directors and officers on the basis of specific obligations (e.g. continuous disclosure) and/ or general obligations (e.g. the statutory duty to act with reasonable care and diligence, as we have noted previously).

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What's next?

The COVID-19 pandemic has exposed deep economic and social vulnerabilities to disaster, and shifted global perceptions of climate change risk. The pressure to act on revised understandings of climate change risk is increasing in light of recent political, legislative and legal developments. Businesses should ensure that they properly assess their climate change risks and disclose that risk where necessary. In the coming months we expect to see:

- increased climate change litigation globally, as climate change proponents try to prioritise the climate change agenda and as climate related natural disasters continue to arise (e.g. the recent wildfires in North America). Joe Biden's recent win in the US election will likely fuel that momentum in light of the most progressive pledges on climate change in US history, which include rejoining the *Paris Agreement*. To the extent that government and business action conflicts with a 'sustainable' and 'green' recovery from the pandemic, that action will be susceptible to climate change litigation.
- increased Australian climate change litigation. Australia is a particularly fertile testing ground for public interest litigation on climate change, given its sophisticated and independent legal institutions, a government policy supporting carbon heavy industry, and the severe climate change impacts in the region. The recent recommendations of the Royal Commission into National Natural Disaster Arrangements[13] may spur further activist litigation, while the Climate Change Bill, which is currently before the Federal Standing Committee on the Environment and Energy, will likely inform Australian climate change litigation if passed.
- renewed focus by investment funds, including superannuation funds, as well as investment managers and advisers on the scope of their obligations to identify, mitigate and disclose the financial risks of climate change within their asset portfolios.
- increased likelihood of climate change litigation to the extent that government aid packages support carbon heavy industries, or where the response to the pandemic is to reduce the effect of environmental regulations, or where there is a perceived inconsistency between business discourse on climate change and action.
- increasingly creative linkages between the COVID-19 health emergency and the climate change emergency, with a renewed focus on rights to a safe, clean, healthy and sustainable environment.[14]

See Issue 2 Footnotes page 26.

MANAGING MODERN SLAVERY RISKS IN THE AGE OF COVID-19 AND BEYOND

Given COVID-19 restrictions are likely to remain in place going into next year we discuss some of the challenges and opportunities facing businesses in addressing modern slavery risks in their operations and supply chains during COVID-19.

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OPERATIONS

The United Nations and the Walk Free Foundation estimate there are approximately 40 million victims of modern slavery around the world.

Modern slavery is one of the world's most complex human rights issues we face today. Complex supply chains and a globalised workforce requires addressing modern slavery with strategic thinking. But what is modern slavery? It is situations where coercion, threats or deception are used to exploit victims and undermine or deprive them of their freedom to choose whether they work or not. Examples of modern slavery include the trafficking of persons, slavery, servitude, forced labour, debt bondage, deceptive recruiting, and the worst forms of child labour. While practices like substandard working conditions or underpayment of workers do not constitute modern slavery, these practices are also illegal and harmful.

The nature and extent of modern slavery means it is often hidden through the components that find their way into the supply chains and operations of businesses and the products we purchase as consumers. The United Nations and the Walk Free Foundation estimate there are approximately 40 million victims of modern slavery around the world. Modern slavery can occur in every industry and sector, but some are more suspectable due to the nature and location of the work, these include agriculture and fisheries, construction, healthcare services, IT services, manufacturing, and mining.

Too often there is an assumption that modern slavery is something that happens in far-off locations but Australia is not immune. In 2008, the first criminal conviction for a slavery offence in Australia was upheld by the High Court in *R v Tang* [2008] HCA 39 on appeal from the Victorian Court of Appeal. Between 2015 and 2017 the Australian Government estimated that there were 1,567 modern slavery victims in Australia. In 2018, the Australian Parliament passed the *Modern Slavery Act 2018* requiring entities to submit an annual modern slavery statement. Under the Act, statements must describe what an entity is doing to assess and address the modern slavery risks in its global and domestic operations and supply chains. The reporting requirement is part of Australia's broader response to modern slavery domestically and overseas and implements Australia's commitment to the *UN Guiding Principles on Business and Human Rights.*

Australia is not alone - earlier this year New Zealand saw its first criminal conviction for both human trafficking and slavery in the High Court decision in *R v Matamata* [2020] NZHC 1829. In that case, the victims were lured from Samoa to New Zealand by the promise of better wages working in horticulture. Last year in the United Kingdom Police uncovered more than 400 victims of slavery who were put to work in the West Midlands by an organised crime gang. The gang tricked vulnerable people from Poland to move to the United Kingdom with the promise of work and a better life.

The first reporting period for the majority of entities required to report has now ended. Businesses will be reflecting on what they have discovered and what measures will need to be put in place before completing their first modern slavery statements, as well as what activities they will undertake in the next reporting period. For many businesses, this is the first time they have had to assess modern slavery risks in their operations and supply chains. COVID-19 has undoubtedly added additional complications to this exercise by forcing millions of vulnerable workers out of work and requiring businesses to make quick and difficult decisions regarding retaining their workforce and supporting their supply chains through the pandemic. Given COVID-19 restrictions are likely to remain in place going into next year we discuss some of the challenges and opportunities facing businesses in addressing modern slavery risks in their operations and supply chains during COVID-19.

Challenges

Managing supply chains and maintaining good practices: as a result of COVID-19 some businesses have suffered supply chain shortages as suppliers have had to shut down or reduce production. This has led to businesses having to find new suppliers, often quickly and without conducting due diligence as comprehensively as in normal circumstances. Additionally, some businesses will have started to address modern slavery risks before COVID-19, including amending existing procurement policies, adapting supplier and tender due diligence requirements, and updating audit processes. While it may be tempting to circumvent these practices in circumstances where quick decisions are required or where undertaking supplier due diligence may be more challenging, in doing so, businesses will increase their long-term exposure to modern slavery risks.

Protecting vulnerable workers: businesses need to be aware that suppliers face the difficult challenge of how best to protect their workers from catching COVID-19. This is particularly difficult for those workers in factories where space can be limited, and the work cannot be carried out remotely. For those workers producing essential goods, such as facemasks and hand-sanitiser, they face increased risk of exploitation as there is increased pressure to work long hours to meet the global demand or to maintain productivity levels despite a reduced workforce. Further, in circumstances where budgets are tight and businesses are considering implementing cost-cutting measures, to the extent that they involve placing additional pressure on suppliers to reduce their prices, businesses should consider the impact of these decisions on the workers in their supply chain. As COVID-19 restrictions ease and businesses start to recover, attention should be given to how practices such as short production timeframes and short-term contracts can create or contribute to modern slavery.

Opportunities

Getting to know your suppliers better: COVID-19 provides an opportunity for businesses to engage more fully with their suppliers as they try to better understand their supply chains and the risks associated with that supply chain. This engagement is an opportunity for businesses to gain a better understanding of their suppliers' operations and supply chains, including the modern slavery risks. Engaging with suppliers during COVID-19 also provides businesses with a chance to revisit and reassess the risks within their supply chain, supporting more focussed due diligence on suppliers, goods or jurisdictions of greater risk. In some circumstances, businesses may wish to revisit their initial modern slavery risk assessments and conduct hot-spot analysis because of factors that increase the vulnerability of workers during COVID-19.

