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Briefing note November/December 2014

Australian Energy and Resources Update

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

Highlights this month include the New South Wales government's cancellation of all licence applications for coal seam gas (CSG) exploration, introducing a tender process for gas exploration. We also cover the rapid implementation of elements of the Australian Government's Direct Action Plan for emissions reductions, following the passage of the Carbon Farming Initiative Amendment Bill at the end of November.

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.

Key issues

- New South Wales cancels CSG applications and releases new Gas Plan
- Emissions Reduction Fund now operating and review into emissions trading established
- Queensland continues "greentape" reduction reforms
- Sinosteel's Midwest mine expansion refused on environmental grounds
- "Publish what you pay" Bill to tackle bribery issues in oil, gas, mining and forestry
- Comment sought on safety reforms in WA
- New policy on statutory penalties in Western Australia
- New Commonwealth Bill to encourage new exploration.

New South Wales cancels CSG applications and releases new Gas Plan

The New South Wales (NSW) Government has released a new Gas Plan, overhauling the requirements for gas exploration and production in the state.

As part of the Gas Plan, the government will under a Strategic Release Framework (SRF) (to be implemented from 1 July 2015) assess and release for tender areas for gas exploration.

Until the SRF is implemented, the moratorium on new exploration titles will continue. Also, existing applications for exploration titles will be cancelled under the *Petroleum (Onshore) Amendment (NSW Gas Plan) Act 2014.* Lodgement fees will be refunded and applicants who had their earlier applications terminated will be given the first opportunity to apply should the area of their earlier application be released under the SRF.

Other key features of the Gas Plan are:

- A one-off buy-back of petroleum exploration titles will be offered to existing titleholders with a "use it or lose it" policy ensuring titleholders commit to investment by the end of 2015 or face cancellation of their title.
- The Environment Protection Authority will become the lead regulator for gas exploration and production.

- New conditions for gas licences will be introduced in 2015.
- The State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 will be amended so that all gas exploration is dealt with by the NSW Minister for Resources and all gas production is dealt with by the NSW Minister for Planning or the Planning Assessment Commission.
- Projects benefitting NSW gas consumers may be designated 'Strategic Energy Projects', entitling them to receive whole-of-Government coordination (including the appointment of case managers to facilitate determination of approvals).
- Landholders will be entitled to compensation for petroleum exploration and production on their land and a Community Benefits Fund is to be established.
- An independent review of royalties will be commissioned (to report to the NSW Government in May 2015).

A copy of the New South Wales Gas Plan can be accessed here: https://www.nsw.gov.au/nsw-gas-plan.

Emissions Reduction Fund now operating and review into emissions trading established

As foreshadowed in our October Update, the Australian Government's Direct Action Plan, including its Emissions Reduction Fund designed to purchase lowest cost emissions reductions, is now a reality with the passage of *the Carbon Farming Initiative Amendment Act 2014* on 24 November 2014.

The Act received Royal Assent on 25 November and most of its provisions commenced on 13 December 2014. The Act:

- Expands the existing Carbon Farming Initiative to allow carbon credits to be created from emissions reduction activities in all sectors of the economy. Prior to the amendments, the Carbon Farming Initiative only applied to emissions reduction and avoidance activities in connection with land-based agricultural operations. As a consequence, a number of new emissions reduction methodologies have been released that describe how projects in new sectors can generate emissions reductions under the Initiative.
- Establishes the process for the conduct of auctions by the Clean Energy Regulator and empowers the Clean Energy Regulator to purchase carbon emissions using a standard carbon abatement contract and using money set aside in the Emissions Reduction Fund. In response to public comments on an earlier draft, the standard contract has been amended and released, together with an explanatory guide. The Regulator has also released guidelines for the conduct of carbon abatement auctions. The first auction will be held in early 2015, with the Regulator giving six weeks' notice of the auction date.
- Sets out a framework for the safeguard mechanism, which is an important aspect of the Direct Action Plan. The safeguard mechanism is intended to ensure that emissions reductions that are purchased by the Clean Energy Regulator using the Emissions Reduction Fund are not offset by increases in emissions in other sectors of the economy. In broad terms, the safeguard mechanism will operate by imposing a baseline emissions level on certain designated emitters and imposing an obligation on those emitters not to exceed that baseline. Detailed safeguard rules are to be developed in consultation with industry with the mechanism to commence on 1 July 2016.

The Act also makes a range of amendments to streamline a number of approval and assessment processes in the existing Carbon Farming Initiative and provides transitional arrangements for existing Carbon Farming Initiative projects to be registered under the Emissions Reduction Fund.

