

# Australian energy and resources update: November 2013

Welcome to our monthly update on Australian energy and resources-related legal developments. This update is intended as a snapshot and not specific legal advice (nor an exhaustive coverage of all relevant issues). If you would like further information on any specific issue, please let us know.

## Update on the carbon tax and MRRT repeal bills

A package of seven bills to remove the carbon pricing mechanism was introduced into the Australian House of Representatives on 13 November 2013.

The bills have progressed through the House and are now in the Senate. The Senate referred the package to the Senate Committee on Environment and Communications Legislation, which held a public hearing on 26 November. The Committee was to report on the package by 2 December and the Senate will then formally consider the bills.

As has been widely reported, Labor and Green Party Senators are expected to reject the bills or pass considerable changes to them, forcing the bills back to the House of Representatives for further consideration.

The Prime Minister has stated that he will consider extending the parliamentary term into the Christmas break in order to consider these and other legislative issues. The houses were due to rise for the Christmas break on 6 December.

Progress of the bills can be tracked at <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr5137%22>.

The bill to repeal the Minerals Resource Rent Tax was referred to the Senate Economic Legislation Committee on 14 November. The Committee was to report back to the Senate by 2 December.

Progress of this bill can be tracked at <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr5142%22>.

## Report calls for tougher greenhouse gas reduction targets

The Climate Change Authority (CAA) has called for tougher greenhouse gas emissions reduction targets in Australia, claiming in a new report that the current minimum target of a 5% reduction from 2000 levels is inadequate.

A draft report released on 30 October was open for public consultation until 29 November 2013. Submissions are being considered by the CCA prior to submission of its final report to the

## In this issue

- Update on the carbon tax and MRRT repeal bills
- Report calls for tougher greenhouse gas reduction targets
- Expanded Queensland mine water strategy
- State environmental approval processes may exempt the need for Federal approval
- Great Barrier Reef Strategic Assessment open for public comment
- New planning system for New South Wales one step closer
- Government introduces retrospective environment bill
- Fracking ban in Victoria extended to 2015
- New South Wales law allows cancellation of mining and petroleum licences for corrupt conduct.

government by the end of February 2014 in line with current legislative requirements.

Whether the draft report will be finalised is somewhat uncertain as the

CCA is to be abolished under the Coalition's carbon tax repeal package. However, the CAA has complied with its current legislative obligations and produced the draft report, which expressly addresses the "direct action" approach to emissions reduction of the Coalition Government.

A copy of the draft report and related materials can be accessed at <http://climatechangeauthority.gov.au/Node/100>.

## Expanded Queensland mine water strategy

The Queensland government has announced the expansion of the 2013-2014 Fitzroy Basin coal mine water pilot programme to effectively manage the release of coal mine-affected water that is still required due to flooding in previous years.

The expanded programme purports to allow participating coal mines to take advantage of flow events to maximise the release of legacy mine water and is one aspect of a long-term strategy to support economic development in the resources sector.

The government aims to create developments in mine water management taking coal mines to the next level of industry practice. Participating mines must have effective mine water management already in place before amendments to the relevant environmental authority will be made to improve the opportunities for release of mine-affected water.

In response to the Queensland government's announcement, Senator Larissa Waters of the Australian Greens stated that the government's expanded programme "will see more mining waste water

*flow into Queensland's rivers and the Great Barrier Reef... the Government should require safer and more sustainable disposal alternatives, such as reverse osmosis to purify the waste water".*

Information about the programme can be found at <http://www.fitzroyriver.qld.gov.au/coal-mine-management/201314-coal-mine-water-release-pilot>.

## State environmental approval processes may exempt the need for Federal approval

The Australian Minister for the Environment is progressing plans to accredit the Queensland government's environment assessment process, removing the need for additional Federal approval for certain projects.

The minister formally gave notice, in accordance with subsection 45(3) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act), of his intention to develop a draft bilateral agreement with the Queensland Government to accredit that state's environmental assessment process and remove the need for separate assessment under the EPBC Act, and to develop a second agreement with the state to accredit the state's approval process and remove the need for a separate approval under the EPBC Act for certain projects.

