A GUIDE TO INVESTING IN A MINING PROJECT

AN OVERVIEW OF FOUR OF ASIA PACIFIC'S KEY MINING AREAS: INDONESIA, MONGOLIA, VIETNAM AND WESTERN AUSTRALIA

holman fenwick willan hfw

Global mining hotspots

Over the last decade, increasing demand for mining commodities has led to rapid and large-scale development of mining exploration and recovery activities in Asia and Australasia.

In many cases, the legislative regimes have had to react to this by developing improved legal frameworks to allow foreign investment in mineral extraction. However, the position varies significantly between the more mature mining locations, such as Indonesia and Australia, and emerging markets such as Mongolia and Vietnam, which are faced with the challenge of trying to introduce a clear set of laws and policies to cover the technical and commercial issues of mining activities, while trying to keep pace with the rapid economic growth and demand from foreign investors.

In this guide, we compare some of the legal issues faced by foreign investors when considering investment in a mining project in four of the rapidly developing mining hotspots within the Asia-Pacific region.

Where to start? - an overview of the legal system

Indonesia

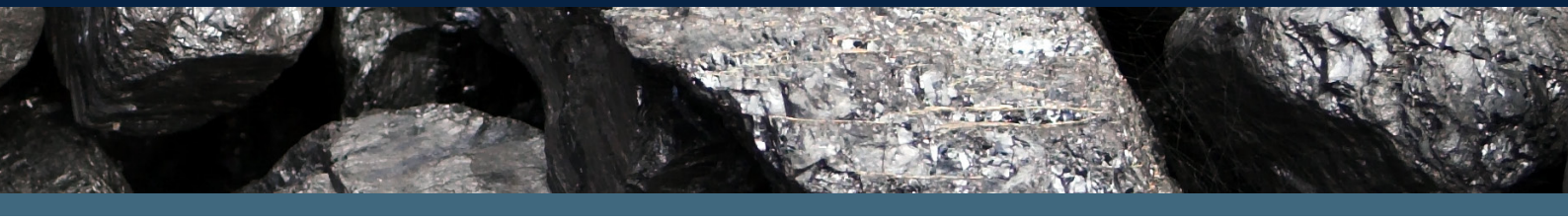
Indonesia was a colony of the Dutch until World War II and consequently its legislative styles reflect the European Civil Law system of the 19th and early 20th centuries. The Indonesian Civil Code was derived from the Civil Code of the Netherlands in the 19th century, which in turn was a derivation of the French Napoleonic Code. Law in Indonesia is drafted broadly and in general does not set out specific terms. As such, it provides a framework of high level governing principles in respect of a subject matter. Subordinate legislation then sets out the substantive implementing provisions.

As a resource rich country composed of a variety of different ethnic groups and regional identities, control over local resources and equitable distribution of profits between regions in Indonesia and between Indonesia and foreign investors are political issues. Indonesia's current mining regime is a product of this context and reflects underlying issues which Indonesians are grappling with as it seeks to balance the interests of its various stakeholders.

Mongolia

Mongolia's legal system, following the collapse of communism over 20 years ago now, embodies principles of democracy, privatisation, protection of human rights and market economy. Undoubtedly, Mongolia's legal infrastructure has been influenced by the transition from a 'one time' empire to a new modern state. The country's unified system of law has the flavour of the Romano-Germanic legal system, in particular, the division between civil and public law, with statutes being the main source of law and precedents playing a much lesser role.

Much of Mongolia's future growth is dependent on a stable legal and fiscal infrastructure. This vast, mineral rich, largely uninhabited and landlocked country, which still embraces its nomadic lifestyle traditions, has taken significant



steps in recent years to improve its legal framework, although this is influenced by political pressures and often protracted decision-making processes. Further changes in the legal system are required.

Vietnam

The Socialist Republic of Vietnam was formally established in July 1976, as a result of the official reunification of North and South Vietnam. It has only one political party, the Vietnamese Communist Party. The Communist Party, which is the principal non-state body, operates in accordance with the laws. Government powers in Vietnam are divided into legislative, executive and judiciary powers.

The centre of power is the Political Bureau (Politburo). Members are elected by the committee of the Communist Party. Policy decisions are initiated at Politburo/Central Committee level, and referred to a National Assembly which generally meets for one month, twice a year, and has the authority to pass the legislation referred to it. The National Assembly is the highest body within the state. At a regional level there are a number of Provincial People's Councils, each with a People's Committee, which implements the constitution and the laws within the province, and below this District Councils.

All policies and laws are issued by the National Assembly and supplemented by guidance notes from the government in relation to their implementation. The Assembly appoints the President (head of state), the Prime Minister (head of government), the Chief Justice of the Supreme People's Court of Vietnam, and the Cabinet (the executive). The Communist Party is able to exercise a great deal of influence over the executive, with members of the party holding all senior government positions.

Vietnam's legal system broadly resembles a European style of civil law system and is based on a series of written laws which are proposed by the Communist Party and enacted by the National Assembly. The legal system is evolving fast and the efficiency of enacting and publishing legislation has been significantly improved. This has improved transparency and confidence in the legal system. However, laws are usually drafted in such general terms that they are not enforceable without implementing decrees and circulars. This legislative process gives the executive the unwritten power to interpret law.

Western Australia

Australia was colonised by the British. In 1901, Australia became a federation through the enactment of the Commonwealth of Australia Constitution Act.

The Constitution specifies those matters which fall within the exclusive legislative power of the Federal Government (such as taxation, defence and external affairs) and those matters that fall within the concurrent legislative powers of the Federal and State Governments.

Legislative power in relation to mining lies with the various State Governments, and consequently each state has its own mining law. The Federal Government, however, has the power to pass laws affecting mining projects, including laws relating to the environment, taxation and native title. If there is any inconsistency between federal law and state law, the federal law will prevail to the extent of the inconsistency.

Western Australia is an Australian state. As with the Commonwealth and other states, Western Australia has a common law system.

Overview of the mining legislation

Indonesia

Before 2009, a dual system of mining rights was used under Law No. 11 of 1967 regarding Basic Provisions of Mining (the Mining Law 1967). The first one is a mining licensing system based on licenses known as *Kuasa Pertambangan* or KP, which was closed to foreign investors. At the same time, the Mining Law 1967 also used another form of mining rights where foreign investment was allowed for mining projects through Contract of Work, under which the Indonesian Government entered into a contract with a special purpose company incorporated by foreign investors for the purpose of carrying out mining activities.

On 12 January 2009, Indonesia passed Law No. 4 of 2009 regarding Mineral and Coal Mining (the Mining Law 2009), putting an end to the Mining Law 1967 regime. Under the Mining Law 2009, mining rights are regulated under a licensing system and take the form of Mining Business Permits, known by their Indonesian acronym as IUPs (*Izin Usaha Pertambangan*). IUPs are either newly

issued under the Mining Law 2009 (which has not yet been implemented) or have been issued as a result of conversion of KPs. Existing Contracts of Work have been preserved under the Mining Law 2009 until the expiry of their terms, and will be converted into IUPs upon extension. However no new Contracts of Work will be issued.

Under the Mining Law 2009, IUPs consist of Exploration IUP and Production Operation IUP. There are also small-scale mining rights known as People's Mining Right (*Izin Pertambangan Rakyat* - IPR).

Mongolia

Mining laws in Mongolia have undergone a major transition in recent years, but are still a work in progress. In 1997, the Minerals Law of Mongolia (the Minerals Law 1997) was introduced, under which taxation and royalty burdens were low, making Mongolia a favourable place for investors. Forming the authority on mining law for almost a decade, the Minerals Law 1997 was superseded in 2006 by a new Minerals Law (the Minerals Law 2006).

The Minerals Law 2006 was legislated for with the aim of obtaining sovereignty over Mongolia's geological wealth and maximising revenue. It reformed the granting of exploration and mining licences and delved into the concept of 'state participation', which gives the government a particular equity stake in projects (dependent on state funding) involving minerals of 'strategic importance'. The government is currently reviewing the Minerals Law 2006, but no specifics have yet been made public.

Another law which has affected the mining sector is the Windfall Tax, enacted in 2006. It imposed a 68% tax on metals sales prices. This has since been repealed and replaced by a new surtax royalty scheme, incorporated into the Minerals Law 2006, discussed below.

