

# Australian Energy and Resources Update

Welcome to our monthly update of Australian energy and resources-related legal developments.

This month saw the release of a draft report into Australia's competition policy and a green paper on the country's energy market. The release of both documents signals potentially far-reaching changes to Australian business settings, as the government attempts to reshape the economy.

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.

## Competition Policy Draft Report released

A government-appointed independent panel has released its draft report on Australia's competition policy for public comment until 17 November 2014. The panel considered whether Australia's competition policies, laws and institutions remain fit for purpose and is the first comprehensive review of competition policy since 1993.

The panel identified three factors that it believes will influence future competition policy:

- The rise of Asia, and the Asian middle class, and other emerging economies in Europe, Africa and Latin America, which presents not only opportunities for Australian business but also introduces increased competition for Australian products and services

- Australia's ageing population
- New technologies that disrupt the way in which markets operate.

The panel made the following observations and recommendations on Australian competition policy of particular relevance to the energy and resources sector:

- Cost-reflective road pricing linked to road construction, maintenance and safety should be introduced to make road investment decisions more responsive to users
- Reforms already underway in the electricity, gas and water sectors must be finished
- There should be a review by State and local governments of regulations that restrict competition, including planning and zoning restrictions and parallel importing rules

## Key issues

- Competition Policy Draft Report released
- Energy Green Paper issued for public comment
- Final report into Northern Australia released
- Bill to validate decisions made by the Western Australian Environmental Protection Authority
- Introduction of risk-based regulation for mining activities in Western Australia
- Costs of obtaining environmental approvals to increase
- Update on the Emissions Reduction Fund and the Direct Action Plan.

- Australia's intellectual property regime should be reviewed as a priority.

The panel recommended reforms to Australia's Competition and Consumer Act 2010 including:

- Amending the misuse of market power provisions to focus on competition rather than competitors
- Simplifying the cartel provisions
- Extending the operation of section 45 of the Act, which deals with contracts that may substantially lessen competition, to cover business practices that may have a similar impact.

The panel has also recommended that the third party access and pricing regulation functions of the Australian Competition and Consumer Commission be transferred to a new independent regulator. The panel proposes that this regulator would also assume certain regulatory functions of the National Competition Council and the Australian Energy Regulator and, over time, similar functions undertaken by State-based entities should also be transferred.

The panel has committed to an extensive public consultation programme before finalising its report by March 2015. Information on the consultations can be found here: <http://competitionpolicyreview.gov.au/consultation/>

A copy of the panel's draft report can be downloaded here: <http://competitionpolicyreview.gov.au/draft-report/>

An analysis of the Competition Policy Draft Report and its implications for the resources sector is in preparation and will be available shortly. If you would like further information on the implications of the report before then, please contact Dave Poddar (*contact details on p 6*).

## Energy Green Paper issued for public comment

The Australian Department of Industry has taken the next step in implementing the government's pre-election resources and energy policy by releasing a green paper on Australia's energy policy for public comment until 4 November 2014.

The green paper seeks input around four themes:

- Attracting investment to the energy sector – including by streamlining approvals processes and improving labour and productivity frameworks
- Putting downward pressure on electricity price rises through tariff reform, improved system reliability standards and use efficiency, and rationalising emissions reductions programmes
- Developing the Australian gas supply market including bringing on new gas supply quickly and developing a strategy for the unconventional gas industry in Australia
- Securing reliable and affordable future energy supplies and improving our ability to forecast supply threats and opportunities.

For each of these themes, the green paper lists a number of goals that the Australian government is pursuing or is proposing to pursue and seeks feedback on how such goals should be achieved.

Many of the issues and proposals discussed in the green paper refer to existing reviews and proposals being considered by other bodies, including the COAG Energy Council, the Renewable Energy Target scheme review and the national competition review panel (see the previous item in this update).

## The green paper can be downloaded here:

[http://ewp.industry.gov.au/sites/prod2.ewp.industry.gov.au/files/egp/energy\\_green\\_paper.pdf](http://ewp.industry.gov.au/sites/prod2.ewp.industry.gov.au/files/egp/energy_green_paper.pdf)

## Final report into Northern Australia released

Infrastructure projects feature in a list of growth opportunities for Northern Australia prepared to inform a government white paper on development later this year.