Often the same supplier will be part of the supply chain for multiple businesses. To the extent that businesses are sending a range of questionnaires to the same supplier as part of their supplier engagement, we have seen suppliers struggle to respond. However, during the COVID-19 lock-down industry groups have been working collaboratively to develop industry specific questionnaires. For example, the Financial Services Council of Australia has developed a due diligence questionnaire designed to provide asset owners comfort that fund managers are investing their funds in line with modern slavery reporting requirements. We expect more questionnaires will become standardised which will ease the burden on suppliers.

Embracing technology and innovation: COVID-19 has required businesses to adapt quickly with new and innovative approaches. With travel restrictions in place it will be harder for business to conduct unannounced audits on their suppliers in person. However, businesses can embrace technology to help manage their modern slavery risks. Technology can reduce the cost of supply chain due diligence when conducted virtually. Some businesses have established remote auditing programmes, which can be sustained and developed post-COVID-19 and allow for more suppliers to be audited than otherwise possible under an in-person audit programme. Technology can also help businesses gain a better insight from the perspective of the suppliers' workers. Businesses can ascertain the working conditions of supply chain workers through an anonymous hotline, direct virtual meetings with supply chain workers, or through online discussion boards where supply chain workers can report concerns. The challenges of COVID-19 present an opportunity to try a different strategy that may support long-term efficiencies.

Looking beyond COVID-19

In the short-term, post-COVID-19 will be a time for businesses to build on the progress made during the first reporting period and address any new risks that were identified as a result of COVID-19. One such risk is the concentration of supply chains. COVID-19 unmasked the risk to businesses of having their supply chains concentrated in a limited number of jurisdictions. We expect to see businesses consider diversifying and relocating aspects of their supply chains.

In the long-term, post-COVID-19 we expect to see a greater focus by consumers and investors on environmental, social and corporate governance issues. There is a general push towards more sustainable supply chains, which will require businesses to address issues of modern slavery. As such, the legal landscape for businesses with regards to human rights is changing with multinational companies having to navigate increasingly complex human rights obligations. The number of jurisdictions that require businesses to either identify modern slavery risks in their supply chains, take steps to mitigate such risks, or make public disclosures is increasing, and includes Australia, United Kingdom, Germany, France, and United States. We expect to see more jurisdictions adopt similar obligations as countries implement the United Nations Global Compact. Where businesses are caught by modern slavery obligations in one jurisdiction, there will be a growing expectation that modern slavery will be addressed in all the jurisdictions those businesses operate in. Further, we are already seeing a ripple effect where businesses who are not caught by modern slavery obligations are being asked by their partners that are caught to address modern slavery. In those circumstances, investors, consumers, and civil society expect businesses to be doing something or at least thinking about how to address modern slavery. This is a trend we expect to only increase.

RELATIONSHIPS

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Aboriginal heritage after Juukan

Rio Tinto's blast of the 46,000 year old Juukan rockshelters in the Pilbara has transformed community awareness and perspective of Aboriginal heritage.

Occurring in the midst of the Black Lives Matter movement and just before National Reconciliation Week, it drew significant community interest. The commentary and reaction in the months since the incident have highlighted the importance of Aboriginal heritage within broader environmental, social and governance (ESG) considerations it demonstrates that companies need to do more to protect heritage alongside their operations, and to build and maintain relationships with traditional owners as a key stakeholder. The reaction of governments, community and investors, particularly superannuation funds, to the incident has been a key driver of this transformational change and carries important lessons for company boards and management.

RELATIONSHIPS

This article explores what comes next for those seeking to operate alongside and to protect and minimise impact on Aboriginal heritage values.

What happened at Juukan Gorge

On 24 May 2020, Rio Tinto detonated charges in an area of the Juukan Gorge, approximately 60km north west of Mt Tom Price in the Pilbara region of Western Australia, as part of its Brockman 4 mining operations. The resulting blast significantly impacted two ancient deep time rock shelters, dated with evidence of human occupation over 46,000 years ago. The incident caused significant distress to the Puutu Kunti Kurrama and Pinikura People (**PKKP People**), and a large public outcry followed.

This occurred in circumstances where Rio Tinto held a Ministerial approval under the *Aboriginal Heritage Act 1972* (WA) to undertake mining and disturb the rock shelters, and had entered a comprehensive agreement with the PKKP People. As a result, the destruction of the rock shelters raised questions about the adequacy of the underlying framework for protecting Aboriginal heritage sites. Rio Tinto undertook a Board review of its heritage management practices and published the results.

The incident has led to three senior executives at Rio Tinto losing their jobs, along with considerable scrutiny of Rio Tinto's governance, corporate culture, cultural heritage practices, agreements with Traditional Owners, and of the legislative regime that provided Rio Tinto with the legal authorisation.

Outcomes, so far

On 11 June 2020, the Senate referred the Juukan Gorge incident and associated legal regime to the Joint Standing Committee on Northern Australia (the **Committee**) for inquiry and report. The Committee has conducted several public hearings and is currently due to publish its report by 9 December 2020.

In parallel, the Western Australian government is progressing its review of the *Aboriginal Heritage Act 1972* (WA) which commenced more than 2 years ago. It released a consultation draft of the *Aboriginal Cultural Heritage Bill 2020* (WA) on 2 September 2020, the bill is proposing a new approach to cultural heritage protection that will lead practice in Aboriginal heritage protection across Australia.

Media coverage and the information released has raised community awareness and expectations about how cultural heritage is protected in the mining industry. Investors have been seeking assurance about heritage protection and risk management and companies are working with their indigenous stakeholders to revisit their approach.

The incident has profoundly changed the risks associated with activities that impact on cultural heritage across Australia and the world and has highlighted ESG issues as a primary consideration for companies (both in the mining industry and more broadly across Australia).

Influence of shareholders

We have seen an increase in the influence of shareholders. Two examples highlight this: Rio Tinto's Board-led review, and shareholder resolutions and calls for assurance.

(a) Rio Tinto Board Review

Rio Tinto launched an internal Board-led review in June 2020, headed by independent director Michael L'Estrange. A key finding was that there were 3 critical phases where better decision-making could have avoided the incident. The Rio Tinto Remuneration Committee considered the findings and recommended (with approval of the Rio Tinto Board (minus the Executive Directors)) that three executive officers have their short term incentive plan payments withheld, as well as an approved reduction of the CEO's long term incentive plan.

Following the Board Report major investors and superannuation funds publicly expressed their dissatisfaction with the penalties proposed and called for greater transparency and accountability. AustralianSuper met with Rio Tinto to seek tougher penalties, saying the bonus cuts fell significantly short of appropriate accountability. Following the increasing calls from investors, the Rio Tinto board of directors met to discuss an escalation of the company's response, which resulted in the resignation of the three senior executives who were found to bear some responsibility for the incident.

(b) Shareholder resolutions and calls for assurance

Investors and superannuation funds have also called for immediate action from mining companies. We are seeing an increase in the level of scrutiny from shareholders relating to the alignment of company operations with their public commitments.

A coalition of global investors including HESTA, the Australian Council of Superannuation Investors and AXA recently issued a letter to some of Australia's biggest mining companies, seeking assurances regarding relationships with First Nations peoples and Indigenous communities. The letter was mainly targeted at miners with operations in Australia, such as BHP, Glencore, FMG, South32, Newmont and Northern Star, however companies such as Vale, Barrick and Pan American Silver Corp were also included.

