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Briefing note October 2014

Australian Energy and Resources Update

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

The highlight this month is the release of the final report by the New South Wales Chief Engineer into the State's coal seam gas industry. The report acknowledges the risks associated with the development of the CSG industry in the State but ultimately concludes that those risks can be managed and makes recommendations for sweeping legislative reform.

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.

As we have gone to press, the legislation needed to establish the Australian government's Emissions Reduction Fund and implement the Direct Action Plan for addressing greenhouse gas emissions has passed the Senate with the support of the Palmer United Party and two cross bench senators.

In exchange, the government has agreed not to abolish the Climate Change Authority, which will now be tasked with investigating what sort of emissions trading scheme would be appropriate for Australia. The government also agreed to other amendments to its draft legislation proposed by the cross bench.

We will provide a fuller analysis of this development in our next Energy and Resources Update.

Key issues

CSG risks can be managed, says NSW Chief Scientist

The Chief Scientist & Engineer of New South Wales (NSW) has handed down her final report on coal seam gas (CSG) activities in NSW. After drawing on expert information and extensive consultation, the Chief Scientist made a number of findings including:

- There is significant public concern about CSG activities and community distrust of CSG companies
- CSG activities can be beneficial - industry benefits from increased quantities of locally produced gas and landholders are provided with a new revenue stream
- New knowledge and technologies are becoming available but need to be harnessed to make CSG

extraction safer and more productive.

The report concludes that whilst CSG activities will always have risks, these risks can be managed provided certain conditions are in place. The Chief Scientist also made a number of recommendations in relation to the future management of the CSG activities in New South Wales including:

- A revised legislative framework based on simplicity and clarity
- Careful designation of areas appropriate for CSG extraction
- The creation of a whole-of-environment database for monitoring CSG operations with ongoing automatic scrutiny of the resulting data
- Establishing a standing expert advisory body on CSG
- Mandatory training within the CSG industry.

A copy of the report can be downloaded here: http://www.chiefscientist.nsw.gov.au/__data/assets/pdf_file/0005/56912/140930-CSG-Final-Report.pdf.

Additional reports prepared by the Chief Scientist during the review process focusing on specific CSG-related issues are available here: http://www.chiefscientist.nsw.gov.au/reports.

Next steps in mining proposal reform in Western Australia

The Western Australian Department of Mines and Petroleum (DMP) has completed the latest stage of its Reforming Environmental Regulation program with the release of a discussion paper on reforms to the mining proposal process. Public comment on the discussion paper closed on 31 October.

Mining proposals are comprehensive documents describing a proposed mining operation from construction to mine closure. The proposed reforms are intended to create a more targeted regulatory framework through site-specific environmental risk assessments.

The proposed changes set out in the discussion paper include the following proposals:

- Tenement holders must implement and maintain management systems for identifying and controlling the environmental risks of their operations
- Tenement holders may have different mining activities approved under a single mining proposal, rather than being required to prepare a new mining proposal for each alteration to existing operations
- Minor changes to mining operations may be dealt with through a notification process instead of an approval process
- The DMP will not re-assess a mining proposal that has already been granted environmental approval under different legislation
- An online mining proposal format will be introduced, requiring proponents to set out activity-based spatial data (rather than the current requirement for a map identifying proposed activities).

The DMP also sought responses to two questions in the discussion paper:

- Should the spatial approval associated with a mining proposal be based on an activity footprint or within an approved envelope?
- To what extent should a mining proposal consider land-use, community and heritage–related issues.

The DMP will now review public submissions and prepare specific amendments to the Mining Act 1978 (WA). The discussion paper can be accessed here: http://www.dmp.wa.gov.au/documents/Mining_Proposal_Reform_Discussion_Paper.pdf.

Exploration Development Incentive tax offset legislation released

On 10 October, the Australian Treasury released exposure draft legislation for the Exploration Development Incentive (EDI) tax offset for a two-week public consultation period.

The EDI has been developed as a result of a noticeable decline in greenfields exploration and is designed to encourage small mineral exploration companies to undertake such exploration.

Under the current income tax regime, as smaller companies engaged solely in mineral exploration generally incur a tax loss, they do not receive the benefit of deductions of their expenditure.

The EDI addresses this by entitling eligible mineral exploration companies to convert a portion of their tax loss into exploration credits up to a capped amount based on the company's exploration expenditure.