The newly proposed, but not yet implemented, Securities Markets Law is likely to impact the mining sector by encouraging listings on the Mongolian Stock Exchange and, more importantly, capital raising, accordingly lifting Mongolia's capital market presence.

Vietnam

The Government of Vietnam passed the Law on Foreign Investment in 1987 and the Ordinance on Mineral Resources in 1989 to encourage foreign investment. Subsequently, a number of production-sharing contracts were entered into between the government and foreign companies to explore for oil and natural gas, and numerous exploration licences to explore for coal, copper, gold, nickel, manganese, rare earths, tin, titanium, tungsten, zinc, and zirconium.

Vietnam's National Assembly then passed a new mining law in March 1996 (enacted in September 1996), to replace the 1989 Ordinance on regulations and guidelines for the frameworks for managing mineral resources and such activities as geologic surveys, prospecting, exploration, development, production, and processing of minerals in the mining sector.

The government issued a foreign investment decree in 1998 that disallowed 100% foreign ownership in oil and mineral exploration projects, but eased licensing and export rules for export-oriented companies. The government also implemented a new Enterprise Law in 2000, to simplify the license application by removing a considerable number of the sub-licence procedures.

Currently, the principal legislation is the Mineral Law, which was issued in 2010 (the Mineral Law 2010). This covers surveys of minerals, mineral exploration and mining and state management of mineral assets. It also creates the framework for the development of strategies to manage mining activities, and details the process to apply for a mineral mining licence, and the criteria for the granting of these. The government also introduced a decree in 2012 which regulates the auction of mineral mining licences.

The Mineral Law 2010 does not cover activities relating to oil, gas and natural water.

Western Australia

The Mining Act 1978 (WA) (the Mining Act 1978) and the Mining Regulations 1981 (WA) (the Mining Regulations 1981) are the principal legislative instruments governing mining in Western Australia. They contain detailed provisions concerning where mining can be carried out,

the different types of mining tenements, the terms and conditions on which mining tenements are granted and the rights and obligations of mining tenement holders, among many other matters.

The idea behind this is to provide more certainty to investors, as the interpretation of the legislation is quite literal. Accordingly, it is viewed by investors as an important aspect that their rights are set out as clearly and in as much detail as possible, which leaves as little as possible for interpretation or discretion, and in turn investors can plan in advance and assess risks more accurately.

Even though the mining sector is a fundamental aspect of the Australian economy, the structure of Australia's mining law and the mining rights granted under those laws are not political issues (unlike in Indonesia, for example). Nonetheless, there are instances where this general rule of thumb does not apply - for example, there was a debate over mining investment by Chinese investors which has reached political level. But generally speaking, the mining laws in Australia are detailed, clear and provide more certainty to investors.

The types of mining tenements that can be granted under the Mining Act 1978 are: (i) a prospecting licence; (ii) an exploration licence; (iii) a retention licence; and (iv) a mining lease.

Structure a business

Indonesia

There are few types of entities operating in Indonesia, namely Limited Liability Companies (*Perseroan Terbatas - PT*), Cooperatives (*Koperasi*), Foundations (*Yayasan*), Unlimited Partnerships (*Firma*) and Limited Partnerships (*Commanditaire Venootschap - CV*).

A *Limited Liability Company* is the type of entity most commonly used for business activities in Indonesia. It is governed primarily by Law No. 40 of 2007 regarding Limited Liability Companies (the Company Law 2007) and Law No. 25 of 2007 regarding Capital Investment (the Investment Law 2007). Under the Investment Law 2007, an approval from the Capital Investment Coordinating Board (*Badan Koordinasi Penanaman Modal - BKPM*) is required for foreign investment in a Limited Liability Company, either in an existing Limited Liability Company or in a newly established Limited Liability Company. The Company Law 2007 requires every Limited Liability Company to have at least two shareholders. The Company Law 2007 uses the concept of "par value" shares, where Limited Liability Companies have an authorised capital as well as issued and paid-up capital. At least 25% of the authorised capital must be issued to and fully paid-up by the shareholders. Foreign investors can directly invest in a Limited Liability Company that holds an IUP, subject to the minimum capital requirements imposed by the BKPM and divestment requirements.

Another type of entity which is also commonly used for business activities is a *Limited Partnership*. These are governed by the Indonesian Commercial Code (*Wetboek van Koophandel*) - a legacy from the Dutch colonialism era. A Limited Partnership consists of one or more managing partners and one or more silent partners. It is called a Limited Partnership because each managing partner is jointly and severally liable with the other managing partners for the entire debt of the Partnership up to their personal assets, while the silent partners have limited liability only up to their contribution (similar to a shareholder in a Limited Liability Company). Only Indonesian citizens can be partners in a Limited Partnership. Consequently, more arrangements will need to be created for any proposed foreign investment in a Limited Partnership. An *Unlimited Partnership* is essentially similar to a Limited Partnership, except that it does not have silent partners.

A *Cooperative* is a business entity with individuals or another Cooperative as its members. The activities of a Cooperative are based on the principles of the Cooperative and it acts as a mass economic movement based on the principle of collective efforts. Only Indonesian citizens can be members of a Cooperative. They are not open to foreign investors.

A *Foundation* is a legal entity which consists of assets being utilised to achieve certain purposes in the field of social, religion and humanity. In accordance with its purpose, a Foundation cannot be used for business activities.

Mongolia

The Revised Company Law of Mongolia of 2011 (the Company Law 2011) provides two types of companies in Mongolia, namely:

- *Limited Liability Company* - a company whose shareholders' capital is divided into shares and the right to dispose of these shares is limited by the company's charter. The number of founders of a Limited Liability Company is limited to a maximum of 50.

- *Public Company*

    - *Open Public Company* - a company whose shareholders' capital is divided into shares, which are registered at the securities trading organisation and may be freely traded to the public.

    - *Closed Public Company* - a company whose shareholders' capital is divided into shares, which are registered at the securities trading organisation but are traded in a closed market.

The most common type of legal entity used by foreign companies to set up a business in Mongolia is a Limited Liability Company. Unless provided otherwise by the law, there is no minimum capital requirement for the establishment of a company under the Company Law 2011. There are no strict rules on shareholdings and it is possible for a Limited Liability Company to have 100% foreign shareholders.

It is also possible for foreign companies to set up a *Branch Office* or a *Representative Office* in Mongolia, which must be registered with the registration authority. These are not separate legal entities and must conduct their activities in accordance with the procedures adopted by the establishing company. However, since representative offices are not allowed to bring in revenue, these will be more suitable for non-profit organisations.

Vietnam

Since joining the World Trade Organisation in 2007, Vietnam has significantly developed the legal framework to conduct business, primarily to encourage foreign investment. The legal frameworks are set out under the Law on Investment of 2005 (the Investment Law 2005), the Law on Enterprises of 2005 (the Enterprise Law 2005) and the Commercial Law of 2005 (the Commercial Law 2005).

The main types of business structure which can be adopted in order to conduct business in Vietnam are a Limited Liability Company, a Shareholding Company (also known as a Joint Stock Company), a Partnership, a Private Enterprise, a Branch Office or Representative Office of a foreign parent. In addition, foreign businesses can enter into Business Co-operation Contracts with a Vietnamese partner or Build-Operate-Transfer, Build-Transfer or Build-Transfer-Operate contracts with the Vietnamese State. However, these are forms of joint venture and are not separate legal entities.

Limited Liability Companies can have a single member or between two to fifty members, and their liability is limited to the amount which they have contributed for their shares. This type of company can be 100% foreign-owned or it can have domestic shareholders. However, it cannot issue additional shares, which restricts its ability to raise capital from investors.

A *Shareholding Company* is similar to a Limited Liability Company, except that it must have at least three shareholders, with no upper limit on the number of shareholders, and it is permitted to issue additional shares or to be listed on a public securities exchange. It may also be 100% foreign-owned. Initial public offerings of stock (an IPO) is becoming a popular method by which Shareholding Companies may raise capital, and there are two stock exchange markets, in Ho Chi Minh and Hanoi, with several hundred listed companies.

A *Partnership* is an enterprise with at least two individuals as co-owners of the company jointly conducting business under one common name, who are liable for the obligations of the Partnership to the extent of all of their assets. These individuals are called unlimited liability partners. A Partnership can also have limited liability partners, who are only liable for the debts of the Partnership to the extent of the amount of capital they have contributed into the Partnership. A Partnership is not allowed to issue any type of securities, and is consequently limited in its ability to raise funds for its business.