The Australasian Centre for Corporate Responsibility also recently proposed shareholder resolutions to be put to BHP and FMG at their respective AGM's, calling for an immediate pause on mining activities that would "disturb, destroy or desecrate" culturally significant Indigenous sites until reviews of state heritage legislation have been completed, and for a commitment to the non-enforcement of any relevant contractual or other provisions (including confidentiality provisions) that limit the ability of Traditional Owners to speak publicly about ACH concerns on their land.

The BHP shareholder resolution was withdrawn by the ACCR on 13 October 2020, the day before it was due to be voted on. BHP had earlier announced that it had worked with the First Nations Heritage Protection Alliance to agree principles to enhance the influence and voice of traditional owners in relation to heritage protection.

The risk of cultural / operational disconnect

Much criticism focussed on the disconnect between Rio's actions and the company's values.

"The destruction of the Juukan caves sits oddly with the company's stated pride in its extensive engagement with Indigenous communities in Australia," noted the Australian Financial Review's Chanticleer column, drawing particular attention to the fact that Rio's board report revealed the Company's CEO, Jean-Sebastian Jacques was apparently unaware of the caves' significance.

Rio's board report explains its failures as organisational: *"Linked-up decision-making was lacking at critical points. Some dimensions of governance and oversight needed more rigour. Aspects of an inclusive work culture needed to be stronger. Means of escalating unresolved issues to more senior leaders were not always accessible or utilised. There was inflexibility in processes and systems to accommodate material new information in appropriate ways, accentuating silos rather than connectedness in organisational structures."*

It appears that these organisational failures contributed to operational decisions that didn't fully consider corporate values, particularly after legal agreements and authorisations had been granted to disturb the caves: *"the risk to social licence was not fully apparent from the perspective of mine operations, creating a 'blind spot' for operational management."*

KWM's annual *Directions* survey of corporate clients and senior business figures consistently finds 'maintaining an appropriate corporate culture' as among boards' highest priorities. Incidents as damaging as this illustrate why, and also demonstrate where any corporate effort to ensure operational culture is aligned with values must begin – at the top.

Heritage Framework

The disconnect between community and corporate values and what happened at Juukan has also raised questions about the adequacy of the framework for protecting cultural heritage.

Cultural heritage is often protected by legislation that requires approval to disturb, and agreements between those proposing disturbance and Aboriginal groups. Agreements have often been reached early in project development when rights to access land is first sought and in the context of clarifying the respective rights and interests of native title holders alongside the new tenure and the new land use proposal. Heritage has long been a critical part of this discussion, including because Aboriginal groups usually claim and, more often in recent times, have been determined to hold a native title right to protect sites and objects of significance.

The Juukan incident has shone a light on the nature of Aboriginal heritage and these processes. The community is more aware of the significance of Aboriginal cultural heritage to Aboriginal people, its broader significance to humanity and about the laws, agreements and corporate processes in place, and is seeking assurance that these are adequate. In particular, questions have been raised about whether agreements and approval processes are suitable for ensuring decisions to disturb cultural heritage values are being made with appropriate and adequate information about the cultural values.

Looking forward

The Juukan Gorge incident highlights the influence that shareholders and the community can have on a company's business, laws and operational decision making. It has also highlighted several areas where corporate culture, corporate processes, agreement making and regulation can be improved to ensure decisions to operate alongside or disturb cultural heritage values are made with appropriate and adequate information about the cultural values.

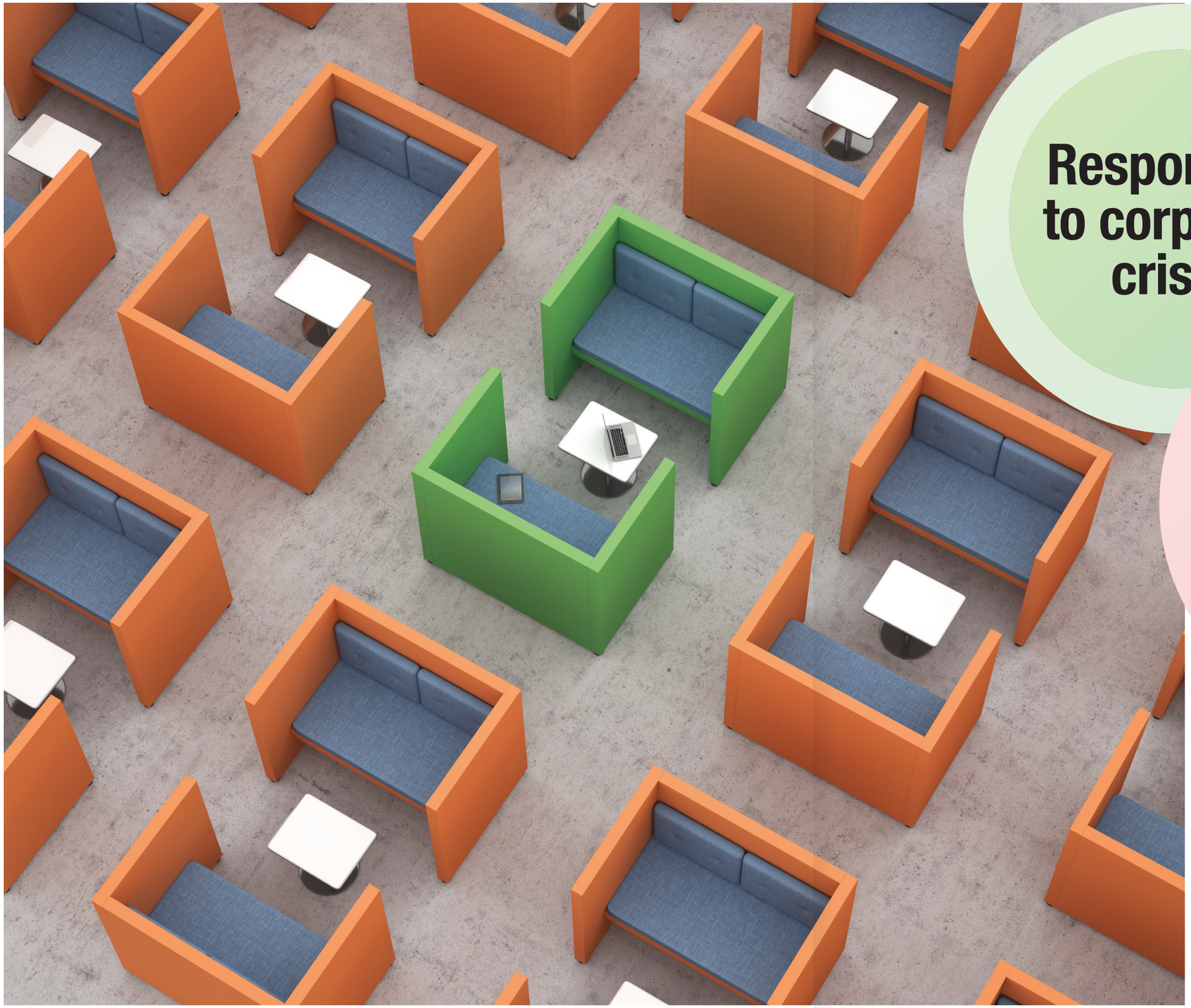
The importance of heritage protection has increased exponentially, driving change in the way those decisions are made. Traditional Owners now have significantly more influence in decisions about how activities occur which might impact heritage values.

We are seeing significant change in processes for identifying and assessing heritage values alongside commercial values, new approaches in agreements about how operations can happen alongside heritage protection, review of corporate decision-making processes, governance and escalation mechanisms, and new approaches to risk management. Legislative change is also occurring to reflect and embed the new standards.