These exploration credits can then be issued to shareholders, who are entitled to a refundable tax offset or

franking credit equal to the amount of the exploration credit.

Some key features of the EDI are as follows:

- Participation in the EDI will be voluntary
- Deductible expenses for activities related to determining the economic viability of an identified resource (eg feasibility studies) will not qualify for the EDI
- Entities entitled to the EDI will have a maximum exploration credit entitlement, and if entities create exploration credits in excess of this entitlement they will be subject to excess exploration credit tax and potentially shortfall penalties.

It is proposed that the EDI applies for three tax years – 2014/15 to 2016/17 – after which it will be reviewed. The exposure draft and explanatory material can be accessed here: http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2014/Exploration-development-incentive.

Australia's Industry Innovation and Competitiveness Agenda to reduce more red-tape

The Australian government has released its Industry Innovation and Competitiveness Agenda aimed at reducing costs and creating a business friendly environment with less regulation.

On 14 October, the Commonwealth Minister for Industry released an "Action plan for Australia's future" underneath the Agenda, which sets out six major reforms to be rolled out over 18 months:

- Encouraging employee share ownership
- Reforming the vocational education and training sector
- Promoting science, technology, engineering and mathematics skills in schools
- Establishing industry growth centres
- Enhancing the 457 (skilled migrant) and investor visa programmes
- Accepting international standards and risk assessments for certain product approvals.

In relation to the last reform, the government has announced that it will adopt the principle that if a system, service or product has been approved under a trusted international standard or risk assessment process, Australian regulators should only require additional approvals for the same system, service or product in Australia if there is good reason to do so.

For example, if Australian manufacturers of medical devices obtain a European Union certification for their product, additional certification by the Therapeutic Goods Administration will not be required. Similarly, there will be greater recognition and use of risk assessment processes from overseas regulators in relation to the importation and use of industrial chemicals in Australia.

More information about the Agenda and the Action Plan can be located at http://www.dpmc.gov.au/publications/Industry_Innovation_and_Competitiveness_Agenda/index.cfm.

The Australian government is also continuing its red tape reduction reforms for environmental assessments and approvals with the finalisation of bilateral agreements for assessments only with the governments of Western Australia, Victoria and Tasmania in October.

Assessment agreements have already been signed with the governments of South Australia, the Australian Capital Territory, New South Wales and Queensland. Bilateral agreements for environmental approvals are also being negotiated in those states.

However, despite the government's success in negotiating these agreements, and the progress being made on the approval bilaterals, the government's 'one stop shop' plan cannot be fully realised until legislative amendments to the Commonwealth Environment Protection and Biodiversity Conservation Act 1999 are approved.

The EPBC Amendment (Bilateral Agreement Implementation) Bill has been stalled in the Senate as a result of the Palmer United Party senators agreeing with the Australian Greens not to support the Bill, in exchange for the Greens' support of the Palmer United Party-initiated inquiry into aspects of the Queensland government.

It is now unlikely that this Bill will progress in 2014.

Shareholder carbon test case targets the Commonwealth Bank

The Australasian Centre for Corporate Responsibility (ACCR) has commenced proceedings against the Commonwealth Bank of Australia (CBA) in the Federal Court of Australia seeking a ruling on the rights of the bank's shareholders to put resolutions on carbon risk at an annual general meeting.

The case is listed for a directions hearing in late November with the substantive matter likely to be heard early next year.

The outcome will influence the ability of small groups of shareholders to move resolutions at company general meetings, without the need for the approval or support of the company's board of directors.

The proceedings arose after CBA refused to allow an ordinary resolution proposed by a small group of shareholders representing approximately 0.0086% of CBA's issued shares to be considered at the bank's AGM on 12 November 2014.

The proposed resolution required CBA to quantify total greenhouse gas emissions associated with projects it has financed and identify the current level and nature of risks to the company from "unburnable carbon" (fossil fuel projects that are unlikely to go ahead due to economic trends and global action to mitigate climate change).

ACCR alleges CBA's refusal to allow the resolution to be moved breaches section 249N of the Corporations Act 2001 (Cth).

Regardless of the court action, CBA has included a special resolution to be considered at its AGM which seeks to amend the company's constitution to require the directors to determine and report annually the amount of greenhouse gas emissions the bank is responsible for financing. The resolution was proposed by the same group of shareholders that proposed the broader resolution that is now the subject of the litigation.

