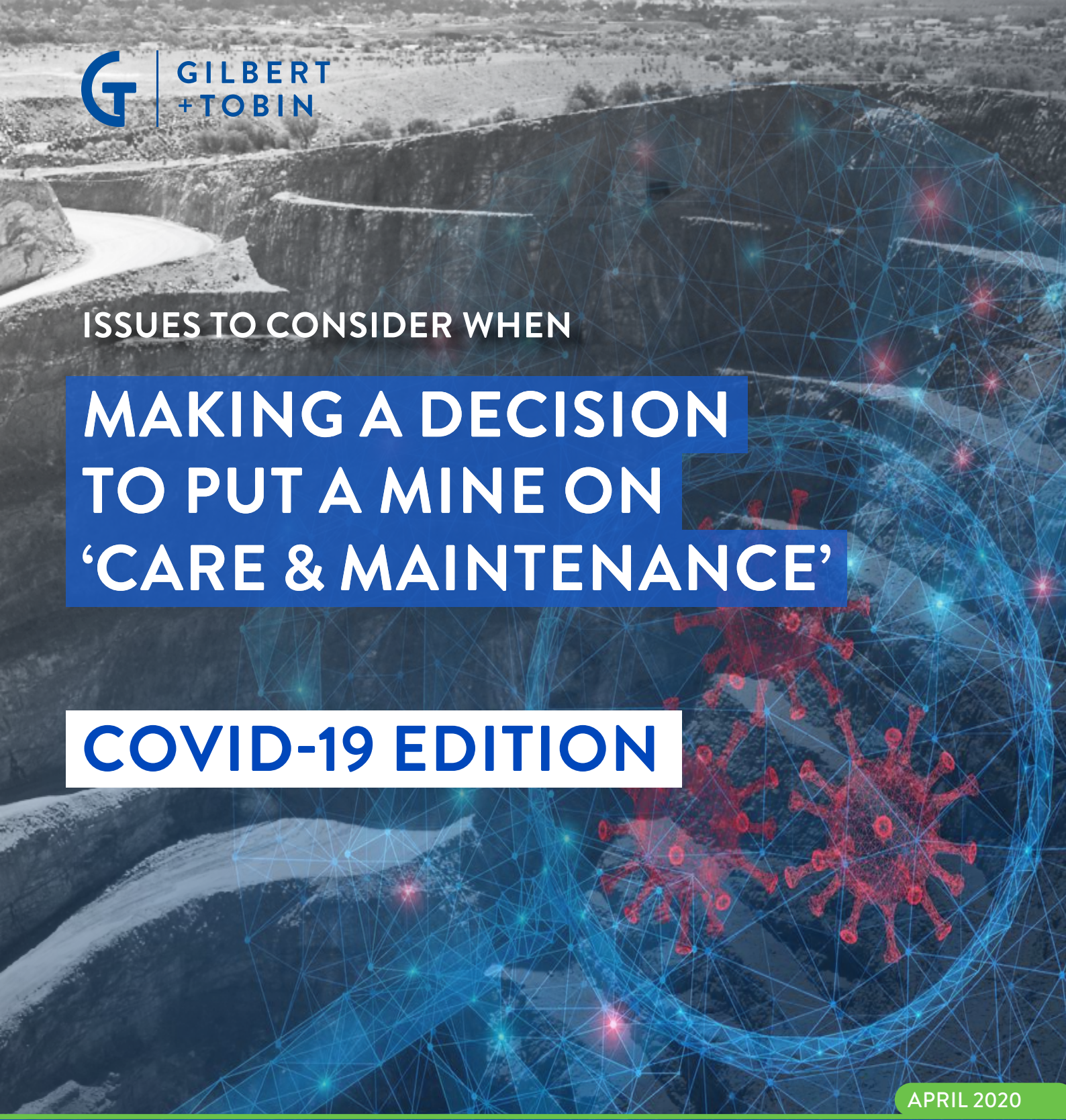
GILBERT +TOBIN

ISSUES TO CONSIDER WHEN

MAKING A DECISION TO PUT A MINE ON 'CARE & MAINTENANCE'

COVID-19 EDITION



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THIS PUBLICATION WILL FOCUS ON YOUR:

- Environmental obligations
- Employees and consultants
- Health and safety obligations
- Shareholders
- Financiers and Insurers
- Titles
- Contracts
- Board and Other Stakeholders

INTRODUCTION

The world is currently grappling with an unprecedented health and economic crisis. COVID-19 is rapidly evolving and significantly impacting Australia's economy. In this environment, mining companies are facing material impacts to their operations, primarily through constraints on available labour, and considerable uncertainty with respect to both share prices and commodity prices. Some mining companies may need to consider placing their mines on care and maintenance whilst they weather this storm.

Whilst the decision to put a mine on care and maintenance is primarily a business decision, executing it the right way will save considerable costs, time and effort in the long run and allow for a rapid ramp up and resumption of operations should a decision be made to resume operations.