A Parliamentary Joint Select Committee released its report into the development of Northern Australia on 4 September 2014.

The committee examined the potential for the development of the region's mineral, energy, agricultural, tourism, defence and other industries, and identified the critical economic and social infrastructure to support growth. The committee also made recommendations on:

- Enhanced trade and investment links with the Asia Pacific region
- Addressing impediments to growth
- The establishment of an attractive regulatory, taxation and economic environment.

The committee's report identified opportunities for Northern Australia in most sectors of the economy, including minerals and energy, carbon farming, agriculture and manufacturing.

It also reviewed a considerable number of major capital infrastructure projects that require direct government funding. Proposed projects that should be prioritised according to the committee include:

- Significant highway upgrades
- A rail line between Mt Isa and Tennant Creek (two significant mining centres in Queensland and the Northern Territory)

- Development of major water projects, including dams.

The report identified a number of impediments to development in Northern Australia which were grouped into the following categories:

- Population – only 5 per cent of the country's population lives in Northern Australia
- Deficiencies in capital infrastructure, particularly roads and telecommunications
- Absence of adequate social infrastructure, such as schools and health facilities
- Affordability and high costs of living
- Complex regulatory environment, particularly for taxation and the treatment of fly-in, fly-out workers, land tenure administration and native title.

The recommendations from the report will be considered by the government in the development of its White Paper on Northern Australia, which is being undertaken by a specially appointed taskforce. A copy of the committee's report can be downloaded here:

<http://www.aph.gov.au/~media/02%20Parliamentary%20Business/24%20Committees/244%20Joint%20Committees/JSCNA/Final%20Report/Final.pdf>

### Bill to validate decisions made by the Western Australian Environmental Protection Authority

25 major resources projects in Western Australia will gain protection through a State bill, after a WA Supreme Court ruling threatened to invalidate their environmental approvals.

On 10 September 2014, the Western Australian Government introduced the

Environmental Protection Amendment (Validation) Bill 2014 to validate approvals given by the State Environment Minister between 2002 and 2012 for 25 major resource projects in the State.

The need for the bill arose as a result of the decision of the West Australian Supreme Court in *The Wilderness Society of WA (Inc) v Minister for Environment* [2013] WASC 307 in relation to the Browse LNG Precinct at James Price Point in the Kimberley.

The Wilderness Society had challenged the decision of the Environmental Protection Authority (EPA) to recommend approval of the Precinct on the ground that the decision was not made in accordance with the conflict of interest requirements of the Environmental Protection Act 1986 because at various times three members of the EPA had a direct or indirect pecuniary interest in the Precinct. The Supreme Court upheld the challenge and the subsequent decision by the Environment Minister under Part IV of the Act that the Browse LNG Precinct proposal could be implemented was invalid.

Following the Court's decision, the Environment Minister ordered a review of the validity of other environmental approvals issued under Part IV. Twenty-five projects were identified where there was a potential risk that the environmental approvals could be determined to be invalid for the same reason as the decision on the Browse Precinct.

These projects included major LNG and iron ore projects, such as the Macedon Gas Development which supplies 20% of the State's daily domestic gas supply, Woodside's Pluto Project, and various projects

operated by Rio Tinto, BHP Billiton and Fortescue Metals Group.

The bill purports to retrospectively "validate" any potentially invalid approvals issued before 19 August 2013 to protect them from legal challenge and provides that the rights, obligations and liabilities of all persons will be the same as if each relevant action of the EPA and subsequent environmental approval from the Minister had been validly done.

The validation does not apply to the Browse LNG Precinct proposal which is being reassessed by a new independent panel.

A copy of the bill can be downloaded here:

[http://www.parliament.wa.gov.au/Parliament/Bills.nsf/756661DEBE3EDB2848257D4E002A18EE/\\$File/Bill092-1.pdf](http://www.parliament.wa.gov.au/Parliament/Bills.nsf/756661DEBE3EDB2848257D4E002A18EE/$File/Bill092-1.pdf)

### Introduction of risk-based regulation for mining activities in Western Australia

The Western Australian Department of Mines and Petroleum (DMP) has announced it will be seeking amendments to the Mining Act 1978 and Mining Regulations 1981 as part of its ongoing "Reforming Environmental Regulation" programme to introduce risk-based environmental regulation of mining and exploration activities.