A copy of the *Carbon Farming Initiative Amendment Act 2014* can be accessed here: http://www.comlaw.gov.au/Details/C2014A00119/Html/Text#_Toc404952193.

Information about the carbon abatement auction process can be accessed here: http://www.cleanenergyregulator.gov.au/Emissions-Reduction-Fund/Want-to-participate-in-the-Emissions-Reduction-Fund/step2/Pages/default.aspx.

A copy of the carbon abatement contract and related materials can be accessed here: http://www.cleanenergyregulator.gov.au/Emissions-Reduction-Fund/Want-to-participate-in-the-Emissions-Reduction-Fund/step2/Pages/Carbon-Abatement-Contract.aspx.

As part of the agreement with crossbench senators to secure the

passage of the Act, the Australian Environment Minister has formally requested the Climate Change Authority to assess whether Australia should have an emissions trading scheme in the future and what conditions should cause the introduction of a trading scheme. The minister has asked the Authority to issue a draft report on which emissions reductions targets Australia should commit to by 30 June 2015 and a second draft report on an emissions trading scheme by 30 November 2015. Both reports are to be open for public comment.

The Authority has also been asked to issue a report by 30 June 2016 recommending actions for Australia to implement following the new global climate agreement to be finalised in Paris in December 2015.

Queensland continues "greentape" reduction reforms

The Queensland Government has enacted the second stage of its greentape reduction reforms. The amending legislation – *the Environmental Protection and Other Legislation Amendment Act 2014* (Qld) (EPOLA) – makes a number of significant changes to the *Environmental Protection Act 1994* (Qld) (EPA), the *Environmental Offsets Act 2014* (Qld) (Offsets Act) and the *Waste Reduction and Recycling Act 2011* (Qld) (Waste Act).

The amendments to the EPA include:

- changes to the Environmental Impact Statement (EIS) process;
- increased penalties for offences (including certain misdemeanours becoming indictable offences);
- the introduction of enforceable undertakings for contraventions of the EPA;
- imposing new duties upon owners, occupiers and auditors of contaminated land; and
- recognising the Great Barrier Reef as an area of "special significance" and, as such, falling within the scope of the most serious offences.

The EPOLA has also replaced the beneficial use approvals under the Waste Act with new "end of waste" codes and approvals. The amendments are intended to provide greater certainty as to when, and under what circumstances, a waste ceases to be classified as "waste" and therefore no longer needs to be managed as waste.

The amendments to the Offsets Act include a new process aimed at removing duplicate offset conditions imposed by different legislation. This includes a mandatory obligation on administering agencies to consider existing offset conditions.

In addition to these new changes, there are ongoing initiatives in industry-led water strategy, the identification of regulated waste and the regulation of waste management activities.

A copy of the Act can be accessed here: https://www.legislation.qld.gov.au/LEGISLTN/ACTS/2014/14AC059.pdf.

Sinosteel's Midwest mine expansion refused on environmental grounds

The Western Australian (WA) Environmental Protection Authority (EPA) has recommended to the WA Minster for Environment that a proposal by Sinosteel Midwest Corporation to expand its Mungada Ridge operations in the Blue Hills should not be implemented.

The EPA identified as the key environmental factor the maintenance of the "integrity" of landforms, defining "integrity" as a measure of the wholeness and intactness of the landform and its integrally linked ecological functions and environmental values.

Sinosteel's assertion that its proposal would impact only a small percentage of the total area of the Mungada Ridge did not fully address integrity issues as:

- it failed to have regard to the loss of the physical structure of landforms or consider the consequence of these losses; and
- it generalised all landforms as being the same rather than considering the Mungada Ridge on its own individual merits.

The proposal was deemed environmentally unacceptable and the EPA recommended it not be implemented, noting:

- the Mungada Ridge possesses significant landscape and biodiversity values;
- the Mungada Ridge is the last substantively intact landform in the Blue Hills area (other high-value landform units having been extensively mined);
- further mining would result in serious and irreversible impacts to the integrity of the landform and the environmental values it supports; and
- the proposal could not be reasonably modified or mitigated to ameliorate environmental impacts.

The appeals period has closed. A copy of the EPA's report can be found here: http://www.epa.wa.gov.au/EIA/EPAReports/Pages/1532-BlueHills.aspx?pageID=3312&url=EIA/EPAReports.

"Publish what you pay" Bill to tackle bribery issues in oil, gas, mining and forestry

The Australian Greens party has introduced the *Corporations Amendment (Publish What You Pay) Bill 2014* into the Australian Parliament to establish mandatory reporting of payments made by Australian-based extractive companies to foreign governments on a country-by-country and project-by-project basis.