In this publication, we set out the key areas that companies should focus on when taking a decision to put a mine on care and maintenance, namely:

+ identifying and managing your ongoing environmental obligations with respect to the mine-site;
+ dealing with your employees and consultants;
+ auditing and complying with ongoing health and safety obligations;
+ communicating with shareholders and strategic investors;
+ notifying, consulting and managing your financiers and insurers;
+ maintaining and retaining your mining tenements and other titles;
+ managing your ongoing contractual obligations and communications with counter-parties;
+ providing your directors with sufficient and appropriate information and advice in order for them to make an informed decision; and
+ notifying and consulting all of your other stakeholders.

While this guide focuses on the position in Western Australia, the majority of the comments will apply equally to other jurisdictions.

Gilbert + Tobin have significant expertise across all legal issues involved in considering and executing a decision to place a mine on care and maintenance. Please contact us if you have any queries or require any assistance.

We hope you find this information useful.

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CARE AND MAINTENANCE DURING COVID-19

This guide sets out the key areas that companies should focus on when making a decision to put a mine on care and maintenance. For those making this decision in the midst of the COVID-19 crisis, some additional issues arise. In particular, the impact of Government actions to try and curtail the spread of COVID-19, such as restrictions on the movement of people, and local outbreaks of the virus on site, may necessitate a rapid suspension of mining operations. Accordingly, companies may be forced to implement care and maintenance actions at shorter notice and with greater speed than anticipated. Some of these additional critical considerations are included in this section. A number of these raise complicated and/or novel issues that we have considered in other publications (you can find these on the G+T COVID Hub) or that will require specific advice tailored to your circumstances. Please contact us if you have any queries or require any assistance.

YOUR ENVIRONMENTAL OBLIGATIONS

Notwithstanding that the events arising from COVID-19 are outside of your control and were unforeseeable, you will be expected by regulators and the community to suspend operations in a safe and orderly manner so that the safety of the environment and the public is safeguarded. During suspension, your obligations to comply with your care and maintenance plan and emergency response plan, and to monitor and report, which we describe later in this guide, will continue to apply unless otherwise negotiated with regulators.

Even companies that are still operating should be reviewing their care and maintenance plans to consider the implications of needing to implement those plans in a shorter time-frame than normally proposed as a result of COVID-19. It would be prudent to consider which environmental obligations may be difficult to implement at short-notice and with a lack of personnel, what the risks arising from such lack of implementation are and what can be done to mitigate those risks. You should engage with regulators as soon as possible to discuss possible exemptions to or deferral of obligations, or practicable alternative interim measures.

YOUR EMPLOYEES + CONSULTANTS

The most significant Government action in response to COVID-19 has been the restrictions on the movement of people. There are multiple layers of restrictions imposed at both interstate and intrastate levels and in some cases, there are exemptions to enable workers to travel for mining related work and in others there are not.

Issues arising from shortage of labour are likely to arise and may either contribute to the decision to put a mine on care and maintenance, or impact the identification of the care and maintenance team.

As these restrictions are constantly changing and rapidly increasing it is important to seek specific advice at the time of considering your options for care and maintenance staff.

YOUR HEALTH + SAFETY OBLIGATIONS

As with your environmental obligations, health and safety obligations will continue to apply. Mining companies must ensure they can continue to provide a work place that is free from hazards in the face of COVID-19. This will require additional systems and planning where access to the site is restricted and/or where less staff are on site as a result.

In relation to the virus itself, employers' duty of care includes providing information and education to employees about the risks of the virus, keeping up to date with medical advice on the virus (see www.health.gov.au), and developing systems for dealing with the virus, such as sanitisation measures, isolation rules, evacuation procedures from remote areas or regions with limited hospital facilities and changes to business as usual operations at risk of disruption by the virus.

Health and safety compliance is particularly an issue for employers where an employee:

+ reports symptoms of the virus or is diagnosed with the virus; and
+ an employee returns from travel (in particular where returning from overseas) or has had contact with someone who has the virus, whether at work or elsewhere.

In order to comply with your health and safety obligations in respect of your employees, you may lawfully direct your employees not to attend work as a strategy to quarantine employees from potential exposure to the virus. The right to direct is subject to an employee's terms and conditions and may be subject to challenge in limited circumstances only (such as employees who are paid per work product produced).

YOUR TITLES

The WA State Government has recently announced that tenement holders will be able to apply for an exemption from exploration expenditure requirements on the grounds that the tenement holder is unable to meet the tenement's expenditure requirements as a direct result of COVID-19 or because of restrictions imposed by the State and Federal Governments. The decision will be valid until 31 March 2021, unless rescinded earlier, and we have been advised that a statement of opinion from the WA Minister for Mines and Petroleum outlining the specifics of this decision will be published in the Government Gazette shortly. At this stage, based on the announcement, the statement of opinion is limited to exploration expenditure only, but this will not preclude companies from seeking a broader exemption as a result of COVID-19, for example on the basis of political or other difficulties preventing or restricting mining or for other reasons which, in the opinion of the Minister, justify exemption.

In respect of seeking relief from tenement rents, we understand that the WA State Government is proposing that tenement holders utilise an existing mechanism which allows tenement holders to apply for an extension of time to pay. Applications for extension are made by MTO online and enable a request for deferral to a specific date (not for a period of time).

To date there has been no announcement by the WA State Government in respect of relief from shire rates payable by tenement holders.