A step change is occurring in the nature of cultural heritage management agreements and plans across Australia. The trend is towards ensuring cultural heritage values are identified comprehensively up front, Traditional Owners having significant influence in land use decisions as they affect heritage values, clearer identification of management controls to minimise impact on heritage values and putting in place processes for determining what happens if new information arises. We are seeing a fundamental change in what is an acceptable allocation of risk in this area.

Most importantly, there is a continuing and fundamental shift occurring in the importance, strength and nature of relationships across organisations with Traditional Owners, particularly at senior leadership levels.

The legacy of this incident will likely be better outcomes across Australia for Traditional Owners, business, governments and all Australians.



GOVERNANCE

Responding to corporate crises

managing accountability through remuneration

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Historically Australia has had no mandatory legal standards governing decisions by boards and companies on variable remuneration.

There seems

to be an increasing litany of companies finding themselves in the midst of a scandal. From the failures laid bare by the Banking Royal Commission, to sexual harassment and various environmental and cultural incidents, the themes of corporate accountability and executive remuneration have been the subject of extensive community and shareholder scrutiny.

Whilst the conduct under examination will differ, the underlying question remains. How are boards expected to manage non-financial risks, and respond to conduct issues and corporate crises? In recent years, regulatory, shareholder, and media attention has had a sharp focus on how these matters are managed, and what happens when a company falls short of expectations.

There is now an expectation from both the media and more recently (and significantly) institutional shareholders, that boards must impose consequences for executives who are accountable for material risk failings, incidents or poor conduct.

This can be be uncomfortable territory for both boards and the members of the executive team being held to account, as often decisions are made deep inside an organisation and outside of executive line of sight.

Common questions for directors include:

- Should accountability and consequences be assessed on an individual or collective basis?
- What principles should be applied to determine consequence outcomes?
- Is there a need for procedural fairness?
- How and when to disclose the consequences?

The consequences for executives held accountable for failures can range from remuneration adjustments through to termination of employment. Noting a worrying trend towards a knee-jerk 'heads must roll' responses at the expense of stable management through a crisis, this article asks; 'how might that outcome be avoided?' The answer is by having a consequence-management framework to guide accountability outcomes.

Regulatory framework and market trends

Historically, Australia has had no mandatory legal standards governing decisions by boards and companies on variable remuneration. In recent years, there has been a steadily growing focus on variable remuneration practices (particularly for financial services companies and other businesses regulated by APRA), but still no comprehensive legislative framework.

In June this year, ASIC released an information sheet on variable executive remuneration, following its review of remuneration practices at 21 ASX100 companies (Information Sheet 245 (INFO 245)).

The information sheet emphasises the needs for boards to ensure that discretion is exercised in the best interests of the company. ASIC suggests boards may wish to:

- adopt practices or frameworks to prompt the use of discretion in the company's variable pay scheme; and
- apply practices or frameworks that guide the exercise of discretion before variable pay decisions are made.

ASIC also encourages companies to ensure they have a 'look back' provision so that prior to the vesting of deferred pay the board can:

- consider making adjustments using the discretion principles developed to avoid unintended gain; and
- address significant risk or conduct issues that have occurred since the variable pay award was granted.

ASIC's contribution to the area adds further to the increasing regulatory and public attention on remuneration governance in Australia.

While the regulatory guidance is still emerging, both community and now investor expectations are becoming clear.

Recent media coverage of conduct and other non-financial risk issues in corporate Australia evidences the pressure brought to bear on companies when things go wrong. This is particularly so for listed companies and other organisations regarded as having a 'social licence'. What emerges is that stakeholders, including large investors with significant commercial influence, expect that accountability will be determined swiftly and often in a public way. Further, it is clear that the outcomes will be scrutinised. Where risk or conduct issues arise, boards and executive teams must be prepared to act expeditiously to determine accountability and what (if any) remuneration or other consequences should be applied.

Remuneration adjustments in market practice

In high risk industries with particular a safety-related exposure, variable remuneration has frequently been used as a tool to drive safety outcomes. It is relatively common for executive key performance indicators (KPIs) to incorporate safety metrics including 'zerofatality' gateways for the award of short-term incentives.

For example, a report published by the Australian Council of Superannuation Investors analysed reporting by ASX200 companies in the 12 month period ending September 2020. This analysis found that 90 of the ASX200 companies linked safety metrics to executive remuneration (an increase from 85 in the previous surveyed year).

According to this research, health and safety performance generally accounted for between 5% and 25% of the total short-term incentive for executives[1].

The inclusion of these metrics in the design of variable remuneration frameworks means that pay outcomes are tested against safety performance at the time of the award. Similarly, adverse safety-related incidents can be included in the malus provision as a specific basis for previously-awarded variable remuneration to be adjusted or forfeited.

However, market practice relating to other corporate risks is still emerging. The table overleaf provides an overview of recent remuneration adjustment outcomes implemented in response to risk and conduct issues in large listed companies. As the overview shows, there is also an emerging trend of directors accepting a fee reduction in some cases.

Company	Remuneration adjustment(s)
BHP	**Samarco Dam failure – FY16** • CEO Andrew McKenzie did not receive any performance-related pay in 2016 and both short term and long term incentives were zero.
QBE	**CEO's undisclosed workplace relationship** • In 2017, the STI for the former CEO was reduced by 20% (around $550,000) in connection with his failure to disclose to the Board his romantic relationship with his personal assistant.
Westpac	**AUSTRAC investigation into AML/CTF breaches – Standalone announcement FY20** • The CEO ceased employment with Westpac and the Chair of the Risk Committee also departed Westpac. • Variable reward, including withheld FY19 remuneration and short term variable reward deferred from previous years, was reduced for 38 individuals by approximately $13.2 million. • FY20 short term variable reward (including the CEO and GEs) was cancelled to reflect collective accountability (valued at approximately $6.9 million, assuming an outcome of 50% target opportunity).
Woolworths Group	**Fair Work investigation for payment shortfalls – standalone announcement and FY20 annual report** • The board fee for the Group Chairman was reduced by 20%. • The Group CEO voluntarily forfeited his FY20 short-term bonus, as did the Chief People Officer. • GEs collectively received a 10% reduction in STI result for FY20. • Further, the in-year remediation costs were applied to the 'return on funds employed' measure for the LTI plan.
Rio Tinto	**Destruction of Juukan rock shelters – standalone announcement** • The CEO of Iron Ore, GE, Corporate Relations will not receive a performance bonus under the STI plan. • The CEOs 2016 LTI plan award was reduced by 1 million pounds (subject to vesting). • Subsequent to the remuneration adjustments, Rio announced the resignations of the 3 executives above. We anticipate there are likely to be remuneration consequences flowing from these resignations, which will be disclosed in the FY20 annual report.
QBE	**Inappropriate workplace communications – standalone announcement** • Following a complaint made by a female employee, QBE announced the departure of its CEO. • The CEO's termination payment comprised a payment in lieu of notice plus statutory leave entitlements. The CEO is ineligible for grants under the QBE incentive schemes for the 2020 financial year and all unvested conditional rights previously awarded were forfeited. Market commentary estimated the value of the CEO's forfeited remuneration to be around $10 million.