Mining activity easier to locate in Victoria

On 15 October 2014, the Victorian government launched Australia's first website map service designed to help Victorian communities swiftly locate mineral and petroleum production and exploration activities on or near their land.

The "Mining Licences Near Me" service provides key information on the status of mining and petroleum licences, including when they expire and the commodities being explored or produced. The service uses a Google Map interface and is optimized for mobile devices including smartphones.

In releasing the service, the Victorian government is seeking to balance the rights of the resources industry, which contributes A$6.43 billion to Victoria's economic output each year, and the public's right to know where, when and what mining activities are being undertaken in their area.

However, the new service does not provide information on all resource activity in the state, with one CSG lobby group noting that the service only shows approved licences for exploration and does not identify any pending applications for licences, which would allow a landowner to object to the grant of the licence.

Disclosure of mining activities seems to be welcomed by Victorian communities, but it does not solve all relevant issues, and further issues may arise as the service is more widely used.

The service can be accessed here: http://www.energyandresources.vic.gov.au/earth-resources/maps-reports-and-data/mining-licences-near-me.

Release of Native Title Act Review discussion paper

The Australian Law Reform Commission (ALRC) has released its long awaited discussion paper on the review of the Native Title Act 1993 (Cth). Public comment on the paper is open until 18 December 2014.

The terms of reference require the ALRC to inquire into the elements for proving "connection" between traditional owners and their country when defining the scope of native title rights and interests, the nature and content of native title rights and interests and the barriers imposed by the authorisation requirements of the Native Title Act (where a person or persons can only become the "applicant" for a native title claim after an authorisation process in the Act is followed).

The discussion paper proposes a number of changes to the Native Title Act designed to clarify and simplify aspects of the Act that have previously been identified as causing delays or problems. It also asks questions about possible measures to improve the speed of resolution of native title claims and other aspects of the native title claim process.

A copy of the discussion paper can be downloaded here: http://www.alrc.gov.au/publications/native-title-dp82.

Contacts

Sydney

Mark Pistilli
Partner, M&A and Corporate, Resources
T: +61 2 8922 8001
E: mark.pistilli@cliffordchance.com

Dave Poddar
Partner, Competition, Regulatory Access
T: +61 2 8922 8033
E: dave.poddar@cliffordchance.com

Richard Graham
Partner, M&A and Corporate, Resources, Infrastructure
T: +61 2 8922 8017
E: richard.graham@cliffordchance.com

Diana Chang
Partner, Litigation and Dispute Resolution
T: +61 2 8922 8003
E: diana.chang@cliffordchance.com

Jane Ann Gray
Special Counsel, M&A and Corporate, Resources, Infrastructure
T: +61 2 8922 8013
E: janeann.gray@cliffordchance.com

Amelia Horvath
Counsel, M&A and Corporate, Resources
T: +61 2 8922 8023
E: amelia.horvath@cliffordchance.com

Deniz Tas
Associate, M&A and Corporate, Resources
T: +61 2 8922 8066
E: deniz.tas@cliffordchance.com

Perth

Michael Lishman
Partner, M&A and Corporate, Resources
T: +61 8 9262 5502
E: michael.lishman@cliffordchance.com

Jon Carson
Partner, M&A and Corporate, Resources, Projects
T: +61 8 9262 5510
E: jon.carson@cliffordchance.com

Justin Harris
Partner, M&A and Corporate, Resources
T: +61 8 9262 5503
E: justin.harris@cliffordchance.com

Paul Lingard
Partner, M&A and Corporate, Resources, Projects
T: +61 8 9262 5575
E: paul.lingard@cliffordchance.com

Tracey Renshaw
Partner, M&A and Corporate, Resources,
T: +61 8 9262 5505
E: tracey.renshaw@cliffordchance.com

Philip Sealey
Partner, Project Finance
T: +61 8 9262 5542
E: philip.sealey@cliffordchance.com

Paul Vinci
Partner, M&A and Corporate, Resources
T: +61 8 9262 5504
E: paul.vinci@cliffordchance.com

Robyn Glindemann
Counsel, Environmental, Projects, Resources
T: +618 9262 5558
E: robyn.glindemann@cliffordchance.com

Nicole Ortigosa
Associate, M&A and Corporate, Resources
T: +61 8 9262 5530
E: nicole.ortigosa@cliffordchance.com