YOUR CONTRACTS

In this guide we discuss the need to review the force majeure, suspension and termination clauses of your contracts. As companies look at their options to rely upon force majeure and related provisions to relieve them from performance, we set out some key issues for consideration arising from COVID-19:

+ Is COVID-19 a type of event which is expressly referred to as a force-majeure event, for instance does the clause expressly cover epidemics, pandemics or viral outbreaks or will an argument need to be formulated that the event falls within a broader category (e.g. a natural disaster or act of God)? The latter could be more difficult to satisfy.
+ Can the requirement of causation be made out – i.e. can it be shown that COVID-19 is actually the cause of the disruption? This element may be easier to satisfy if actions of government qualify as a force majeure event under the contract, as the measures taken by governments to restrict the movement of people are clearly having a direct impact on workforce availability.
+ Can the party claiming force majeure demonstrate that it is satisfying its duty to mitigate? For instance, can parts or labour be sourced elsewhere, even if this means that greater costs will be incurred?
+ Does the force majeure clause only entitle the parties to suspend performance or also to terminate? Have the other elements of the force majeure clause been satisfied? The notice provisions of the contract may oblige the party seeking to rely upon the clause to provide notices and information about the steps it is taking to avoid or mitigate the force majeure event within strict time periods.

YOUR SHAREHOLDERS + BOARD

The unprecedented nature of the policy response to the COVID-19 outbreak presents unique challenges to the boards of listed companies when navigating their continuous disclosure obligations. Mine operators have been required to digest and respond to daily, and in some cases hourly, changes to the rules governing the staffing of operations with resulting impacts on costs and production volumes, which are often very difficult to predict.

Given COVID-19 is a medical and not just financial issue, mining companies will need to be acutely aware of social licence considerations when deciding whether to place a mine on care and maintenance. As a result, the need to ensure workers health and safety will likely be even further to the forefront of directors' considerations.

Many listed mining companies have elected to withdraw, or at the very least heavily qualify, market guidance in the face of uncertainty created by COVID-19. In appropriate cases, it may also represent the most prudent approach to foreshadow consideration of whether a mine will be placed on care and maintenance pending a return to more normal operating conditions.

YOUR ENVIRONMENTAL OBLIGATIONS

In deciding whether to place a mine on care and maintenance, mine operators need to be aware that they must meet ongoing environmental obligations during this period. If mine operators do not comply with the tenement conditions and other environmental approvals, then the tenement(s) may be at risk of forfeiture action, and the mine operator may be prosecuted for environmental offences.

ENVIRONMENTAL AUDITS

As soon as possible after the decision is made to place a site on care and maintenance, an environmental audit of the site should be carried out. This audit will involve all landforms and infrastructure being allocated an environmental risk status for the expected care and maintenance period, and if unknown, for the next 2 years as a minimum. It should also consider whether there is scope to reduce the frequency of environmental monitoring and reporting (thereby reducing compliance costs) while the mine is in the care and maintenance period.

CARE AND MAINTENANCE PLANS

A care and maintenance plan must then be prepared based on the pre-existing mine closure plan to manage the environmental risks identified in the audit. This plan must be submitted to the WA Department of Mines, Industry Regulation and Safety (**DMIRS**) within 3 months of the notification of temporary closure to the relevant DMIRS District Inspector or at such other time as specified in writing by DMIRS. The care and maintenance plan must demonstrate that ongoing environmental obligations will be met during the closure period.

Common environmental factors to be considered in preparing a care and maintenance plan include:

+ how the dispersal of waste dump or tailings material to the surrounding environment can be prevented;
+ appropriate storage or disposal procedures for process-related materials from treatment plants and hydrocarbons; and
+ the implementation of appropriate bunding or other surface drainage structures to ensure open pits and underground workings do not store water (creating disposal issues if operations recommence) and issues for downstream vegetation systems.

The plan will also need to provide for appropriate measures to prevent erosion, seepage, groundwater contamination and pollution of the surrounding area.

EMERGENCY RESPONSE PLANS

It is critical that, in addition to the care and maintenance plan, an emergency response action plan is in place with clear lines of communication to ensure that any serious environmental harm is dealt with in a timely manner.

MONITORING AND REPORTING

As environmental reporting obligations continue during care and maintenance periods, regular monitoring and reporting to DMIRS must continue to be carried out. This is especially important as inspectors have powers to conduct inspections and monitor environmental compliance. Any environmental incidents and potential major incidents must be reported at the time of occurrence or discovery.

It is intended that, if the above requirements are complied with, operations can recommence when circumstances warrant.

CHECKLIST ITEMS:

- ☐ Conduct an environmental audit identifying the environmental risks associated with all landforms and infrastructure.
- ☐ Prepare a care and maintenance plan to manage the environmental risks identified in the audit.
- ☐ Submit the care and maintenance plan to DMIRS within 3 months of the notification of temporary closure.
- ☐ Prepare an emergency response plan to ensure any adverse environmental harm is addressed in a timely manner.
- ☐ Monitor the site and submit regular environmental reports to DMIRS.

IMPOSITION OF BONDS

Mining companies should also be aware that the Minister for Mines retains the right to impose bonds as security for compliance with environmental conditions. Under DMIRS policy, the imposition or variation of bonds will be recommended when there is a material change in risk of the tenement holder not complying with their environmental conditions (and subsequently the risk of the rehabilitation liability reverting to the State). Placing a mine on care and maintenance may trigger a mining security review, particularly if there is no real prospect of the mine reopening, and result in the imposition of, or increase in, a bond.