CBA	**AUSTRAC investigation into AML/CTF breaches – FY17 and FY18 remuneration reports**
	• STVR outcomes for CEO and GEs adjusted to 0 for FY17.Y17 deferred remuneration vesting outcomes reduced for some former GEs, including 100% forfeiture of deferred STVR and LTVR reductions of 40-70%.
	• Non-executive director base and committee fees reduced by 20%.
	• CEO voluntarily gave up FY18 STVR award. The board and the former CEO agreed he would not receive STVR award for 2018 or unvested LTVR awards.
	• The board exercised its discretion to:
	  • reduce 2018 financial year STVR payments of current and former GEs by 20%;
	  • lapse a portion of the unvested deferred STVR awards for approximately 400 current and former Executive General Managers and General Managers; and
	  • forfeit the full amount of unvested LTVR awards of select former GEs.
	APRA Prudential Inquiry Report – FY18
	• Current CEO and GEs: The CEO and GEs were assessed as Partially Met on risk outcomes with the board applying a negative risk adjustment of 20% to the 2018 financial year STVR outcomes for each individual.
	• Former CEO: agreed with the board to forfeit 2018 financial year STVR award and any unvested LTVR awards.
	• Former GEs: forfeited all unvested LTVR awards for two former GEs, reflecting collective and individual accountability.
	Royal Commission – FY19
	• Of the 15 GEs eligible for an STVR award, 14 received in-year reductions in relation to risk and reputational matters, including the CEO.
	• The board forfeited all unvested deferred awards for a former GE, having regard to the performance outcomes of their business unit.
	• The CEO, along with GEs who stayed in their roles, did not receive an increase to fixed remuneration.

NAB	**Royal Commission – FY19 report** • Over the previous two years, CEO agreed to reductions of $1.7 million to total remuneration package. In 2018 his remuneration was $3.03 million below target total remuneration. • The board reduced variable reward outcomes for individual executives by 10% - 75% for risk matters. • Variable reward across NAB was reduced by approximately $114 million. • The "One NAB Score" was reduced by 20% for employees, 30% for the Executive Leadership Team and 10% for the Group CEO and Senior Executives. • "Substantial changes" to remuneration framework were made to ensure they continue to be focused on the right outcomes for customers and shareholders. • All unvested 2017 deferred STI, 2018 deferred VR, 2016 LTI and 2017 LTI awards for Chief Customer Officer, Consumer and Wealth were forfeited. **Royal Commission – FY19 standalone announcement** • Executive Leadership Team received no short-term variable reward and no fixed remuneration increase for FY19. • Upon his resignation in February, former Group CEO forfeited all deferred variable reward potentially worth $21 million. • Deferred variable reward previously awarded between 2016 and 2018 for the majority of the 2018 Executive team (other than the former Group CEO), potentially worth $5.5 million, was forfeited. • The board accepted the resignation of the Chairman and determined that other directors would receive a 20% reduction in fees for 2019. **Royal Commission – FY18** • No incentives were allocated to AMP executive leadership team. • Chairman's fees were reduced and director's fees were also reduced by 25% for the rest of the 2018 calendar year. • Unvested incentives for the former CEO and the former GE, Advice and Banking were forfeited, with a value of approximately $10.8 million. • Unvested incentives were forfeited for other select executives and employees in connection with 'no fee, no service' issues.

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How to implement a remuneration decision-making process

Several companies have responded to the increased focus on accountability by developing guidelines to assist the board and other decision-makers in the exercise of their discretion relating to remuneration adjustments. This has been recognised as desirable by ASIC in Information Sheet 245, which aims to set out practical guidance to support board oversight and the exercise of discretion on variable pay outcomes, adding to the growing body of guidance on best practice in remuneration governance. This type of guidance has proved useful to boards looking to implement their response to a significant risk event in a consistent and reasonable manner.

The first step from a legal point of view is to assess whether the malus provision permits the adjustment to be made. This step should not be overlooked in the rush to apply consequences, as often the adjustment rights are not as broad as a board may expect and may be limited to instances of serious misconduct, material misstatement in accounts or fraud/criminal conduct. These grounds are not often present when considering consequences for accountability failings, which may not involve any deliberate or intentional wrongdoing. The ability to extend or delay a vesting period to allow conduct or risk matters to be further reviewed is also an important tool which can provide the board with more time to make an informed decision.

In response to the new focus on accountability and consequences for non-financial risks, there has been a trend in recent times of companies looking to expand the scope of their malus provisions in equity plans to ensure they are fit for purpose.

Key points to note:

- An adjustment of in-year short term cash incentive (or STVR) before it is awarded through the application of discretion or a conduct/risk management gateway is by far the simplest form of adjustment.
- Issues become more challenging when there is no in-year variable remuneration to adjust (for instance, for former employees) and the board is required to resort to a malus or clawback condition to implement the reduction.
- Noting that clawback is rare, the focus is normally on the ability to adjust unvested equity under a malus provision.
- As adjustment will normally involve the exercise of board discretion, there is a risk of legal challenge. To guard against this, boards must have a rational basis for decisions and show they were made with access to adequate information.
- While there is no general legal requirement for procedural fairness, most companies typically provide executives with an opportunity to have input into the adjustment, to respond to the reasons for the adjustment.
- Some companies have implemented formal procedures enshrining these rights.

These processes should be considered carefully before they are implemented, because they can impede the efficient decision-making required in this area.

Given the current climate, companies and their boards should be seeking to get ahead of the game on variable remuneration, and not wait to have a serious incident or conduct issue arise before setting up a consequence management framework to help guide decision-making. In particular, there is a modern-day need for boards to develop consequence management frameworks which clearly articulate the relationship between conduct and other non-financial risks and remuneration outcomes. A robust framework is an essential tool for ensuring boards are well-equipped to make the decisions expected by stakeholders quickly in response to a crisis.

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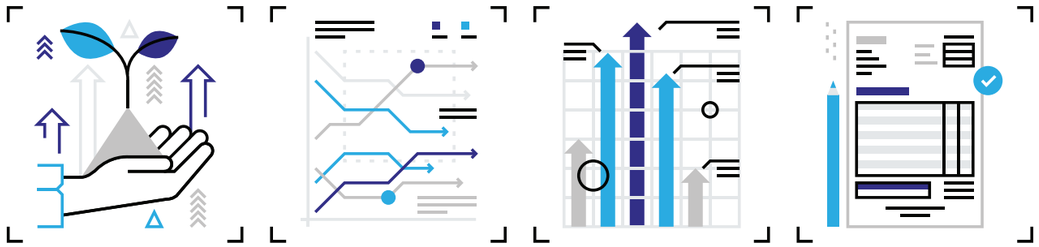
IS YOUR PROJECT ELIGIBLE FOR 'FAST-TRACKING'? FEDERAL AND STATE 'FAST-TRACKING' OF ENVIRONMENTAL LEGISLATION FOR COVID-19 ECONOMIC RECOVERY

Key points



Flexibility and fast-tracking of planning and environmental assessment legislation has been a focus of response to COVID-19 and economic recovery for the Federal and State Governments.

The States (Victoria, New South Wales and Queensland discussed here) have used existing fast tracking mechanisms in planning and environmental legislation and some reforms to legislation and planning instruments to fast track priority projects which meet eligibility requirements. Many projects are already on the fast track in these States, but your project may also be considered if it meets these criteria (outlined overleaf).

Projects with significant impacts on matters of national environmental significance still require referral under the *Environment Protection Biodiversity Conservation Act 1999 (Cth)* (**EPBC Act**) and may still need to be assessed under state environmental impact assessment legislation (consistent with assessment bilateral agreements) and approved under the EPBC Act.