While precise details of the proposed amendments have not been released, the DMP has indicated that all environmental regulatory provisions in the Mining Act will be consolidated, with provisions concerning the grant of mining tenure to be clearly distinguished from provisions that

regulate activities on tenure once granted. The DMP has also released the following proposals:

- The Regulations will prescribe “low impact activities” that may be carried out without an approved Programme of Work (PoW)
- Tenement holders will be required to maintain a system for identifying and managing environmental risks arising from any of their operations that have been approved by a Mining Proposal (MP)
- Activities approved by PoWs or MPs will be exempt from the requirement to obtain a native vegetation clearing permit under the Environmental Protection Act 1986 (WA).

An industry briefing session will be held by the DMP on 7 October 2014 to outline the proposed reforms and seek public comment. A discussion paper explaining a revised Mining Proposal format will also be released for public comment for a four-week period. Further information on the briefing session can be accessed here:

[http://www.dmp.wa.gov.au/7105\\_20804.aspx](http://www.dmp.wa.gov.au/7105_20804.aspx)

### Costs of obtaining environmental approvals to increase

The cost of approvals from the Commonwealth Environment Minister and the Western Australian Department of Mines and Petroleum is set to rise.

From 1 October 2014, the Commonwealth Department of Environment will charge fees for applicants who refer proposals for

assessment under the Environment Protection and Biodiversity Conservation Act 1999 (Cth).

With only some limited exemptions, the fees will apply to proposals referred on or after 14 May 2014 and where the actual assessment work by the department occurs after 1 October 2014, as well as to proposals referred on or after 1 October.

The fees, which start at A\$7,352 for a basic referral, will increase from a base level depending on the level of assessment that is set for the proposal and the degree of complexity of the proposal itself.

For example, the base fee for a proposal that is assessed at the Public Environmental Review level (which is a common level of assessment) will be A\$30,202. Payments will be staged throughout the assessment process and the department will not commence work on each stage of the process until the relevant fee has been paid.

An applicant can challenge the quantum of fees applied to a referred proposal within 30 days of receiving the fee schedule from the department. If a fee is challenged, the fee will be reconsidered by a more senior departmental officer. Once that officer makes their decision, no further challenge is possible.

Further information on the fee structure and how it will be applied is available here:

<http://www.environment.gov.au/epbc/cost-recovery>

Meanwhile in Western Australia, the Department of Mines and Petroleum (DMP) is contemplating charging fees for certain approvals processes to support the ongoing implementation

of its environmental regulation programme (see previous item in this update).

The DMP has released a short discussion paper seeking industry input until 20 October 2014. The department proposes an application fee together with an annual compliance fee in relation to the approval and monitoring of mining proposals and closure plans and the assessment and approval of programmes of work. A key issue for consideration is whether the fees should be flat rates or area based.

A copy of the discussion paper is available here:

<http://www.dmp.wa.gov.au/20755.aspx>. The department proposes to impose fees from 2015.

### Update on the Emissions Reduction Fund and the Direct Action Plan

While the government is still not assured of getting its legislation through Parliament, the Department of Environment has released a number of draft methodologies for creating carbon credits under the proposed Emissions Reduction Fund (ERF).

Under the ERF, the government will only purchase emissions reductions that are generated by projects that use approved reduction calculation methods. The draft methods released to date cover emissions from:

- Energy efficient commercial buildings
- Destruction of methane from coal mine waste gas
- Avoided clearing of native vegetation regrowth

- Alternative waste treatment using certain organic wastes
- Destruction of methane from landfill gas.

Each of the draft methods is open for a 28-day public consultation period. Comment is being sought on whether projects that are developed in accordance with the draft method will cause significant adverse social, environmental or economic impacts.

The draft methods can be accessed here:

<http://www.environment.gov.au/climate-change/emissions-reduction-fund/methods>

The Commonwealth Parliament will be sitting at the end of September and early October and it is anticipated that the ERF legislation will be considered by the Senate in this sitting period. While the Labor and Greens parties remain opposed to the ERF, the only chance of success for the government to pass the legislation continues to be an agreement with the cross bench senators.

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HK-1-1063027-v1

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