YOUR EMPLOYEES + CONSULTANTS

A decision to place a mine on care and maintenance will have obvious and significant implications for your workforce. As part of this process, you will need to consider dismissing some employees and consultants and offering different positions and contractual terms to others. In considering these issues, the following will be important.

EMPLOYEES

+ Review and comply with applicable employment contracts, enterprise agreements, awards and company policies;
+ Consult with your employees and any relevant unions if you need to. Most awards and enterprise agreements require consultation and prescribe the steps that must be followed throughout the consultation process;
+ Identify the positions to be made redundant. If there is more than one employee in each position, establish selection criteria to assess the employees holding the targeted position so that you can identify the employees to be dismissed;
+ Consider whether any alternative positions are available within your business (or the business of your related entities) and whether you need to offer alternative employment in order to minimise exposure to unfair dismissal claims. If alternative employment is offered, any contractual changes should be confirmed in writing. Note that redundancy pay is sometimes required even if a new role is offered;
+ Notice of termination (or pay in lieu of notice) and/or redundancy pay will be required. Check the employees' contract of employment, any applicable award or enterprise agreement, the Fair Work Act 2009 and your company policies to identify the minimum period of notice that must be given and any redundancy pay required on termination;
+ Exercise caution when terminating employees who do not have a written or current contract of employment. These employees may have claims for reasonable notice and advice should be obtained early in the decision making process;
+ Accrued but untaken annual and long service leave must be paid to employees on termination;
+ Seek advice about the correct tax treatment for termination payments;
+ If not properly managed, the redundancy and termination process often leads to litigation. By adopting a fair process and seeking advice early in the decision making process, potential pitfalls can be avoided and the risk of litigation can be significantly reduced; and
+ Closely monitor and safeguard IP and other confidential information which is often at heightened risk of being stolen, copied or lost.

CONSULTANTS

+ Review and comply with the terms of each consultancy agreement to be terminated. Ensure that each agreement is terminated in accordance with its terms;
+ Consider whether any consultant could be an employee as a matter of law, rather than an independent contractor. Seek advice before terminating if you are not sure, or if one or more of the following apply:
  - the arrangement is for the consultant's personal services;
  - the consultant is engaged directly, rather than through a corporate entity;
  - the consultant is subject to your control in relation to how they provide their services, has fixed hours, an expectation of ongoing work and/or is paid based on time worked rather than results achieved;
  - the consultant works in your business like an employee, rather than operating their own business and generating goodwill in their business; and/or
  - you supply the place of work and/or equipment.

YOUR HEALTH + SAFETY OBLIGATIONS

The safety obligations owed by a company which is the employer, lessee or occupier of a mine continue following the mine being placed on care and maintenance.

Statutory safety obligations are owed in respect of mining operations conducted at a mine. For the purposes of the relevant legislation, mining operations include all operations undertaken for the care, security and maintenance of a mine and plant at the mine during any period when production or development operations at the mine are suspended.

HAZARD IDENTIFICATION

A key statutory safety obligation during operations and during the period of care and maintenance is that the company is required to take all practical measures to ensure that any person who accesses the mine (whether with the consent of the company or as a trespasser) is not exposed to hazards. Hazards means anything that may result in injury to a person or harm to that person's health.

To ensure that no person is exposed to hazards on the site during the care and maintenance period, all buildings, plant and equipment must be appropriately locked down and secured. Any rehabilitated or partially rehabilitated works must be bunded and fenced as required to prevent any inadvertent or uninvited access. Appropriate signage should also be placed around the site to ensure that all persons are aware that access to the site is prohibited.

APPOINTMENT OF CARETAKER

Once the site has been evaluated for hazards during the suspension of operations and properly secured, an appropriately experienced caretaker must be appointed to undertake daily systematic monitoring of the mine and the safety measures implemented in securing the mine to ensure their ongoing effectiveness. Written reports of each inspection should be prepared by the caretaker and provided to the company. This will ensure that any issues which are identified during daily inspections are able to be promptly reported to DMIRS (if necessary) and that appropriate steps are taken to reduce, minimise and eliminate the hazard in a timely manner.

PROVIDING A SAFE WORKING ENVIRONMENT

The company will owe the usual safety obligations to any employees who are at site, including the caretaker, while the mine is on care and maintenance. These obligations may also be owed to any contractors or labour hire personnel who are deemed to be employees of the company pursuant to the relevant legislation because the company maintains the requisite control over safety issues on site. As an employer, the company must ensure, so far as is practicable, that it provides and maintains a working environment, plant and system of work at the mine in which employees (or deemed employees) are not exposed to hazards. This will include, but is not limited to, ensuring that any employees who will be present on the mine while it is on care and maintenance receive the appropriate training and induction in relation to the specific issues which may arise at a mine on care and maintenance.

EMERGENCY RESPONSE PLANS

An emergency response action plan should also be developed for implementation in the event there is a safety incident at site during the care and maintenance phase.

There is often a need for greater caution in this key transition phase when the company's financial resources and attention to procedures regarding health and safety by contractors are stretched.