Companies caught by the Bill include Australian companies involved in oil and gas extraction, hard rock mining and native forest logging.

Christine Milne, the leader of the Greens, stated that the aim of the Bill is to improve transparency and accountability of these companies and to deter corruption by requiring payments to be public, aligning with similar requirements in the United States, the United Kingdom and the European Union.

The Bill requires companies to submit a financial report detailing all payments over A$100,000 (such as royalties, dividends, bonuses, licence fees, production entitlements, infrastructure improvements, social payments and security services) made to foreign governments. The report would then be published by the Australian Securities & Investments Commission on its website. Misleading reporting would be dealt with under existing rules relating to financial statements.

In response to anticipated concerns about cost increases as a result of compliance with the Bill, Ms Milne pointed out that the companies caught by the Bill are already required to provide this information under schemes in other countries.

A copy of the Bill can be downloaded here: http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s981.

Comment sought on safety reforms in WA

The Department of Mining and Petroleum in Western Australia (DMP) has announced plans for a modernisation of WA's safety legislation and is seeking stakeholder contributions through a new consultation paper on how to structure WA's safety legislation covering mining, petroleum and Major Hazard Facilities (MHF).

Currently, there are six Acts governing safety in these areas. These include one mining act, three petroleum acts and two MHF acts. The consultation paper contains five proposals for reform:

Option 1 – One new act covering mining, petroleum and MHF. The DMP would be the only regulator.

Option 2 – Two new acts, one covering mining and the other covering petroleum and MHF. The DMP would be the only regulator.

Option 3 – Two new acts, one covering mining and the other consolidating the petroleum acts. The MHF acts remain unchanged. WorkSafe and DMP retain their current roles as regulators.

Option 4 – One new act, consolidating mining and petroleum. The MHF acts remain unchanged. WorkSafe and DMP retain their current roles as regulators.

Option 5 – One new act for mining. Existing petroleum and MHF acts remain unchanged. WorkSafe and DMP retain their current roles as regulators.

The DMP's preferred option is to unify all six Acts and move to a single regulator (being the DMP) to cover all aspects of mining, petroleum and MHF (Option 1).

The purpose of the consultation process is to determine whether stakeholders consider consolidation of the legislation to provide the best outcome for Western Australia. The consultation process does not consider the content of the current legislation and whether this should change, but only focuses on whether consolidation should occur.

The consultation paper contains a series of questions posed by the DMP, including whether the objectives outlined in the paper are appropriate, whether stakeholders consider Option 1 best fulfils the objectives, and considerations of the costs analysis in the paper.

Written submissions on the consultation paper closed on 19 December 2014. Any changes are proposed to be implemented between 2015 and 2017.

The consultation paper, prepared by Marsden Jacob Associates, can be located here: http://www.marsdenjacob.com.au/wp-content/uploads/2014/10/Consultation-RIS-Resource-Safety-WebVersion.pdf.

New policy on statutory penalties in Western Australia

The WA DMP has released a new policy on the application of statutory penalties contained in legislation administered by the department. The new policy complements the DMP's existing Enforcement and Prosecution policy of the DMP.

The policy outlines eight equally weighted principles that guide the DMP in setting and imposing penalties. Specifically, these principles are that penalties ought to be: Applicable, Consistent, Open, Proactive, Proportionate, Risk-Based, Time and Transparent.

The policy is backed by strategies that the DMP proposes to implement in order to achieve these principles, including considering moving to a unit-based system to ensure greater consistency across legislation, engaging stakeholders in the penalty review process, and imposing higher penalties on repeat offenders.

The DMP proposes to promote transparency through making penalties imposed readily available to the public and removing barriers to public release of penalty and prosecution information. Some of the strategies will require legislative amendments.

A copy of the policy is not yet available on the DMP's website; however background information on the review of statutory penalties can be accessed here: http://www.dmp.wa.gov.au/19199.aspx.

New Commonwealth Bill to encourage new exploration

On 4 December, the Australian Treasurer introduced the *Excess Exploration Credit Tax Bill 2014* into the Australian Parliament.

The Bill, together with parts of the *Tax and Superannuation Laws Amendment (2014 Measures No. 7) Bill*, introduce an exploration development incentive to encourage investment in small mineral exploration companies undertaking greenfields mineral exploration in Australia.

The incentive works by providing tax incentives to investors in those companies that choose to give up a portion of their losses from exploration expenditure in an income year. The total value of the tax incentives is limited to A$25 million for expenditure incurred by eligible companies in the 2014-2015 financial year, rising to a A$40 million ceiling for expenditure incurred in 2016-2017 when the incentive ceases.

Information about the Bills can be accessed here: http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5392.

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