A *Private Enterprise* is an enterprise owned by one individual who is liable for all activities of the enterprise to the extent of all of his or her assets. Each individual can only establish one Private Enterprise and is not allowed to issue any type of securities.

A *Branch Office* of a foreign entity is a subsidiary unit of a foreign entity which is established and conducts

commercial activities in Vietnam in accordance with the law of Vietnam or an international treaty ratified by Vietnam. A Branch Office is restricted in the types of activities which are permitted and although it can import machinery which can be used in mining, it does not have an unrestricted right to carry on all activities relating to mining, and as such is unlikely to be a suitable vehicle for mining investment.

A *Representative Office* of a foreign entity is a subsidiary unit of a foreign entity which is established in accordance with the law of Vietnam in order to survey markets and to undertake a number of commercial enhancement activities (i.e. promotional activities) permitted by the law of Vietnam. It cannot carry on any direct commercial activities, and its function is essentially to act as a business development and/or marketing office of its foreign parent.

A Branch Office or a Representative Office of a foreign entity is eligible to hold an Exploration Licence. However, they are not eligible to hold a Mining Licence. Consequently, they may not be a suitable vehicle for long-term mining investment in Vietnam.

Foreign investors can also invest in the following contractual forms:

- *Business Co-operation Contract* (BCC) - a contractual joint venture between parties to carry out a specific contract, in which at least one of the parties is Vietnamese.

- *Build-Operate-Transfer* (BOT), *Build-Transfer* (BT) and *Build-Transfer-Operate* (BTO) - contractual arrangements entered into between an investor and the competent Vietnamese state body to carry out infrastructure and/or construction projects, typically where there is no sufficient local expertise in that sector.

The Investment Law 2005 applies to both direct and indirect investment in Vietnam. Direct investment includes establishing a 100% foreign-owned entity, a contractual joint venture with a local entity or the state. Indirect investment covers the purchase of shares or other forms of financial investment. Where an investor is investing directly, it must have approval for a specific project, and will receive an investment certificate conferring the approval. Indirect investment simply requires compliance with the main governing law, the Securities Law. The approval process will depend on the size and nature of the project. For mining projects special governmental approval must be obtained, which results in the process taking 1-2 months typically.

Western Australia

Mining investment in Western Australia may be conducted by using a Company, Joint Ventures (incorporated or unincorporated), Partnership, Unit Trust or Registered Foreign Company.

Companies are regulated under the Corporations Act 2001 (Cth) (the Corporations Act 2001). There are four types of companies:

- *Companies limited by shares* - the liability of its shareholders is limited to the amount (if any) unpaid on the shares held by them.

- *Companies limited by guarantee* - the liability of its members is limited to the amount they undertake to contribute to the property of the company if it is wound up.

- *Unlimited companies* - the liability of its shareholders is unlimited.

- *No liability company* - the company has no right to recover amounts unpaid on shares held. The company must be formed specifically for mining purposes.

Companies may be public or proprietary and listed or unlisted. A public company must have at least fifty shareholders and may be listed on the Australian Stock Exchanges by making offers to the public to acquire its shares, if it satisfies prescribed listing requirements. A listed company has obligations over and above those prescribed in the Corporations Act 2001, particularly relating to the prompt disclosure to the market of price sensitive information about the company. A proprietary company must have less than fifty shareholders and cannot make offers to the public to acquire its shares.

A public company can have the form of any of the above, while a proprietary company can only have the form of a company limited by shares and an unlimited company. A company limited by shares is the type of company that is commonly used by foreign investors.

A *Joint Venture* (JV) may be in the form of an incorporated JV or an unincorporated JV, where:

- An *incorporated JV* involves the joint venturers incorporating a Joint Venture Company (JVC) for the specific purpose of carrying on the JV business. The JVC is a separate legal entity from the joint venturers themselves. The rights and obligations of the joint venturers - as shareholders of the JVC - will normally be regulated in a shareholders agreement, and also be subject to the Corporations Act 2001. Each of the joint venturers will be entitled to appoint nominees to the board of directors of the JVC. Their economic interest will be in receiving dividends payable on the shares they hold in the JVC.

- An *unincorporated JV* is formed by the joint venturers entering into an agreement under which they agree to co-operate in conducting a specific business and sharing the costs and output of that business, in specified proportions. Unlike incorporated JVs, no separate legal entity is created. The joint venturers' rights and obligations are governed by the terms of the joint venture agreement. The joint venturers will be entitled to appoint members to a 'JV management committee', which supervises the carrying out of the business by a manager (usually one of the joint venturers or its subsidiary). The economic interest of the joint venturers is in receiving their agreed shares of the output of the business (minerals) which they can sell (independently of each other or jointly) to buyers.

Partnership is also considered as an unincorporated joint venture, which is governed by the contract between the joint venture partners and also by the legislation and common law in respect of Partnership. In a Partnership, each partner has unlimited liability for all the Partnership's debts.

A *Unit Trust* is a trust under which the interests of the beneficiaries are divided into units. A trustee in a Unit Trust owns the joint venture assets on behalf of the beneficiaries. A Unit Trust deed provides for the investment of the trust fund and how it is used for the creation or transfer of the units.

A *Registered Foreign Company* is a foreign company that does not use an Australian subsidiary to carry on business in Australia. Consequently, it must be registered as a foreign company with the Australian Securities and Investment Commission (ASIC) and must appoint at least one local agent.

Authority to issue mining rights

Indonesia

Indonesia is a unitary state with delegation of powers throughout the regions under the regional autonomy law. There are three levels of government in Indonesia:

- Central Government (which is based in Jakarta, the capital city, and led by the President).

- Provincial Government (which administers a particular province and led by a Governor).

- Regency/Municipality Government (which administers a particular regency/municipality within a particular province and led by a Regent/Mayor).

The regional autonomy law, which was enacted to preserve the unity of the country after the fall of Suharto's regime, sets out how the powers are delegated to the Provincial and Regency Governments.

Under the regional autonomy law, and as reinforced by the Mining Law 2009, power to issue mining rights has been delegated to the Regency Government, if the mining area is located within one Regency. If the mining area overlaps two or more Regencies, the Provincial Government has the authority to issue mining rights. The Central Government will have the power to issue mining rights if the mining area overlaps two or more provinces.

Mongolia

Like Indonesia, Mongolia is also a unitary state, but with four levels of government. There is one central government with three sub-national levels. Provinces (*aimag*) are the highest tier of sub-national government and are divided into regions (*soum*) and the capital city into districts. Governors are the local representative of the higher levels of sub-national government. Rural sub-districts (*bag*) and urban sub-districts (*horoo*), together referred to as communities, form the lowest level of government and are represented by an Assembly. Administrative units of Mongolia are based on the 1992 Constitution promoting self governance and

state management, with each having its own Governor and Assembly.

In the context of mining, the Exploration and Mining Licences are administered by a number of governmental agencies. The Ministry of Mineral Resources and Energy (MMRE), a cabinet level ministry of the Government of Mongolia, oversees the process of issuing Exploration and Mining Licences. Exploration Licences are granted by the Department of Geological and Mining Cadastre (DGMC) and the Mineral Resources Authority of Mongolia (MRAM) is responsible for granting mining licences. The DGMC is also responsible for registration of Exploration and Mining Licences.

Vietnam

The Mineral Law 2010 specifies that the Central Government has the responsibility to produce mineral strategies as well as an overall mineral master plan which details how all mining activities will be conducted. It also specifies the authority which lower tiers of government have to issue licences for exploration and mining.

Under the Mineral Law 2010, a Provincial People's Committee (being a local branch of the Communist Party), which represents the site in which the initial field survey will take place, has the authority to organise the enforcement of the mineral laws in its district, with the ultimate responsibility for the protection of unexploited minerals falling within the scope of the Ministry of Natural Resources and Environment (MONRE).

Under the Mineral Law 2010:

- The Provincial People's Committee has the authority to issue:
    - Licences for the exploration and mining operations of minerals to be used for common construction materials, peat, and minerals in areas identified and published by MONRE as areas with scattered and small-scale minerals.
    - Licences for salvage mining.
- MONRE has the authority to grant licences for exploration and mining operations of minerals in cases outside the authority of the Provincial People's Committee.