CHECKLIST ITEMS:

To ensure its safety obligations will be met a company should (prior to shutdown):

- ☐ undertake a risk assessment of all hazards at site including a consideration of the measures required to manage identified risks during the suspension of operations;
- ☐ create a checklist of hazards to be monitored (daily, weekly or monthly) by the caretaker to ensure the measures to manage hazards remain effective;
- ☐ ensure a regular reporting mechanism is in place for the caretaker (or any other personnel at site) to keep the company informed of the ongoing management of hazards and the identification of any new hazards; and
- ☐ ensure the company has developed and trained relevant personnel in a crisis response action plan for managing any incidents which may occur while the mine is on care and maintenance.

YOUR SHAREHOLDERS

In implementing a care and maintenance plan, you will need to take care to manage stakeholder expectations, and at the same time comply with the ASX continuous disclosure regime.

WILL YOU NEED TO DISCLOSE?

ASX's continuous disclosure regime provides that subject to certain exceptions, a company needs to immediately disclose any information that a reasonable person would expect to have a material effect on the price or value of the company's securities. Except in very exceptional circumstances, a decision to put a project in care and maintenance is something which will most likely need to be disclosed.

WHEN AND WHAT TO DISCLOSE?

A decision to place a mine on care and maintenance will often take weeks or months to make, and may involve discussions with (among others) contractors, JV partners, financiers, and various other stakeholders. At what point do you need to disclose the planned closure to investors? The continuous disclosure regime allows companies to withhold price sensitive information from the market if the information is insufficiently definite to warrant disclosure. So whilst a company may be considering putting a project on care and maintenance, it is generally not necessary to disclose this until such time as a decision has been made by the Board. This is, of course, subject to the information remaining confidential. If the fact that the Board is considering putting a project on care and maintenance is leaked, the company's ability to rely on the exception will be lost and an announcement will need to be made immediately.

The level of disclosure required will depend on the circumstances. At a minimum, the market will largely want to know why the decision has been made, how long the company intends to keep the project on care and maintenance and what its likely plans are in the interim and for the future.

INTERACTIONS WITH YOUR KEY INVESTORS

Shareholders hate bad surprises. In this regard, it may be helpful to announce that a review of the project is being undertaken (which may in itself be disclosable in certain circumstances). Early engagement with key investors can also help to reduce investor backlash by providing them with a 'seat at the table' when key issues are being discussed. It can also open a dialogue with respect to securing additional capital to meet the expenses of the project during the care and maintenance period and with a view to restarting the project once conditions improve. However, if a decision has been made to bring an investor 'over the wall', care should be taken to ensure there are no breaches of insider trading laws.

BRINGING PARTIES 'OVER THE WALL'

Bringing a party 'over the wall' involves disclosing to the party that the information you wish to convey to them is inside information and that they must not trade in the securities of the company until such time as this information has been fully disclosed to the market. It is not uncommon for certain institutional or strategic investors to be informed about key decisions regarding the company's operations and, in this way, stepping 'over the wall'.

INTERACTIONS WITH MUM AND DAD SHAREHOLDERS

A company is likely to receive a significant number of enquiries from retail shareholders following the announcement of a decision to put a project on care and maintenance. The company should plan adequately for such enquires, including training the person(s) responsible for dealing with enquires on how to respond to different enquiries that may come up. Responses to investors should be as informative as possible, but should not go beyond what has been publically disclosed by the company. Question and answer guides are also helpful in these circumstances.

HOW TO DEAL WITH MARKET SPECULATION?

As noted earlier, a company does not have to announce that it is considering putting a project on care and maintenance until a definite decision has been made by the Board. However, this is subject to the information remaining confidential. If the information is leaked, disclosure should be made immediately. To prepare for this, the company should prepare (and update) a draft announcement so that it can be finalised at short notice if required.

YOUR FINANCIERS + INSURERS

Financiers will obviously need to be kept up to date with a company's plans regarding placing any of the operations on care and maintenance. Early engagement is crucial. Likewise, your insurers should also be consulted and notified.

FINANCIERS

Given the risks associated with non-compliance with financial covenants without approval or forbearance from financiers or secured creditors, the need for consideration and assessment of a company's financing and security position cannot be overstated when taking a decision to place an operation on care and maintenance.

This review should form part of a wider assessment of the company's project agreements and, relevantly, attention is required on all agreements dealing with financial indebtedness, including loan agreements, note facilities, security interests and even day-to-day banking and working capital facilities.

In particular:

+ suspension of operations would likely impact an ability to perform secured obligations or meet repayment milestones;
+ a failure to notify a financier or secured creditor in making a decision to suspend, abandon or scale back operations in an unscheduled manner may be as likely to constitute an event of default as the suspension of operations itself;
+ protection of the secured property, maintenance of good title and covenants around cash flow models are common elements of financing and security documents that will need to be considered in detail;
+ the concept of 'potential event of default' typically incorporated into financing arrangements is a key protection for financiers prior to an event of default actually occurring. Accordingly, early assessment of relevant contractual obligations is a must as a potential event of default may lead to the same outcome as an actual default; and
+ defaults or disputes under other project agreements may trigger cross defaults under the financing arrangements that may provide a financier with a right of enforcement action.