While COVID-19 has created a significant impetus for reform of the EPBC Act devolving powers of approval as well as assessment to the States and providing for greater streamlining of the assessment process, the timing and prospects for success of those reforms are currently uncertain.

FROM THE EARLY DAYS OF THE COVID-19 PANDEMIC THERE HAS BEEN A FOCUS ON STREAMLINING ENVIRONMENTAL ASSESSMENT AND APPROVALS TO PROVIDE FLEXIBILITY, FACILITATE EMERGENCY COVID-19 RESPONSES AND 'FAST TRACK' BUILDING WORK AND INFRASTRUCTURE FOR ECONOMIC RECOVERY FROM THE CORONAVIRUS CRISIS.[1]

The States have responded with various emergency reforms to planning and environmental legislation to address the immediate flexibility required for responses to the pandemic and to provide greater flexibility and centralisation (to Planning Ministers) to approve use and development and calling-in development applications and appeals to fast-track decision making.[2]

The Federal Government and State Governments have identified key developments and infrastructure to be fast-tracked for assessment and approval.[3] Recent reforms and programs in Victoria and New South Wales have focused on identifying and processing priority projects for fast-tracking.

Victoria priority projects and fast-tracking

Building Victoria's Recovery Taskforce has sought to identify:

- shovel-ready building and construction projects of Victorian State and Regional significance and,
- planning and investment opportunities.

Applications for priority project fast-tracking in the Taskforce's pilot phase closed on Friday 5 June, 2020. The Taskforce received 295 applications for assessment of projects to be considered for fast-tracking and has triaged 295 applications and carried out a detailed assessment of eligible projects. Projects being prioritised through the Taskforce include those with an existing application for planning approval (awaiting determination by Council or VCAT) that meets the priority project criteria and will be required to commence within 6 - 12 months of approval. Priority projects eligibility criteria[4] consider matters such as whether the project warrants Ministerial intervention and meets assessment criteria including:

- Economic benefits including jobs, capital value, innovation
- Net community benefit including for example social and affordable housing and environmental sustainability
- Aligns to government policy objectives
- Stakeholder support, views are known or can be ascertained in an expedited manner
- Project complexity and speed of delivery e.g. benefits will be realised in the short to medium term with appropriate management of risk and opportunities
- Feasible proposal e.g. demand is evidenced, supply factors mitigated, proof of funding and shovel ready
- Probity can be assured – addressed in assessment process.

NSW priority projects and acceleration

The NSW government recently launched the second phase of its accelerated environmental assessment program to assist about 30 major projects. The Planning System Acceleration Program had an initial 'rescue' phase comprising a 'fast tracked' assessment program that assisted 101 more advanced 'shovel-ready' projects that could commit to construction within 6 months. The program has now entered into a new 'response' phase, referred to as the 'priority assessment program'.

The 'priority assessment program' targets large complex projects that are early in the assessment process, or have been stuck within it for some time.

Projects from the public and private sector will be considered for the program. State Significant Infrastructure (SSI), State Significant Development (SSD) and Planning Proposals will be considered. The NSW Department of Planning, Industry and Environment (NSW DPIE) may select projects for inclusion, but proponents, councils and other stakeholders may also identify eligible projects.

Criteria for project selection include that the project will be strategically important to the State or a region and provide considerable investment, public benefit, environmental and design outcomes, together with growth and jobs over the medium term.[5] This criteria also includes a willingness for a proponent to commit to construction commencing, or DA's in respect of a planning proposal being lodged, within 18 months.

If chosen for the program, the NSW DPIE will work with the proponent to agree on timeframes for assessment pathways and outcomes for the project. The benefit of the program to proponents is a commitment to process including clear expectations on the indicative schedule for the assessment or rezoning processes, and pathways for issue resolution with the DPIE and stakeholder agencies.[6]

The first 10 projects to be included in the program by the NSW DPIE are SSI projects and include:

- The Sydney Metro line to Western Sydney International (Nancy-Bird Walton) Airport and the Western Sydney Aerotropolis;
- A new transmission connection from the Snowy 2.0 project to the transmission network;
- Two EnergyConnect projects (NSW – Western and Eastern Sections) which connect the NSW and South Australian transmission networks.[7]

Queensland priority projects and fast-tracking

The Queensland government recently announced that a number of major projects have been 'earmarked' for fast-tracking as part of Queensland's Economic Recovery Plan with the intention to get 'shovels in the ground' and kick start the push to rebuild Queensland's economy.[8] The Queensland Economic Recovery Plan, released on 20 August 2020, details the State's staged financial assistance package, including dedicating $7 billion to support Queensland businesses, workers and local communities in an effort to mitigating the economic impacts of COVID-19.[9]

Among other things, the Queensland government has committed to fast-tracking $66 million in civil work approvals for eight key projects over the next 12 months, which is anticipated to attract more than $330 million in private investment over the next two years and play a critical role in the State's economic recovery.

Further, as part of the State-wide economic recovery initiative, the *Planning Legislation (Economic Recovery Measures & Other Matters) Amendment Regulation 2020* (Qld) (**Regulation**) commenced on 11 September 2020, and aims to assist developers, small businesses and local communities by streamlining and simplifying the statutory planning process.

Key amendments introduced by the Regulation include:

- a new version of the Development Assessment Rules (**DA Rules**) which include updated design layout and publication requirements for development applications and make the temporary changes to public notification requirements introduced under the *Planning (COVID-19 Emergency Response) Regulation 2020* (Qld) permanent;
- commencement of a new version of the *Minister's Guidelines and Rules* and the introduction of an amended environmental assessment and consultation processes for the Minister and local governments to streamline and support the delivery of critical infrastructure; and
- an amendment to the *Planning Regulation 2017* (Qld) to provide local governments with the opportunity to 'opt in' (by resolution) to one or more 'economic support instruments'. The economic support instruments are intended to make it easier for new businesses to open, or for existing businesses to relocate and/or adapt to operational challenges as a result of COVID-19, by reducing the level of assessment for certain development. These changes will operate in circumstances where a particular type of development is reasonably anticipated and compatible with the intent of the zone in which it is located and will remain in effect until 17 September 2021.

EPBC Act reform

The key focus of these reforms at the federal level are changes to the *Environment Protection Biodiversity Conservation Act 1999 (Cth)* (**EPBC Act**). This has involved the Commonwealth notifying it's intention to negotiate bilateral approval agreements with the States[10] and introducing other reforms to streamline environmental assessment and approvals in the E*nvironment Protection and Biodiversity Conservation Amendment (Streamlining Environmental Approvals) Bill 2020*. The Bill was introduced into Parliament on 27 August 2020.[11]

When introducing the Bill into Parliament, the Federal Minister for the Environment stated in her second reading speech that:

> *"The interaction between Commonwealth and state and territory environmental laws leads to duplication in approval processes. It adds unnecessary regulatory burden which delays job-creating projects and impedes economic activity, and creates uncertainty around environmental protections."*
>
> ...
>
> *These reforms will unlock job-creating projects that will strengthen the economy and aid our COVID-19 economic recovery, without compromising Australia's unique environment.*

The Bill proposes to make the following amendments to the EPBC Act:

- referral and approval of an action under the EPBC Act is not required if the action is in a class of actions declared by an approvals bilateral not to need approval. This applies to actions that have been, are being or are to be assessed under an approval bilateral agreement;
- allow the Minister to "call in" assessments by declaring the action as excluded from the approvals bilateral;
- allow completed, or partially completed, State or Territory assessment processes to be used by the Commonwealth Minister for an assessment where a bilateral agreement is suspended, cancelled or otherwise ceases to apply to an action;
- remove the restriction on the ability for an approvals bilateral to apply to the "water trigger", however such an approval bilateral agreement will need to include an undertaking by the State or Territory to obtain and take account of advice of the Independent Expert Scientific Committee;
- provide for additional flexibility for approvals bilaterals, including amendments to:
  - expand the range of processes that can be accredited beyond a law of a State or Territory, and extend to instruments made or processes set out wholly or partly under a law of a State or Territory;
  - allow States and Territories to make minor amendments to a bilateral agreement if the Minister is satisfied the amendment will not have a significant effect on the operation of the agreement;
  - expand the range of decision makers beyond the State or Territory, for example, to include local government.