The authority that issued the relevant licence is also authorised to extend, revoke, approve the return of the licence, approve the return of part of the area and approve the transfer of the exploration or mining licence.

Western Australia

The Minister for Mines and Petroleum administers the Mining Act 1978. The Minister is assisted by the Department of Mines and Petroleum, headed by the Director General of Mines. The Minister may delegate any of his powers or functions to any officer of the Department in writing. The delegate must exercise those powers or perform those functions in accordance with the instrument of delegation. If the exercise of the powers or the performance of the functions is dependent on the opinion, belief or state of mind of the Minister in relation to a matter - the power or function so delegated may be exercised upon the opinion, belief or state of mind of the delegate in relation to that matter.

Separately, the Governor may proclaim any part of Western Australia to be a mineral field and divide any mineral field into districts. The Governor may also alter or amend the boundaries of, or abolish, a mineral field or district.

Granting of new tenements

Indonesia

Under the Mining Law 2009, an IUP is granted in two phases:

- Granting of a Mining Business Permit Area (*Wilayah Izin Usaha Pertambangan* - *WIUP*).

  The granting of a WIUP for ferrous minerals and coal is conducted through a tender process. An announcement of a tender process must be conducted at least three months before the tender process is held. The tender process is undertaken by a tender committee formed by the Minister, Governor or Regent/Mayor, in accordance with their respective authority. To be able to participate in the tender process, the participants must satisfy administrative, technical, environmental and financial requirements as provided under the implementing regulations of the Mining Law 2009. The tender committee will report the tender result to the Minister, Governor or Regent/

Mayor, in accordance with their respective authority. Subsequently, the Minister, Governor or Regent/Mayor, in accordance with their respective authority, will stipulate the winner of the tender for WIUP for ferrous mineral or coal.

The granting of a WIUP for non-ferrous minerals and rocks is conducted by way of application for an area. The applicant submits an application for an area to the Minister, Governor or Regent/Mayor, in accordance with their respective authority. Before a WIUP can be granted, a recommendation from the Governor and/or Regent is required to be obtained. A WIUP will be granted on a first-come-first-served basis to an applicant who has satisfied the longitude and latitude coordinates requirement and has paid the area reservation fee.

- Granting of an IUP

The tender winner of a WIUP for ferrous minerals or coal, or the party that has been granted a WIUP for non-ferrous minerals or rocks, must submit an application to obtain an IUP. The application must be accompanied with supporting documents evidencing fulfilment of administrative, technical, environmental and financial requirements.

Under the Mining Law 2009, one entity can only hold one WIUP, with an exception for listed entities.

Mongolia

Under the Minerals Law 2006, mineral resources naturally occurring on and under the earth's surface in Mongolia are the property of the state. As such, it is prohibited to conduct exploration or mining without a valid licence. It is important to note that only Mongolian legal entities can apply for a licence.

A set process must be followed when applying for both Exploration and Mining Licences. Both applications are made on a special government agency approved form together with various supporting documents, including but not limited to the applicant's name and details, fee and most importantly a specially approved area map with a description and the name of the aimag, soum or district in which the area is located. In the context of Exploration Licences, this area will be a quadrilateral shape, of between 25 and 400,000 hectares and with regard to Mining Licences this will be a polygon shape with borders that are straight lines. Both maps must comply with any overlapping restrictions. An application for a Mining Licence will also have to take into account various environmental factors, including evaluating the effect the licence would have on the environment.

Once submitted, the application is registered and processed and the government agency is likely to provide a decision within a few weeks. If a licence is approved, the licence must be issued and recorded in the cartographic registry of Mongolia. It is possible to apply for an extension of the term of a licence by submitting supporting documents together with a fee one month (for Exploration Licence) or two years (for Mining Licence) before expiration.

Vietnam

After the suspension by the government from August 2011, the Prime Minister issued a directive in January 2012 to resume the issuance of Exploration and Mining Licences.

All areas other than those which the government declares as being exempt will be subject to a licence auction process. This requires applicants to submit application documents and pay a participation fee and a deposit. In areas with available mineral exploration data, the deposit will be between 1% and 15% of the initial bid price set by the mining licensing authority. In unexplored areas the deposit will be based on the same criteria and the amount will be set once a survey of the area has taken place and been assessed. The deposit paid by the successful bidder will be deducted from the final bid price at the time of awarding the mining licence. Deposits paid by unsuccessful applicants will be refunded, unless they fail to submit a bid, withdrew a bid, won an auction but failed to accept the result, or won an auction but did not apply for either the Exploration Licence or the Mining Licence within the required timeframe (currently six months for an Exploration Licence and 12 months for a Mining Licence).

A winner of an auction cannot transfer or assign its winning bid to another party.

An application to obtain a mineral Exploration Licence is submitted to the Provincial People's Committee or MONRE, in accordance with their respective authority, and must be accompanied by: (i) an exploration project that

conforms with the master plan; (ii) a map of the exploration area; (iii) an environmental protection commitment - for exploration of toxic minerals; (iv) a copy of the business registration certificate; and (v) a document certifying that the applicant has an equity capital equal to at least 50% of the total investment capital for the exploration. A mineral Exploration Licence will only be issued for an area in which no other exploration or mining activities are being carried on, and there is no ban on mineral activities in that area. An organisation may obtain a maximum of five mineral Exploration Licences.

An application for a mineral Mining Licence is submitted to the same state body that issued the mineral Exploration Licence, and must be accompanied with: (i) a map of the mining area; (ii) a competent state agency's decision approving the mineral deposits; (iii) a mining investment project, attached with the decision approving the project and a copy of the investment certificate; (iv) an environmental impact assessment report or an environmental protection commitment; (v) a copy of the business registration certificate; (vi) a document certifying the winning of an auction - for areas obtained through auction; and (vii) a document certifying that the applicant has an equity capital equal to at least 30% of the total investment capital for mining.

Western Australia

While there are four types of mining tenements that can be granted under the Mining Act 1978, there are only two authorities that can grant mining tenements:

- The mining registrar or the mining warden, who can grant Prospecting Licences.
- The Minister, who can grants Exploration Licences, Retention Licences and Mining Leases (after receiving a recommendation from the mining registrar or the mining warden).

An application for a mining tenement must be made by using a prescribed form. At the time of making the application, the applicant must pay the prescribed rent for the first year of the mining tenement (or a portion of it). There are specific additional requirements for each type of mining tenement application:

- An application for a Prospecting Licence must describe the area of land in respect of which the licence is sought and be accompanied by a map that shows the boundaries of that area.
- An application for an Exploration Licence must be accompanied by a statement specifying: (i) the proposed method of exploration of the area in respect of which the licence is sought; (ii) the details of the programme of work proposed to be carried out; (iii) the estimated amount of money proposed to be expended on exploration; and (iv) the technical and financial resources available to the applicant.
- An application for a Retention Licence must be accompanied by a statement specifying: (i) the details of the programme of work proposed to be carried out; and (ii) the estimated amount of money proposed to be expended.
- An application for a Mining Lease must be accompanied by: (i) a mining proposal; or (ii) a statement in the prescribed form and a mineralisation report prepared by a 'qualified person'.

As a general principle, the mining registrar, the mining warden and the Minister must be satisfied with a prescribed objective test or standard before granting, or recommending the granting of, a mining tenement. For example, the mining registrar or mining warden must not recommend the granting of an Exploration Licence by the Minister unless he is satisfied that the applicant is 'able to effectively explore the land'.

Project life cycle

Indonesia

As discussed above, under the Mining Law 2009, IUPs are divided into two main categories:

- Exploration IUP - which encompasses the activities of general survey, exploration and feasibility study.
- Production Operation IUP - which encompasses the activities of construction, mining (exploitation), processing and refining, as well as transportation and sale.