Quite clearly, avoiding enforcement action by financiers and secured creditors is a key consideration under any decision to place an operation on care and maintenance. The likelihood of a financier or secured creditor granting a forbearance will depend on various factors, including the nature of a facility and the care and maintenance proposal. From a risk management and stakeholder engagement perspective, early consultation with financiers and secured creditors is of primary importance.

INSURERS

A decision to put a mine on care and maintenance will almost invariably constitute a notifiable event under your policies of insurance. You should speak with your insurance brokers about what other implications there may be under your policies of insurance.

It is also often a good time to conduct a general review of the policies of insurance that are in place to ensure that they provide appropriate coverage given the changing nature of the mining operations.

In some circumstances, business interruption insurance (which often attracts very high premiums) can be suspended or cancelled. In addition, companies may be able to negotiate lower premiums under their existing policies given that the risk profile of the operations changes significantly in a care and maintenance phase.

YOUR TITLES

An essential consideration for any mining company contemplating placing its project on care and maintenance is how it will maintain and retain its mining titles. Maintaining titles necessarily involves costs – annual rents, minimum expenditure, shire rates and contributions to the Mining Rehabilitation Fund to name a few. You will no doubt want to minimise those costs.

The key issues to consider include:

- ways to minimise the risk of forfeiture (e.g. by converting mining leases to retention licences, seeking retention status for prospecting and exploration licences or applying for exemptions from expenditure obligations);
- whether some tenement(s) can be surrendered; and
- what your ongoing liabilities will be following the surrender (or expiry or forfeiture) of the tenement.

You will also need to be mindful of the licence conditions that apply to your tenure and ensure that you can continue to comply with those conditions. Failure to comply with the conditions of the tenement may result in exposure to forfeiture action by the Minister or by third parties.

CONVERSION TO A RETENTION LICENCE

One option to consider is converting your tenement to a retention licence. A retention licence (which is a "holding" title) can be sought in certain circumstances if the tenement has an identified mineral resource that is not currently able to be further explored or mined. The term of a retention licence is 5 years and it is renewable for further periods of up to 5 years.

The key benefit of a retention licence is that no prescribed minimum expenditure obligations will apply. A potential disadvantage of applying for a retention licence, however, is that in areas affected by a native title claim, the application will trigger the native title negotiation processes. Most companies will be reluctant to go through the native title process a second time.

EXPENDITURE OBLIGATIONS

Where you do not anticipate meeting the required annual expenditure for a mining title, it is possible to apply for a certificate of exemption.

In the case of a mining lease, it is possible to apply for a five year exemption. For the other types of mining tenements, an exemption for a period of one year may be applied for. An application for exemption must be made during the expenditure year or within 60 days after the end of the year to which the proposed exemption relates (that is, by the date that you are required to lodge your expenditure report).

The grounds for seeking an exemption from expenditure are set out in the Mining Act 1978 (WA) and include that time is required to evaluate work done on the tenement, to plan for future exploration or mining or to raise capital for those things; that the tenement contains a mineral deposit which is uneconomic but which may reasonably be expected to become economic in the future, or that economic or marketing problems are such as not to make the mining operations viable. An exemption can also be granted for any other reason which, in the opinion of the Minister, is sufficient to justify an exemption.

It is possible for a person to lodge an objection in relation to an application for exemption. If an objection is lodged, the objection must be heard by the Mining Warden before the exemption can be determined.

FORFEITURE FOR BREACH

If expenditure obligations are not complied with and an exemption has not been granted by the Minister, there is a risk that an application for forfeiture can be made by the Minister or "any person".

Where an application for forfeiture is made by "any person", there will be a hearing before the Mining Warden to determine whether the breach of expenditure conditions is of sufficient gravity to warrant forfeiture.

DMIRS (on behalf of the Minister) can also issue a forfeiture notice for a failure to pay rent, lodge a Form 5 Operations Report or otherwise comply with tenement conditions. If a forfeiture notice is issued, a tenement holder will have 28 days to make payment and make submissions to the Minister as to why the tenement should not be forfeited.

In all cases, the Mining Warden or the Minister (as applicable) can order forfeiture of the tenement, impose a penalty or dismiss the application.

SURRENDER AND ONGOING LIABILITIES

A further option is to voluntarily surrender your tenements in whole or in part. A surrender of a mining tenement will relieve you of all of your prospective obligations and liabilities in respect of the whole or part surrendered tenement from the date of surrender (but not prior to that date). If the tenement is subject to a mortgage, the consent of the mortgagee is also required.

When land is surrendered, any person who held an interest in the tenement, and any "related person" is not able to apply for a tenement over the land for a period of three months.

YOUR CONTRACTS

Any significant change to the nature, scale or scope of operations – like putting your project on care and maintenance – will require a careful review of your contracts and contractual obligations.

OPERATIONAL CONTRACTS

The first suite of contracts that should be on your agenda for review falls roughly into three categories:

+ **services contracts** (e.g. drilling contracts, mining contracts);
+ **supply contracts** (e.g. power supply, water supply); and
+ **offtake contracts**.

HARDSHIP RELIEF

In undertaking your review, look for any force majeure, hardship or suspension provisions. Force majeure provisions might allow you to suspend performance of your obligations.