The Bill passed the House of Representatives and was introduced into the Senate on 6 Oct 2020. On 12 Nov 2020, the Senate Selection of Bills Committee referred the Bill to the Environment and Communications Legislation Committee but was unable to reach agreement on a reporting date in the report.[12] The Committee listed the reporting date as 27 November 2020, with submissions due to the Committee by 18 November 2020.[13]

One of the key concerns raised by Labor, the Green and independent MP, Zali Steggall[14] is that the Bill does not currently reference national standards recommended by the Interim Report on the review of the EPBC Act by Professor Graeme Samuels AC released on 20 July 2020.[15] The Review's Final Report was submitted to the Minister on 30 October 2020. The EPBC Act requires the report to be laid before each House of the Parliament within 15 sitting days of that House after the Minister receives it. The public release of the report is a matter for Government. To date, the final report has not yet been released to the Senate or to the public.

The Interim Report made a number of key recommendations, including, among other things:

- development of National Environmental Standards (**NES**),
- devolution of decision making so that the States can also issue approvals under the EPBC Act, and
- the creation of an independent compliance and enforcement regulator

Despite the omission of NES from the Bill, the Government has stated that NES would be introduced into law sometime after the Bill is passed, but has rejected the recommendation for a national regulator. The Government intends that the NES will form the basis of the bilateral approval agreements with the State and Territory governments.

Several previous federal governments have sought to streamline the Commonwealth environmental approval process. In 2012, following the first review of the EPBC Act, the Gillard Government also sought to establish a one-stop-shop and had state and territory governments power to grant environmental approval. Gillard abandoned this proposal and described the different arrangements being sought by each state as the "*regulatory equivalent of a Dalmatian dog*". In 2014 the Abbott Government sought to revive Gillard's 'one-stop shop' proposal, but it was blocked by the Senate.

The current Bill also looks to be blocked by the Senate. On 12 November 2020, the Senate referred the Environment Protection and Biodiversity Conservation Amendment (Streamlining Environmental Approvals) Bill 2020 (the bill) to the Environment and Communications Legislation Committee (the committee) for inquiry and report[16].

On 27 November 2020 the committee released a report, which recommended that the Senate pass the Bill. However, three dissenting reports were prepared by Labor, the Greens and cross bench senators Stirling Griff, Jacqui Lambie, Rex Patrick. These reports all recommended that the bill not be passed. Key amongst their concerns were the failure of the bill to include NES or an Independent Regulator, as well as the failure of the Government to provide the bilateral agreement template and the draft accreditation guidelines or the Review's Final Report.

The focus on economic recovery from COVID-19 may provide greater pressure and incentive to make these reforms work this time, but the timing of the EPBC Review Final Report, the Parliamentary Committee reporting and the few remaining sitting days for Federal Parliament in 2020, make this look like a challenging timeline.

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See Issue 2 Footnotes page 26.

* Issue 2 **Footnotes**

Page 6 Climate change litigation and COVID-19: a fresh understanding of climate risk

1 IEA, Global Energy Review 2020, (2020)

2 Between May 2019 – May 2020 climate change litigation was brought across six continents. Setzer J and Byrnes R, *Global trends in climate change litigation: 2020 snapshot*, Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science (2020) 1.

3 Ibid 4.

4 *Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority* (New South Wales Land and Environment Court, 2020/00106678).

5 Youth Verdict and Bimblebox Alliance have both filed objections with the Queensland Land Court.

6 *Kathleen O'Donnell v Commonwealth of Australia & Ors* (Federal Court, VID482/2020).

7 *Sharma & Ors v Minister for Environment (Commonwealth)* (Federal Court, VID607/2020).

8 Setzer J and Byrnes R (n 2).

9 See, eg, objections by Youth Verdict and Bimblebox Alliance against Waratah Coal's Galilee Coal Project (n 5); *Sharma & Ors v Minister for Environment (Commonwealth)* (Federal Court, VID607/2020) (n 7).

10 *Friends of the Earth Australia & Ors v Australia and New Zealand Banking Group* (Complaint to the Australian National Contact Point, 30 January 2020).

11 *McVeigh v Retail Employees Superannuation Pty Ltd* (Federal Court, NSD1333/2018).

12 Rest, 'Rest reaches settlement with Mark McVeigh' (media statement, 2 November 2020)

13 Royal Commission into National Natural Disaster Arrangements, Report (28 October 2020)

14 See, eg, David R Boyd, Special Rapporteur, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, UN Doc A/HRC/43/53 (30 December 2019); John H Knox, Special Rapporteur, Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, UN Doc A/73/188 (19 July 2018).

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1. Safety in Numbers: safety reporting by ASX200 companies (September 2020). Available at: https://acsi.org.au/wp-content/uploads/2020/09/ACSI-Safety-Research-2020_Sep20.pdf

Page 23 Is your project eligible for 'fast-tracking'? Federal and State 'fast-tracking' of environmental legislation for COVID-19 economic recovery

1 David Crowe, 'Environment laws in Morrison's sights in bid to fast-track rail, road and mines' SMH, 15 June 2020. https://www.smh.com.au/politics/federal/scott-morrison-announces-fast-tracking-of-infrastructure-projects-for-coronavirus-recovery-20200615-p552mm.html

2 KWM Insights, 'Planning and development during COVID-19 – States respond with emergency planning legislation and changes to planning controls', 15 April 2020 https://www.kwm.com/en/au/knowledge/insights/planning-and-development-during-COVID-19-emergency-legislation-20200408; KWM Insights, 'Victoria's COVID-19 emergency measures legislation – planning and environmental implications', 29 April 2020 https://www.kwm.com/en/au/knowledge/insights/victorias-COVID-19-emergency-measures-legislation-20200428 ; KWM Insights 'New COVID-19 reforms to the development application process in WA', 26 June 2020 https://www.kwm.com/en/au/knowledge/insights/new-COVID-19-reforms-to-the-development-application-process-in-wa-20200626 ; KWM Insights 'COVID-19 19 economic recovery in Melbourne – planning scheme amendment introduced to assist the Victorian hospitality industry' 27 October 2020 https://www.kwm.com/en/au/knowledge/insights/COVID-19-economic-recovery-planning-scheme-amendment-introduced-20201027