Details of the project life cycle are as follow:

- *Exploration IUP*
  - For ferrous minerals, is valid for a maximum period of eight years, which covers an area between 5,000 to 100,000 hectares.
  - For coal, is valid for a maximum period of seven years, which covers an area between 5,000 hectares to 50,000 hectares.
  - For non-ferrous minerals, is valid for a maximum period of three years (or seven years for certain non-ferrous minerals), which covers an area between 500 to 25,000 hectares.
  - For rocks, is valid for a maximum period of three years, which covers an area between five to 5,000 hectares.
- *Production Operation IUP*
  - For ferrous minerals, is valid for a maximum period of 20 years and extendable twice for ten years on each extension, which covers a maximum area of 25,000 hectares.
  - For coal, is valid for a maximum period of 20 years and extendable twice for ten years on each extension, which covers a maximum area of 15,000 hectares.
  - For non-ferrous minerals, is valid for a maximum period of ten years (or 20 years for certain non-ferrous minerals) and extendable twice for five years on each extension (or ten years on each extension for certain non-ferrous minerals), which covers a maximum area of 5,000 hectares.
  - For rocks, is valid for a maximum period of five years and extendable twice for five years on each extension, which covers a maximum area of 1,000 hectares.

The holder of an Exploration IUP, who is in compliance with the obligations under its Exploration IUP, is guaranteed to obtain a Production Operation IUP as a continuation of its mining business activities. This provides investor certainty of tenure over the period of the licence, which is considered to be necessary to encourage investment.

Mongolia

The project cycle in Mongolia is as follows:

- *Exploration Licence*

  This licence is granted on a first-come-first-served basis for a period of three years, extendable for two further periods of three years each.

  It allows the licence holder to conduct exploration for minerals within the boundaries of the specifically delineated area and requires the holder to have a minimum spend on exploration works. There is no limit on the number of Exploration Licences that can be held by a legal entity.

- *Pre-mining Licence*

  If a mineral reserve has been located, defined and recorded, an Exploration Licence holder may apply for a Pre-Mining Agreement to conduct feasibility studies, mine development and commence production, the duration of which will be no longer than three years following the expiration of the exploration licence.

- *Mining Licence*

  Only an Exploration Licence holder may apply for a Mining Licence, which is granted for a period of 30 years, extendable twice for 20 years each time. Annual fees for Mining Licences go up to US$15/ha.

  As the name implies, a Mining Licence allows the licence holder to engage in mining of minerals, conduct exploration within the mining claim, as well as sell and export the minerals at international market prices.

- *Approval to commence mining operations*

  Before mining can be commenced, official sign-off is required from a senior official from MRAM and a local province to ensure that all documents and pre-mining requirements are compliant with the law.

- *Investment Agreement (IA)*

  This is an instrument facilitating the dialogue between the government and investors. An IA is available for Mining Licence holders undertaking an investment of more than US$50 million during the first five years of a project. The agreement sets out agreed tax rates, mineral royalties and financing arrangements. The term of an IA is heavily dependent on the amount of the investment. If the investment amount over the first five years is:

  - No less than US$50 million, the term of the IA is ten years.
  - More than US$100 million, the term of the IA is 15 years.
  - More than US$300 million, the term of the IA is 30 years.

  More importantly, a well negotiated IA can override legislative provisions and bring stability to investors already exposed to enormous geological risks and vast expenses in conducting exploration.

Vietnam

Under the Mineral Law 2010, the project life cycle for each licence is as follows:

- *Exploration Licence*

  A mineral Exploration Licence entitles the holder to undertake activities to identify mineral deposits, quality and obtain other information for mineral mining.

  A mineral Exploration Licence is valid for a period of 48 months, and may be extended multiple times for a total further period of 48 months. However, on each extension the organisation must return at least 30% of the exploration area stated in the licence.

  The size of an exploration area for certain minerals is as follows:

  - A maximum of 50 square kilometres for gemstone, semi-gemstone and metallic minerals (except bauxite).
  - A maximum of 100 square kilometres for coal, bauxite and non-metallic minerals on land (except minerals for common construction materials).
  - A maximum of 200 square kilometres for all types of minerals in the continental shelf (except minerals for common construction materials).
  - A maximum of 2 square kilometres on land or 1 square kilometre on water surface areas for minerals used for common construction materials.
  - A maximum of 2 square kilometres for mineral water and thermal water.

- *Mining Licence*

  A Mining Licence entitles the holder to undertake activities to recover minerals, including conducting construction of mine infrastructure, excavation, classification, enrichment and other activities.

  A Mining Licence is valid for a maximum period of 30 years, and can be extended multiple times for a total extension period of 20 years. A Mining Licence can be transferred to a third party, for the remainder of the licence period, subject to the approval of the government. A Mining Licence will be revoked if the licence holder has not built mine infrastructure within twelve months of the date of the licence, or failed to conduct mining within twelve months of the proposed date of commencement.

  The size of a Mining Licence area will be the size of the area that has been previously explored and for which the mineral reserves have been approved (in accordance with the master plan) and a mining investment project has been prepared for that area.

Western Australia

The following types of mining tenements can be granted under the Mining Act 1978:

- *Prospecting Licence*

  A Prospecting Licence entitles the holder to: (i) enter the land for the purpose of prospecting for minerals;

(ii) prospect for minerals; (iii) excavate, extract or remove any mineral bearing substances (up to a maximum 500 tonnes); (iv) subject to the Rights in Water and Irrigation Act 1914 (WA), take and divert any water situated in or flowing through the land for the purpose of prospecting for minerals and sink a well or bore on such land and take water from it for domestic purposes or for the purposes of prospecting for minerals.

A Prospecting Licence is valid for an initial period of four years and is extendable for another period of four years. A further extension of four years is available if the licence has obtained retention status. The area of one prospecting licence must not exceed 200 hectares. A person can be granted more than one Prospecting Licence.

- *Exploration Licence*

  An Exploration Licence entitles the holder to: (i) enter the land for the purpose of exploring for minerals, including digging pits, holes and trenches and sinking bores and tunnels; (ii) explore for minerals; (iii) excavate, extract or remove any mineral bearing substances (up to a maximum 1,000 tonnes unless the Minister approves a greater amount); (iv) subject to the Rights in Water and Irrigation Act 1914 (WA), take and divert any water situated in or flowing through the land and to sink a well or bore on such land and take water from it for domestic purposes or for the purposes of exploring for minerals.

  An Exploration Licence is valid for an initial period of five years and extendable for a further period of five years. Subsequently, a further extension of two years may be granted. Based on a graticular boundary (or block) system introduced in 1991, the size of an Exploration Licence is between one block to 70 blocks (within the known mineralisation zone) or between one block to 200 blocks (outside of the known mineralisation zone). There is no limit on the number of Exploration Licences a person can hold. An Exploration Licence holder has the right to apply for, and to have granted, one or more Mining Leases in respect of any part or parts of the Exploration Licence area.

- *Retention Licence*

  A Retention Licence is a “holding” licence for a mineral resource that has been identified under a Prospecting Licence, Exploration Licence or Mining Lease, but cannot be further explored or mined for one or more of the following reasons: (i) the resource is uneconomic or subject to marketing problems; (ii) the resource is required to sustain the future operation of an existing or proposed mining operation; (iii) there are existing political, environmental or other difficulties in obtaining requisite approvals. A Retention Licence entitles the holder to: (i) enter the land for the purpose of further exploring minerals; (ii) further explore for minerals; (iii) excavate, extract or remove any mineral bearing substances (for a maximum of 1,000 tonnes in total); and (iv) subject to the Rights in Water and Irrigation Act 1914 (WA), take and divert any water situated in or flowing through the land and to sink a well or bore on such land and take water from it for domestic purposes or for the purposes of exploring for minerals.

  A Retention Licence is valid for a period not exceeding five years and may be renewed by the Minister for a further period not exceeding five years. A Retention Licence covers the whole or any part of the land within the boundaries of the Prospecting Licence, Exploration Licence or Mining Lease.

- *Mining Lease*

  A Mining Lease entitles the lessee and its agents and employees to: (i) work and mine the land for any minerals (unless the Minister prescribes that only a specified mineral can be mined); (ii) take and remove any minerals and dispose of them; (iii) subject to the Rights in Water and Irrigation Act 1914 (WA), take and divert any water situated in or flowing through the land and to sink a well or bore on such land and take water from it for domestic purposes or for any purpose connected with mining for minerals; and (iv) do all acts and things that are necessary to effectually carry out mining operations.

  A Mining Lease is valid for an initial term of 21 years and is renewable as of right for a further term of 21 years. Thereafter, the Minister may renew the Mining Lease for successive terms of 21 years. The area of

a Mining Lease is related to an identified orebody as well as an area for infrastructure requirements. A person may be granted more than one Mining Lease.