The first agreement proposes that the current bilateral agreement be amended to include *any* proposed actions on state land or waters that may have an impact on a matter of national environmental significance protected by the EPBC Act.

Public comment on the proposed amendments closes at 5pm on Friday, 6 December 2013. Submissions should follow the submission guidelines available on the Commonwealth Environment Department's website <http://www.environment.gov.au/topics/environment-protection/environment-assessments/bilateral-agreements/qld#a1>.

The proposed amendments to the current bilateral agreement also record the parties' intention to finalise the comprehensive approvals bilateral agreement (the second agreement referred to above) to "provide accreditation for the broadest range of approvals possible under the [EPBC Act]" by 18 September 2014. There is no draft approvals bilateral agreement available for comment at this time.

The Commonwealth is also progressing similar bilateral agreement arrangements with the New South Wales government. On 6 November, the Commonwealth Minister formally gave notice of his intention to develop a draft bilateral agreement to accredit the New South Wales government's environmental assessment process and to develop a second agreement with the state to accredit the state's approval process and remove the need for a separate approval under the EPBC Act for certain projects.

In contrast to Queensland, the First bilateral will be a new agreement that purports to cover all actions in New South Wales that are assessable under specific provisions of the *Environmental Planning and Assessment Act 1979* (NSW). Public comment on the draft agreement close at 5pm on Wednesday 18 December 2013. A copy of the draft agreement can be accessed at

<http://www.environment.gov.au/topics/environment-protection/environment-assessments/bilateral-agreements/nsw>

There is no draft approvals bilateral agreement available for review at this time.

## Great Barrier Reef Strategic Assessment open for public comment

The Great Barrier Reef Strategic Environmental Assessment has now moved to the next stage with the release of draft assessment reports for public consultation and comment by the Great Barrier Reef Marine Park Authority and the Queensland government.

These reports give some insight into how future industrial development along the Queensland coast might be assessed in the future.

The strategic assessment was required by the UNESCO World Heritage Committee's July 2011 assessment of the health of the Great Barrier Reef World Heritage Area and will ultimately assist both the Commonwealth and the Queensland government in managing the impact of resources and port development along the state's coast.

The recent inquiry into the operation of the Port of Gladstone, which has been reported in previous editions of the *Energy and Resources Update*, also forms a part of the Reef's management.

The two-part strategic assessment is being undertaken in accordance with the EPBC Act and comprises a coastal zone component and a marine component. The assessment reports are very long and technical documents that describe in detail the

potential impacts of development on the matters of national environmental significance that are protected by the EPBC Act, including the Great Barrier Reef World Heritage area. Both assessment reports are accompanied by a draft programme report that describes the proposed management arrangements for the two components going forward.

Consultation on the draft reports closes on 31 January 2014. Copies of the reports can be found at <http://www.reefhavetyoursay.com.au>.

## New planning system for New South Wales one step closer

The New South Wales government has introduced two new bills that represent the most significant proposals for change to land use planning legislation in decades.

The *Planning Bill 2013* (Planning Bill) and the related *Planning Administration Bill 2013* (Planning Administration Bill) were introduced into the NSW Parliament on 22 October 2013. The Planning Bill, if passed, will repeal the *Environmental Planning and Assessment Act 1979* (NSW) (EPA Act). However, it is not clear how the transition will be made from the EPA Act to the new regime as a great proportion of the transitional provisions have not been released.

The bills permit four types of planning instruments:

- New South Wales planning policies (to be prepared by the state's Director-General of Planning);
- regional growth plans (to be prepared by the state's Director-General of Planning);

- subregional delivery plans (to be prepared by the relevant 'subregional planning board' established under the Planning Administration Bill); and
- local plans (to be prepared typically by local governments).

These planning instruments have a clear hierarchical basis – with all plans being required to be consistent with the state planning policies.

Both bills have passed the state's lower house of parliament (the Legislative Assembly) but were amended in the upper house on 27 November. As a result, both bills have been returned to the Legislative Assembly for agreement.