Hardship clauses could apply, but they might only provide for renegotiation and not offer sufficient relief from existing obligations. Alternatively, there could be suspension provisions that provide relief.

In any event, you will need to determine whether you fall within the scope of the relevant force majeure, hardship or suspension provision. If so, does it give you complete relief (e.g. does it suspend the key obligations)? Is the relief period long enough for your purposes? What are the associated costs (e.g. do you have to pay stand-down rates)?

TERMINATING YOUR CONTRACTS

Alternatively, consider whether you have express rights of termination under the contract. Termination rights can be cast in a variety of ways and apply in different circumstances.

One termination right that might apply is a termination for convenience clause. If you have the benefit of such a provision, it will generally allow you to terminate the contract at any time and for any reason. However, this right is not entirely unqualified. For example, it is not unusual for this right to be accompanied by an obligation to pay a fee. It may also be necessary to consider whether this is subject to an implied obligation of 'good faith' and whether this imposes any practical restriction on the exercise of your rights.

Another termination right that might be available is a termination for cause clause. This may be an option if your counterparty is in breach and the contract allows you to terminate for that breach. If you are able to exercise these rights, it is important to remember that you will need to take steps to mitigate your losses as the non-defaulting party.

If your circumstances do not fall within the ambit of the contract's termination provisions, it is, of course, open to you to terminate by agreement (if the counterparty is willing). (Note, a compromise might be to negotiate appropriate variations to the contract, such as extensions of time or alternative pricing arrangements.)

In any event, where you terminate pursuant to the contract, you will need to make sure you consider the requisite formalities (e.g. providing notice, observing timeframes), any associated costs (e.g. covering the cost of demobilisation of contractor personnel and equipment) and your obligations post-termination (e.g. return of information). When the counterparty is suffering an insolvency event, you should consider the ipso facto laws under the *Corporations Act 2001* (Cth) prior to terminating the contract, as in certain circumstances the right to terminate the contract may be affected by the ipso facto stay.

JOINT VENTURES

If you are the manager of a joint venture, you will also need to closely review your joint venture and management arrangements. Check the decision-making provisions: ordinarily, termination is a decision that will need to be made unanimously by the representatives on the management committee.

Once the decision is made, you will need to carefully review your management provisions to determine what activities and actions fall within your powers and functions. Some management agreements put certain decisions, such as the disposal of property above a certain value, beyond the manager's powers and into the hands of the management committee.

OTHER CONTRACTS

There are many other contracts that you may also need to consider, even though such contracts might not form part of your day-to-day operations. This is because contracts can catch activities or actions that you might be taking during the care and maintenance period. For instance, some third party contracts may impose positive obligations on you to conduct exploration or mining operations, or to maintain tenure. Others might impose restrictions on the surrender of your tenure. Agreements of this nature might include for example, royalty agreements and mineral sharing (also known as "split commodity") agreements.

YOUR BOARD + OTHER STAKEHOLDERS

Communicating effectively (and at the appropriate times) with your board and your key stakeholders will be critical in ensuring a smooth transition to care and maintenance.

YOUR BOARD

The decision to put your company's mine on care and maintenance can be one of the most significant decisions your board has to make. It requires careful planning, due diligence and attention to good governance principles. Prudent directors will demand the right information, and in sufficient detail, to assess the impact of the decision and determine what is in the best interests of shareholders.

PROVIDING THE RIGHT INFORMATION

Timeliness of information is a crucial factor. The information should be provided to your board sufficiently in advance of the board meeting at which the ultimate decision is made so the board can make a properly informed decision. The importance of this is amplified in circumstances where the need to suspend operations becomes financially urgent and/or where certain long-lead arrangements need to be put into place (e.g. lengthy notice requirements, demobilisation of personnel).

Once the due diligence/review process begins, it then becomes necessary to consider what information is relevant to the decision. It is important to communicate regularly with your board to not only keep it informed of the status of operations and the due diligence process, but also importantly to consult with the board (either directly or through the company secretary) as to what additional information it will want from the company's management and advisors (e.g. legal, financial, environmental) – without overloading your directors with information. The board pack should include a summary of (and where appropriate, the detailed supporting materials for):

+ what is involved;
+ the consequences of the decision (e.g. risk to reputation);
+ the consequences of implementation (e.g. under financing arrangements, employee redundancies); and
+ the advantages and disadvantages (e.g. cost savings vs. restart costs).

Depending upon the scale, nature and location of your company's project, this may require a number of reviews (some or all of which may need to be conducted externally). Examples (among many) include:

+ tenure/title reviews (e.g. assessment of forfeiture risks);
+ contract reviews (e.g. as to termination or suspension rights under key contracts); and
+ corporate governance reviews (e.g. requirements of stock exchanges such as ASX and TSX).

GROUP COMPANIES

When decision-time arrives, one very important consideration for group companies is ensuring that the right boards are making decisions in the right manner, so it is important to follow closely your group's subsidiary governance framework. Wholly-owned subsidiaries (often the holder of the project assets) are commonly viewed as an extension of the parent company, so subsidiary governance can be given less attention or overlooked. However, it is the role of the subsidiary's directors, and not the parent company, to manage the affairs of a wholly-owned subsidiary and make decisions in the best interests of the subsidiary, unless expressly permitted to act in the best interests of the parent by its constitution. The principles that apply to decision-making by the subsidiary, and in particular, the extent to which it can have regard to the parent company's interests, should be clarified in advance.