These licenses are linked to one another, reflecting the policy to link the various stages of the project life cycle as closely as possible, so that investors can have confidence on progressing from one stage to the next and have the strongest possible reassurances that their initial investment will be rewarded if the resources are found.

Foreign ownership

Indonesia

As discussed above, a dual system was used under the Mining Law 1967, where domestic investors were investing in companies holding KPs, while foreign investors were investing in companies holding Contracts of Work.

Under the Mining Law 2009, both domestic and foreign investors can invest directly in companies that hold IUPs. There is no longer a distinction between domestic and foreign investment.

The Mining Law 2009 permits foreign investors to hold up to 100% of the shares in a company that holds an IUP, subject to a later divestment to central or regional government, government-owned enterprise or wholly-owned Indonesian company. The initial divestment requirement introduced in 2010 was 20% on the 6th year of production. The policy was changed in February 2012, and Indonesian parties must now own 20% of the shares starting on the 6th year of production increasing gradually to 51% on the 10th year of production. Separately, preserved Contracts of Work have their own divestment requirements under the provisions of their Contracts of Work.

Under the Investment Law 2007, the BKPM is the administering body for every foreign investment in Indonesia, where every proposed foreign investment in Indonesia must obtain prior approval from the BKPM. As previously mentioned, the BKPM sets out the minimum capital requirements for every sector open for foreign investment, including the mining sector. From time to time the BKPM review and revise its policy on the minimum capital requirements. However, there is no threshold for obtaining an approval from the BKPM, which means that every foreign investment must obtain approval from the BKPM.

Mongolia

With rising prices of raw materials, from which huge revenues could have been raised in the early 2000s, the Mongolian government thought that it was time to maximise its autonomy over mining projects, a stark contrast to the Minerals Law 1997.

As such, extensive state equity participation rights were introduced under the Minerals Law 2006, giving the government a right to a 34% stake in projects, where it provided no funding, and a 50% stake in projects involving state funding, where such projects involved minerals of "strategic importance". This was defined, for the first time by reference to national security, in addition to other factors including economic and social developments as well as production levels. Despite the existence of the Strategic Deposits List, this has given the government autonomy in determining what is of "strategic importance".

However, it is possible to enter into negotiations with the government as to the form and amount of state participation through an IA as explained above. In fact, the IA between Ivanhoe Mines and Rio Tinto for the Oyu Tolgoi project, which took six years to negotiate due to the ever widening gap between the investors and government, legislative changes and the influence of the global financial crisis, paved the way for parliamentary changes in this field, by allowing the government to obtain a 34% stake generally and a 50% stake after the first 30 years, giving investors time to recoup their initial outlay.

The Law on the Regulation of Foreign Investment in Business Entities Operating in Sector of Strategic Importance, passed by Parliament in May 2012, introduces a scheme of approvals necessary for incorporation of a business entity or acquisition of shares of a company in Mongolia in relation to state-owned and private investments, with the former being more onerous.

An approval from the Foreign Investment and Foreign Trade Agency (FIFTA) is required for any transaction by a foreign investor that will:

- Provide the right to acquire one third or more of the shares of a business entity operating in sectors of

strategic importance (*Business Entity of Strategic Importance* - BESI).

- Provide the right to appoint the majority of the management or board of directors.
- Provide the right to veto the management's decision.
- Provide the right to exercise a management role or determine management decisions.
- Create a monopoly in an international or domestic commodities market.
- Affect the market and price of mining products exported from Mongolia.
- Dilute the shareholding of a foreign investor.

The most notable provision requires foreign investors for any acquisition to obtain approvals from FIFTA and subsequently the Parliament, to acquire a stake of more than 49% in a BESI worth in excess of 100 billion tugriks (or approximately US$76 million). The mineral sector is classified as one of the sectors of strategic importance.

Vietnam

MONRE is responsible for formulating the mineral strategy of the country, including preparing the mineral master plan and identifying mineral areas, to granting exploration and mining licences and reviewing geological surveys.

People's Committees are responsible for introducing state regulations on: (i) management and protection of minerals; (ii) identifying areas to be banned or temporarily banned; (iii) formulating and submitting to the government for approval local master plans on exploration, mining and utilisation of minerals; (iv) granting licences; (v) approving the lease of land for mineral activities; and (vi) protecting the local environment.

Foreign participation in mining projects is regulated by the Enterprises Law 2005 and the Investment Law 2005. Under the Investment Law 2005, mining is one of the sectors in which investment is subject to conditions. It will only be permitted subject to specific conditions as stipulated by the law. Accordingly, an evaluation must be performed for issuance of an investment certificate. Investment in the mining sector must be implemented in accordance with the Mineral Law 2010, which means that it must comply with the master plans for use of minerals and other natural resources prepared by MONRE.

There is no mandatory requirement for government or national participation in mining projects, although in practice it is the ultimate owner of the land.

Western Australia

The Mining Act 1978 does not distinguish between domestic investors and foreign investors. Nonetheless, Australia exercises some control over foreign investment through the Foreign Acquisitions and Takeovers Act 1975 (Cth) (FATA). The FATA is administered by the Foreign Investment Review Board (FIRB) and the Australian Treasurer. In essence, proposed major investments by foreigners in Australia must be referred to FIRB for review and are subject to approval from the Australian Treasurer.

The proposed investments which must be referred to FIRB include:

- The acquisition of a 'substantial interest' in an Australian company or business, where the acquisition transaction values the company or business at more than AU$244 million. Under FATA, substantial interest is where a person, alone or together with any associate or associates of the person: (i) is in a position to control not less than 15% of the voting power or potential voting power in a company; or (ii) hold 15% of the issued shares in a company. Aggregate substantial interest is where two or more persons, together with any associate or associates of any of them: (i) are in a position to control not less than 40% of the voting power or potential voting power in a company; or (ii) hold 40% of the issued shares in a company.
- The acquisition of any interest in an Australian urban land corporation or trust. A land corporation or trust is deemed to be an urban land corporation or trust if it holds more than 50% of its assets in Australian urban land (that is, non-rural land). Interests in Exploration Licences exceeding five years and Mining Leases are generally deemed to be interests in Australian urban land.

While a proposed investment may not be compulsorily referred to FIRB, the Australian Treasurer has the power to declare that the proposed investment is contrary to Australia's national interest and to prohibit the investment or require divestment. Due to the significant consequences that follow if such a declaration is made, many foreign investors voluntarily refer their proposed investments to FIRB for review.

Payment obligations

Indonesia

The Mining Law 2009 creates a benchmark pricing system for minerals and coal which has the effect that royalty will always be calculated based on the actual sales price if it is higher than the benchmark price, or at the benchmark price if it is lower than the benchmark price. The benchmark prices for coal are compiled on a monthly basis from four indices: Indonesia Coal Indonesia (ICI), Newcastle Export Index (NEX), Newcastle Global Coal Index (NGC) and Platts 1.

Under the Mining Law 2009, the holders of IUPs are required to pay deadrent and/or royalties to the government. These payments are different than tax and categorised as Non-Tax State Revenue (*Penerimaan Negara Bukan Pajak* - PNBP). The government determines the applicable tariffs for deadrent and royalties payable in the mining sector and these tariffs are being reviewed and amended from time to time.

The formula to calculate deadrent is the *size of the IUP area x the applicable tariff,* while the formula to calculate royalties is the *amount of mining commodity sold (in tonnes) x sale price per tonne x the applicable tariff.* The applicable tariffs for deadrent and royalties are set out in a separate Government Regulation. For the purpose of calculating royalties, the sale price is taken to be the free on board (FOB) sales price.

In addition to payment of deadrent and royalties, the Minister of Finance introduced a new export duty tariff of 20% for certain types of ferrous minerals, non-ferrous minerals and rocks. The 20% export duty will be calculated based on the export benchmark price determined by the Minister of Trade periodically.

Mongolia

Under the Minerals Law 2006, a licence holder is required to pay licence fees and/or royalties.

The holder of an Exploration Licence must pay an annual licence fee for each hectare within the exploration area, with the following rates: (i) US$0.1 for the first year; (ii) US$0.2 for the second year; (iii) US$0.3 for the third year; (iv) US$1.00 for the fourth to sixth years; and (v) US$1.50 for the fifth to ninth years. The holder of a Mining Licence must pay annual licence fee for each hectare within the mining area in the amount of US$15, while the fee for coal and other common mineral resources is US$5 for each hectare.