A copy of the Planning Bill is available at

<http://www.parliament.nsw.gov.au/prod/parliament/nswbills.nsf/131a07fa4b8a041cca256e610012de17/33e72ad6ea1238b5ca257c0c0014134d?OpenDocument>.

## Government introduces retrospective environment bill

The Commonwealth Environment Minister Greg Hunt has introduced a bill into Parliament to ensure that past and future EPBC Act decisions are not rendered invalid if the relevant environment minister fails to thoroughly consider conservation advice on threatened species.

The bill addresses the implications arising from the Federal Court's recent decision in *Tarkine National Coalition Incorporated v Minister for Sustainability, Environment, Water, Population and Communities* [2013] FCA 694 where an approval given to Shree Minerals Limited was overturned because the minister had (in the court's opinion) failed to "have

regard to" conservation advice as required by section 139(2) of the EPBC Act.

The Environment Legislation Amendment Bill 2013 also protects the environment minister at the time from exposure to legal action if he or she fails to consider bio-conservation advice when issuing an approval under the act and makes a number of other minor amendments to the EPBC Act.

The bill, if passed, will apply retrospectively to protect decisions made by the Environment Minister before the bill was introduced. The bill was introduced into Parliament on 14 November and remains in the House of Representatives.

A copy of the bill can be accessed at <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query%3DId%3A%22legislation%2Fbillhome%2Fr5128%22;rec=0>.

## Fracking ban in Victoria extended to 2015

The Victorian Premier has announced that a "fracking" moratorium will be extended to at least July 2015 while the state government consults further with the community, despite a report recommending a lifting of the ban.

First announced in August 2012, the Victorian government's moratorium covers the granting of approvals to undertake fracking activities as part of onshore gas exploration and the granting of exploration licences for coal seam gas under the *Mineral Resources (Sustainable Development) Act 1990* while the government considered the potential impact of such activities on the environment and competing land uses. At the time, no fracking approvals had been issued in Victoria.

The government then commissioned a report on gas supply issues in Victoria, which included an examination of the moratorium. The report, which was released on 21 November 2013, recommended that the moratorium be lifted, subject to a package of reforms being developed to address the community concerns about the impacts and manage potential risks.

The gas supply report is open for public comment until March 2014 and can be accessed at <http://www.energyandresources.vic.gov.au/about-us/publications/Gas-Market-Taskforce-report>.

## New South Wales law allows cancellation of mining and petroleum licences for corrupt conduct

A new law passed by the New South Wales government which commenced on 27 November 2013 enables the cancellation of mining and petroleum licences without compensation in the event of 'serious conduct'.

The *Mines and Petroleum Legislation Amendment (Public Interest) Act 2013* amends the *Mining Act 1992* and the *Petroleum (Onshore) Act 1991* to make the 'public interest' a ground for certain decisions relating to mining or petroleum rights (e.g. an exploration licence, assessment lease and mining lease).

As a consequence, the 'public interest' will be a ground on which a decision to cancel a mining or petroleum right (or refuse to renew or transfer a mining or petroleum right) may be made.

While it is not clear how far the concept of 'public interest' stretches,

according to the second reading speech, the motivation for the introduction of the original bill was to empower the government to take the action recommended by the Independent Commission Against Corruption in its fourth and final report (which the government expects to be finalised within the next few weeks) with respect to the 'relevant licences and leases' at Doyles Creek and Mount Penny that were granted on the back of alleged corrupt conduct. The second reading speech further specifies that it is the intention of the government 'to use this special power only where the Independent Commission Against Corruption has determined that serious conduct has affected, in some essential respect, the granting of a licence or the licence holder'.

Holders of mining and petroleum rights, which are in any way connected with a history of alleged corrupt conduct, as well as interested buyers of those rights, should be aware that the Act expressly prevents a holder of a cancelled mining or petroleum right from claiming an entitlement to compensation as a result of the cancellation.

A copy of the Act, and related papers, can be accessed at <http://www.parliament.nsw.gov.au/prod/parlment/nswbills.nsf/d6079cf53295ca7dca256e66001e39d2/7ba9148c901e6240ca257c2a000ad87f?OpenDocument>.

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