3 For example, the Federal Government through Infrastructure Australia has the infrastructure priority list https://www.infrastructureaustralia.gov.au/infrastructure-priority-list ; see also Eryk Bagshaw and Fergus Hunter 'Infrastructure to get $1.5 billion boost and 'priority list" SMH, 14 June 2020 https://www.smh.com.au/politics/federal/infrastructure-to-get-1-5-billion-boost-and-priority-list-20200614-p552hi.html ; and Building Victoria's Recovery Taskforce which has identified priority projects and provides for fast-tracking of those projects largely through use of the Planning Minister's call-in powers in relation to planning permit applications and VCAT applications for review https://www.planning.vic.gov.au/policy-and-strategy/building-victorias-recovery-taskforce ; NSW has a similar approach to fast-tracking priority projects including the 'acceleration program' and recent 'priority assessment program' - see https://www.planning.nsw.gov.au/Policy-and-Legislation/Planning-reforms/Planning-System-Acceleration-Program and https://www.planning.nsw.gov.au/Policy-and-Legislation/Planning-reforms/Priority-Assessment-Program

4 See Victorian criteria https://www.planning.vic.gov.au/__data/assets/pdf_file/0035/463787/Priority-Projects-Eligiblity-Criteria.pdf

5 See NSW Government Priority Assessment Project – Overview & participation Criteria https://www.planning.nsw.gov.au/-/media/Files/DPE/Other/Priority-Assessment-Program-Overview-and-Participation-Criteria-2020-11.pdf?la=en

6 See note 5 above

7 See NSW DPIE, 'New program to support economic rebound', 13 November 2020, https://www.dpie.nsw.gov.au/news-and-events/new-program-to-support-economic-rebound

8 See https://statements.qld.gov.au/statements/90559

9 See https://www.COVID-1919.qld.gov.au/government-actions/our-economic-recovery-strategy

10 See https://www.environment.gov.au/epbc/single-touch-environmental-approvals

11 A summary of the key features of the Bill is included in KWM Insights 'Single-touch environmental approvals proposed under first tranche of EPBC Act reforms', 1 September 2020 https://www.kwm.com/en/au/knowledge/insights/single-touch-environmental-approval-proposed-under-first-tranche-of-epbc-act-reforms-20200901#:~:text=The%20Bill%20aims%20to%20implement,Agreements)%20of%20the%20EPBC%20Act.&text=It%20does%20this%20by%20ensuring,to%20the%20states%20and%20territories.

12 Selection of Bills Committee, Report No.10 of 2020, 12 November 2020.

13 See https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/StreamliningEnviroApp

14 Lisa Cox 'Australian government gags debate to ram environmental law changes through lower house' The Guardian, 3 September 2020. https://www.theguardian.com/australia-news/2020/sep/03/australian-government-gags-debate-to-ram-environmental-law-changes-through-lower-house

15 See KWM Insights 'The EPBC Act Review Interim Report – Fundamental Reform Recommended', 20 July 202 https://kwm.com/en/au/knowledge/insights/the-epbc-act-review-interim-report-fundamental-reform-recommended-20200720 ; The Australian National Audit Office also recently released an audit report on the Federal Department of Agriculture, Water and the Environment (DAWE) administration of the EPBC Act. The report found that DAWE's administration of referrals, assessments and approvals of controlled actions under the EPBC Act is not effective. The report also found that DAWE failed to make decisions within statutory timeframes, and the majority of decisions contained errors and were non-compliant with procedural guidance. See Auditor-General Report No.47 of 2019-20 'Referrals, Assessments and Approvals of Controlled Actions under the Environment Protection and Biodiversity Conservation Act 1999', 25 June 2020 https://www.anao.gov.au/work/performance-audit/referrals-assessments-and-approvals-controlled-actions-under-the-epbc-act

16 https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/StreamliningEnviroApp/Report

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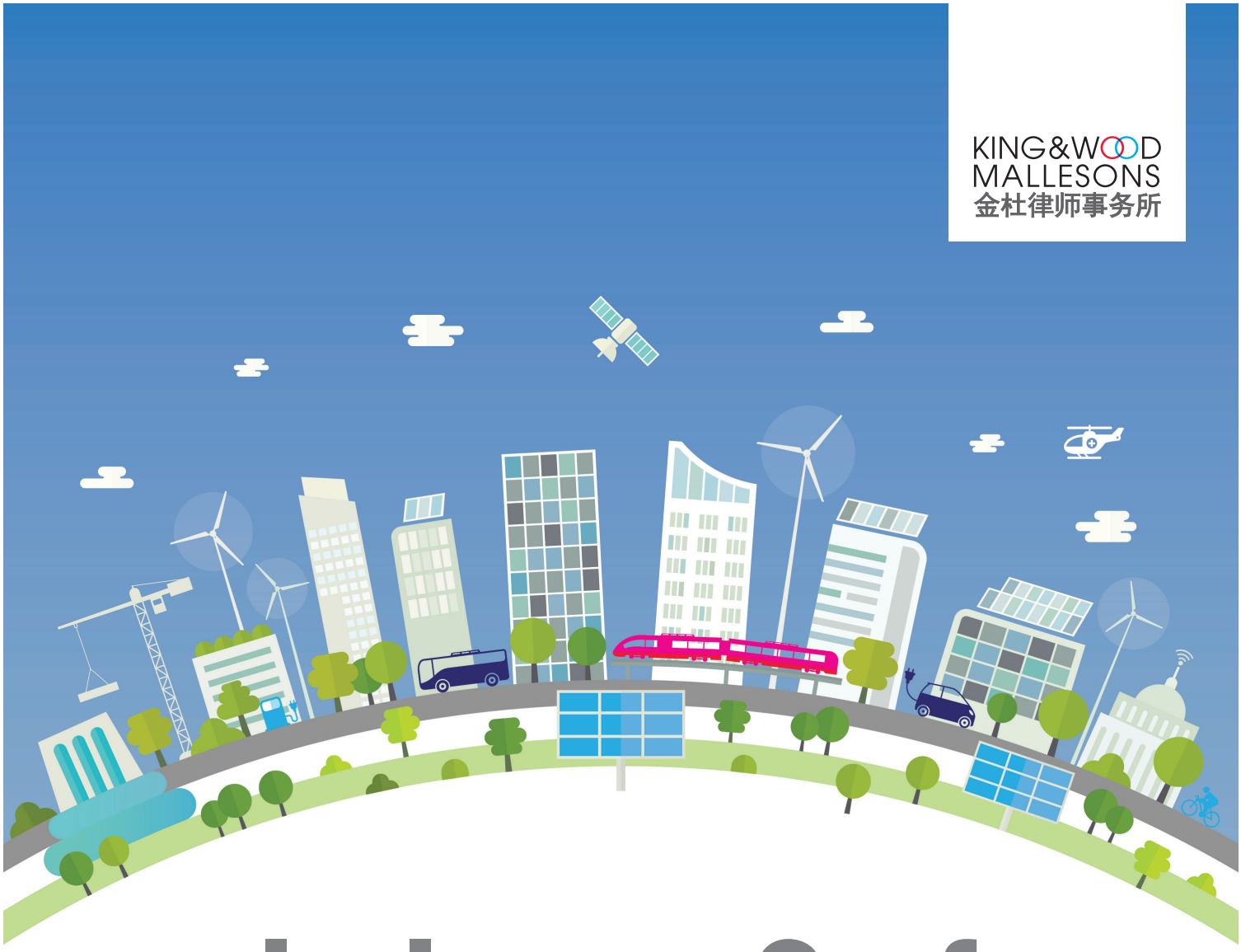

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how modern manufacturing, critical infrastructure and ESG fit together