The royalty payment obligations in Mongolia are based on standard flat rate royalties and new surtax royalties. Standard flat rate royalties are payable on the sale of coal (and common minerals) and other minerals (e.g., gold, copper, zinc) at 2.5% and 5% respectively. This is supplemented by the new surtax royalty scheme recently incorporated into the Minerals Law 2006. The rates of the surtax royalty vary from 1% to 30%, depending on the market price, type of mineral and scale of processing of the minerals and are applied in addition to the standard flat rate royalty mentioned above. However, it is still unclear at which stage of the process the surtax royalty rates will be imposed, how the market price will be determined and how the tax will be collected. This new surtax royalty scheme replaced the draconian Windfall Profits Tax of 68% which used to be imposed on the portion of metal sales price. This was applied on copper (above US$2,600/ton) and gold (above US$500/ounce).

Vietnam

There is no benchmark pricing system under the Mineral Law 2010.

Under the Mineral Law 2010, a mining company must pay a fee for a mining right to be granted, either the mining right is obtained through auction or through selection by the competent state agency. The fee for the mining right will be based on the price, deposit, quality and type of minerals and the mining conditions.

The calculation of royalties is regulated in a separate regulation, being Law on Royalties of 2009 (the Royalties Law 2009). Under the Royalties Law 2009, the minerals

output used to calculate royalties is the quantity, weight or volume of minerals actually exploited in a royalty period. The royalty-liable price will be the company's selling price of a unit of minerals product, exclusive of value added tax. The Royalties Law 2009 also provides the royalty rates for each type of mineral (metallic or non-metallic), which vary from 3% to 25%.

Western Australia

Unlike other countries, including Indonesia, Western Australia does not have a benchmark pricing regime requiring mining companies to sell minerals at or above benchmark prices prescribed by the government.

In Western Australia, the holder of a mining tenement must pay annual rent to the Western Australian Government. The amount of rent depends on the type of mining tenement held, the size of that mining tenement (hectares or blocks) and the term of that mining tenement.

The holder of a mining tenement must pay royalties to the Western Australian Government for all minerals derived from mining operations. There are three types of rates of royalty payable under Mining Regulations 1981:

- An amount per tonne according to quantity produced or obtained.
- An amount equal to a prescribed percentage of the 'royalty value'.
- A specific rate (as provided under Section 86 of Mining Regulations 1981).

The formula to calculate royalty value is the gross invoice value (*quantity of mineral x price of mineral*) - allowable deductions.

Mining services

Indonesia

In contrast to the Mining Law 1967, under the Mining Law 2009 a mining services provider can only provide:

- Consultation, planning and testing of equipment in the fields of mining (exploitation), or processing and refining.
- Consultation, planning, implementation and testing of equipment in the fields of general survey, exploration, feasibility studies, mining construction, transportation, mining environment, post-mining, reclamations and occupational health and safety.

This means that a mining services provider can no longer provide the services of mining (exploitation) as well as processing and refining. Further, priority must be given to local or national mining services companies (i.e. wholly-owned Indonesian) and a foreign-owned mining services company can be engaged only if the tender process result shows that there are no suitable local or national mining services companies available to perform the required services. Moreover, certain process and conditions must be satisfied before the Director General of Minerals and Coal (on behalf of the Minister of Energy and Mineral Resources) will grant its approval for the utilisation of an affiliated entity to provide mining services.

Mongolia

The Minerals Law 2006 does not specifically provide for the regulation of mining services or providers of such services. It is possible that this may be attributed to the early state of the mining laws in Mongolia. It is expected that these may be introduced with time, given the newfound trend of increased regulation, and the current review of the law may spark discussion in this area.

Vietnam

The Mineral Law 2010 specifies that any holder of an Exploration Licence or a Mining Licence must be approved by the government, have sufficient professional experience, personnel and equipment and be properly established either as an independent legal entity or a contractual joint venture with a Vietnamese entity or the state. There is no distinction between providing services and carrying on exploration or mining activities.

Western Australia

There is no provision in the Mining Act 1978 or the Mining Regulations 1981 specifically regulating mining services providers. Under its mining services agreement with the mining tenement holder, however, the mining services provider is generally required to ensure that in providing its services it will comply with all laws (including the Mining

Act 1978 and Mining Regulations 1981) and ensure that the terms and conditions of the mining tenement are not breached.

Environment

Indonesia

It is a requirement under the Mining Law 2009 that a Production Operation IUP cannot be issued unless the Environmental Impact Analysis (*Analisis Mengenai Dampak Lingkungan* - AMDAL) of a company has been approved. Indonesia's Law No. 32 of 2009 on Environmental Protection and Management (the Environmental Law 2009) requires every business that will have a significant impact on the environment to produce an AMDAL and subsequently obtain an Environmental Licence. There are certain kinds of projects and sub-projects which are not required to meet the full AMDAL requirements, but nevertheless are still required to undertake Environmental Management Efforts (*Usaha Pengelolaan Lingkungan* - UKL) and Environmental Monitoring Efforts (*Usaha Pengawasan Lingkungan* - UPL). Regulation of the State Minister for the Environment provides a list of business/ activities which are required to produce an AMDAL. Those involved in exploitation, processing and refining activities are required to produce an AMDAL, while those involved in exploration are not required to produce an AMDAL.

An Environmental Licence is valid for the same period as the main business licence, and an application to amend an Environmental Licence must be made for certain changes of the business of a company (which include change of ownership). An Environmental Licence will also specify a number of additional licences, which are normally required under the subordinate legislations of the Environmental Law 2009, such as a licence for the disposal of waste water or a licence to store and transport hazardous and toxic materials.

The holders of IUPs are also required to conduct reclamation and post-mining. A reclamation plan during exploration activities must be prepared as part of the work plan and budget prior to undertaking exploration activities. A reclamation plan and a post-mining plan for production operation are required to be submitted together with the application to obtain a Production Operation IUP. The holders of IUPs are also required to deposit reclamation bonds and post-mining bonds in a government's bank. If the holders of IUPs fail to satisfy their reclamation plan and post-mining plan, the government is entitled to appoint a third party to undertake reclamation and post-mining activities by using the bond.

Mongolia

Mongolia's environmental laws go towards regulating the relationship between the state, ordinary people and businesses to protect the environment, use and restoration of resources. Of particular significance is the Environmental Protection Law of 1995, as amended in 2005 (the Environmental Protection Law 1995), which is enforced at both state and local levels. Under the Environmental Protection Law 1995, various environmental protection duties are imposed on businesses, namely to:

- Act in compliance with the legislation and any and all decisions of the government and local officials.
- Act in compliance with environmental standards, limits, and procedures.
- Supervise the implementation of the relevant laws and regulations within organisations.
- Create and maintain records on toxic substances, adverse impacts, and waste discharged into the environment.
- Communicate the measures taken to minimise or eradicate toxic chemicals, adverse impacts and waste.

Moreover, under the Minerals Law 2006, specific requirements are imposed on Exploration Licence holders to prepare an environment protection plan and report, whereas Mining Licence holders must prepare an environmental impact assessment in addition to the environmental protection plan. A licence holder cannot commence exploration or mining operation before obtaining an approval on its environmental protections plan and/or environmental impact assessment. Both sets of obligations try to deal with any adverse impacts the operation of the business may have on the environment.

In an effort to ensure parties take their responsibilities seriously and discharge their duties, the law imposes a further obligation on licence holders to deposit funds equal to 50% of their environmental protection budget

in a special bank account established by the Governor, which is refundable on the condition that the licence holder has fulfilled the obligations in line with the environmental protection plan. If the measures outlined in such a plan are not met, the relevant authority will utilise the budget and implement the measures.

Vietnam

Under the Mineral Law 2010 and Environment Protection Law of 2005 (the Environment Protection Law 2005), every mining project is required to prepare and submit an environmental impact assessment report to the competent state agencies for approval. The environmental impact assessment report is prepared together with the feasibility study report. Mining projects can be approved and granted with investment licence, construction and operation permits after their environmental impact assessment report is approved by the competent state agencies. The environmental impact assessment report must be submitted, as part of the supporting documents, together with the application to obtain a Mining Licence.