OTHER STAKEHOLDERS

Many other key stakeholders will be involved naturally and organically as your company moves the project into the care and maintenance phase. These include financiers, mining contractors and suppliers, joint venture partners and offtake parties, as well as regulators like the ASX.

However, depending upon your company's project, there are many other parties (e.g. Native Title parties, local businesses and communities, politicians, bureaucrats, unions, environmental groups) with which communication is necessary or desirable because of the real or perceived impacts it will have on them or their portfolios.

If your company does not have a good communications/stakeholder liaison policy in place, now is the time to do so. It will also be important to balance the need for sufficiently detailed and early engagement with such stakeholders against the risks of an untimely leak of misleading or incomplete information. But it is essential to identify your key stakeholders – they are the parties you will need to be communicating with the earliest and the most frequently.

When you do communicate, make sure you are clear and consistent to ensure stakeholders are not surprised by your company's decision. Listen to and address their concerns. This is so important for your reputation, especially if you plan to continue operating within their jurisdiction or location.

FOR FURTHER INFORMATION, PLEASE CONTACT

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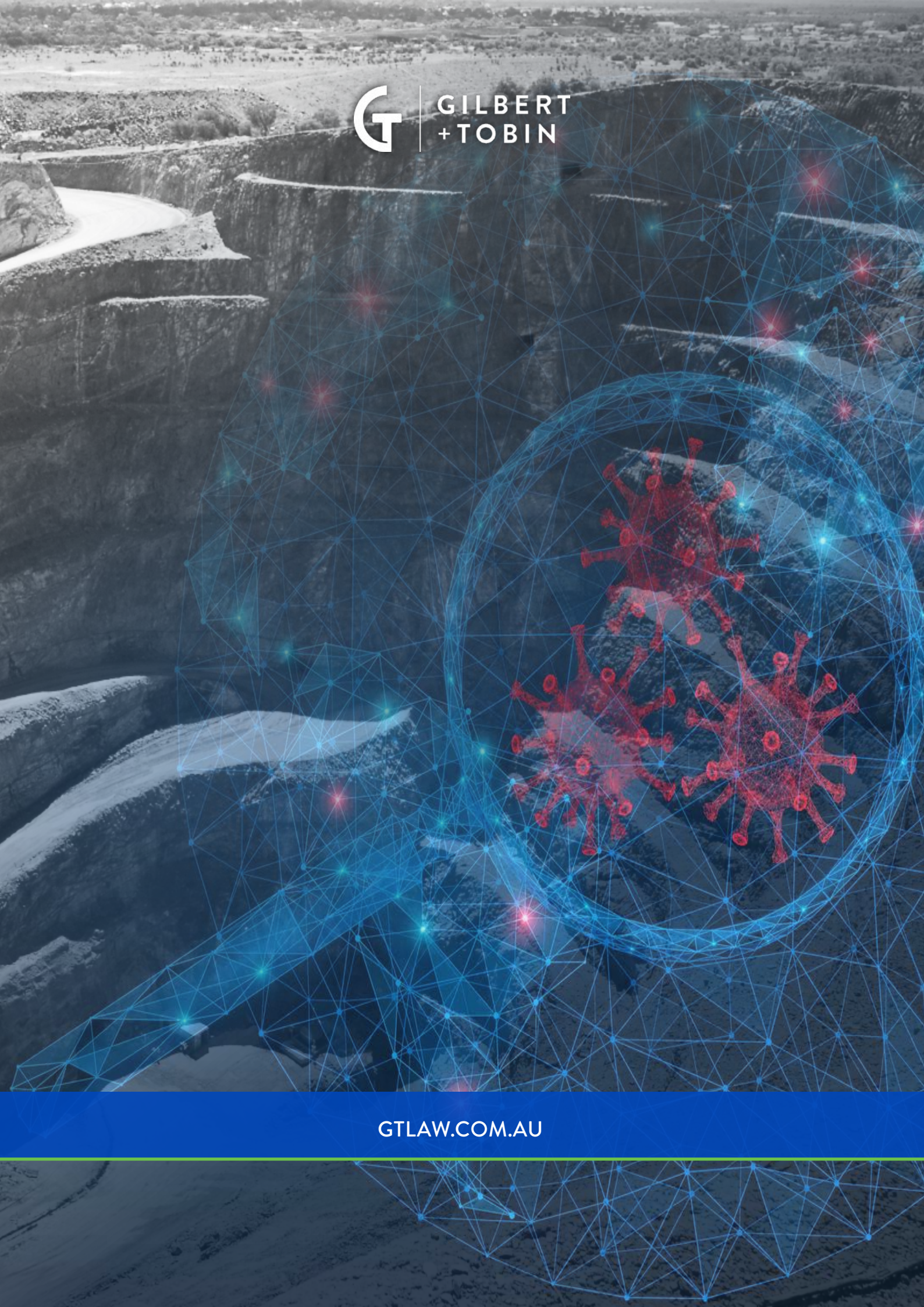
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