For the purpose of prevention and mitigation of impact on the environment, the Mineral Law 2010 provides that mineral exploration and mining may be restricted in respect of those allowed to conduct exploration and mining, the amount of production, the period of mining and the areas, depth and methods allowed for exploration and mining. The Mineral Law 2010 requires mining companies to apply solutions and bear all costs for environmental protection, rehabilitation and restoration. These solutions and costs must be set out under the investment projects, environmental impact assessment report and environmental protection commitments approved by the competent state agencies. Prior to conducting mineral mining activities, mining companies must deposit environmental rehabilitation and restoration bonds. Exploration of toxic minerals requires a mining company to take measures to prevent environmental pollution and adverse effects on human beings. If it contains radioactive substances, they must also comply with the Law on Atomic Energy and other relevant laws.

Environment Protection Law 2005 requires mining companies to take measures to prevent and take action on environmental incidents. In addition, it also requires mining companies to comply with the following:

- Collection and treatment of waste water to meet environmental standards.
- Collection and treatment of solid wastes and management of hazardous wastes must follow the solid waste and hazardous waste management regulations.
- Take measures to prevent and limit hazardous dust and gas discharged into the surrounding environment.
- Rehabilitate the environment after completion of prospecting, exploitation and processing.

Moreover, storage and transportation of minerals must be in specialised equipment and securely covered so that it will not be dispersed into the environment.

For any changes on the volume, substance, start date, implementation period and completion time of a project, the relevant mining company must provide an explanation to the approving agency, and if necessary, prepare additional environmental impact assessment reports.

Western Australia

Under the Mining Act 1978, a mining proposal is defined as a document that:

- Is in the form required by the guidelines.
- Contains information of the kind required by the guidelines about proposed mining operations in, on or under the land in respect of which a Mining Lease is sought or granted.

A mining proposal must be submitted together with the application for a Mining Lease. Before a company can carry out mining operations, its mining proposal must be first approved by the Department of Industry and Resources. Part IV of the Environmental Protection Act 1986 (WA) (the Environmental Protection Act 1986) requires a mining proposal that is likely to have a significant impact on the environment to be referred to the Environmental Protection Authority for assessment.

In addition to project description, type of operation and detailed site plans, the Guidelines for Mining Proposal in Western Australia require a mining proposal to also

specify: (i) the summary of potential environmental impacts and proposed management of those impacts; (ii) the consolidated list of environmental management and rehabilitation commitments; (iii) the existing conditions of the environment (which includes geology, character of water rock and tailings, soils and soil profiles, hydrology, climate, vegetation types and biological communities); (iv) the potential environmental impact and the proposed management of those impacts (which identifies all likely environmental impacts, including significant impacts requiring the implementation of special management procedures, and development of environmental management commitments necessary to minimise, control, and rehabilitate the significant impacts); and (v) a mine closure plan.

Once the mining proposal is approved, it will be imposed as a further condition of the relevant Mining Lease, and any environmental commitment made under the mining proposal will be a legally binding obligation and remain in force until complied with. The tenement holder may also be required to deposit an environmental bond before the mining proposal is approved, with the amount being calculated according to the type and area being disturbed by the proposed mining operation. The approval to start mining activities will not be given until a deposit of the correct bond is made. The state may have recourse to the bond if the holder of a Mining Lease fails to meet its environmental commitments.

Forestry

Indonesia

Under Indonesia's Law No. 41 of 1999 on Forestry (the Forestry Law 1999), mining projects cannot be conducted in a Conservation Forest and only underground mining can be conducted in a Protected Forest, while both open-cut and underground mining can be conducted in a Production Forest. A Borrow and Use Permit (*Izin Pinjam Pakai*) from the Minister of Forestry must be obtained to undertake mining operations in forest areas. The holders of Borrow and Use Permits are required to provide compensation, either in the form of payment of PNBP or of replacement land, depending on whether the forested area within the relevant province covers more than 30% of a river basin area, island and/or provincial area. The government sets out the tariff and formula to calculate the amount of PNBP payable annually (with actual calculations affected by the current situation each year). The maximum area which can be granted for a Borrow and Use Permit is 10% of a continuous area of forest. A Borrow and Use Permit is valid for a period of 20 years but may be extended for a period in line with an extension to the relevant IUP or Contract of Work.

Mongolia

The Mongolian Constitution of 1992 states that the forests are the property of the state. In an effort to protect the woodlands, the Forest Law, which was enacted in 1995, and amended in 2007 (the Forest Law 1995), prohibited clear-cutting of trees whilst at the same time establishing environmental protections and strong enforcement mechanisms.

However, with an increase in mining, Mongolian wilderness, totalling around 11% of the total land area was threatened. As such, the Law on Prohibition of Mineral Exploration in Water Basins and Forest Areas was introduced in 2009 to protect, in part, the forests of Mongolia. The aim of the law was threefold, to:

- Revoke and modify licenses for exploration and/or mining of all mineral resources within an area of no less than 200 meters from a water or forest resource.
- Require the licence holders to be compensated.
- Empower local officials to determine the actual areas which can be mined and extend the 200 meter minimum limit as they see fit.

The implementation of this law triggered the revocation of hundreds of licences in late 2010, and yet with the discretionary rights awarded to local officials, we are still to see the significance of these provisions.

Vietnam

Under the Forest Protection and Development Law of 2004 (the Forest Protection and Development Law 2004), forests are classified into the following:

- Protection forests - with the main function to protect water sources and land, prevent erosion and desertification, prevent natural calamities and "control" climate.

- Special-use forests - with the main function for conservation of nature, specimens of the national forest ecosystems and forest biological gene sources, for scientific research, protection of historical and cultural relics as well as landscapes for recreation and tourism.

- Production forests - with the main function for production and trading of timber and non-timber forest products.

The Mineral Law 2010 prohibits mining activities in special-use forests and protection forests. To carry out mining activities in production forests, forest use rights must be obtained from the Ministry of Agriculture and Rural Development, either in the form of forest assignment or forest lease. The forest use rights are granted with prescribed rights and obligations, including payment of levies.

Western Australia

Under the Mining Act 1978, mining activities can be carried out in state forests and timber reserves. The approval from the Minister of Mines and Petroleum must be obtained in order to conduct mining activities in a state forest and timber reserve. Before granting his approval, the Minister will first consult with, and obtain the consent of, the Minister for Land Administration. An approval to conduct mining activities in a state forest or timber reserve may be given subject to prescribed terms and conditions.

The Conservation and Land Management Act 1984 (WA) (the Conservation and Land Management Act 1984) details what constitutes a state forest and a timber reserve. Under that Act, a state forest and a timber reserve comprise:

- All land that was a state forest or timber reserve under the Forests Act 1918, before the enactment of the Conservation and Land Management Act 1984.

- Any Crown land that is reserved by the Governor as a state forest or timber reserve.

- All land that is acquired and set apart, under the order from the Governor, to be a state forest or timber reserve.

- All land that is reserved as a state forest or timber reserve under any other Act.

The holder of a mining tenement must not allow detritus, dirt, sludge, refuse, garbage, mine water or pollutants from its mining tenement to obstruct any land used for forestry. Any violation will be considered an offence under the Act.

For more information, please contact:

Brian Gordon
Partner, Singapore
T: +65 6305 9533
brian.gordon@hfw.com

Cheryl Edwardes
Partner, Perth
T: +61 (0)8 9422 4793
cheryl.edwardes@hfw.com

Nicholas Poynder
Partner, Shanghai
T: +86 21 2080 1001
nicholas.poynder@hfw.com

Connie Chen
Special Counsel, Sydney
T: +61 (0)2 9320 4616
connie.chen@hfw.com

Mark Tan
Associate, Singapore
T: +65 6305 9536
mark.tan@hfw.com

James Donoghue
Partner, Perth
T: +61 (0)8 9422 4705
james.donoghue@hfw.com

Aaron Jordan
Partner, Melbourne
T: +61 3 861 4535
aaron.jordan@hfw.com

Henry Fung
Partner, Hong Kong
T: +852 3983 7777
henry.fung@hfw.com

Brendan Fyfe
Senior Associate, Singapore
T: +65 6309 3572
brendan.fyfe@hfw.com

Lawyers for international commerce

HOLMAN FENWICK WILLAN SINGAPORE LLP
3 Church Street
#19-03 Singapore 049483
T: +65 6534 0195
F: +65 6534 5864

hfw.com