

# Australian Energy and Resources Update

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

Highlights this month include a new government bill that proposes to ban hydraulic fracturing in Australia and a new commitment to a National Clean Air Agreement by July 2016.

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.

## **New bill proposes fracking ban in Australia**

The Australian Greens have introduced a bill into the Australian Parliament proposing a ban on hydraulic fracturing by corporations and giving Australian landholders the right to refuse gas and coal mining activities on their land.

The Landholders' Right to Refuse (Gas and Coal) Bill 2015 proposes to make hydraulic fracturing by corporations an offence, punishable by a penalty of up to A\$8,500,000.

Individuals whose interests are or may be affected by fracturing operations and organisations that are engaged in environmental protection activities will have the power to apply to the Federal Court to restrain a corporation that has engaged or is proposing to engage in fracturing. The Australian Environment Minister will have the same power.

The bill also requires corporations to secure the written authorisation of each person with an "ownership interest" in land before starting any new exploration or production activities for gas or coal mining on that land.

This requirement is in addition to any consent requirements that are required under state or territory resource extraction legislation. A corporation that contravenes this provision will commit an offence with a penalty of up to A\$850,000.

The prior written authorisation must include a description of

- the gas or coal mining activity proposed; and
- an independent assessment of the current and future risks associated with the proposed activity.

The authorisation will be invalid unless it contains a statement informing the landholder of their right

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to refuse to sign and an instruction to seek independent legal advice. A landholder will also have the power to commence legal action if the corporation does not obtain the necessary authorisation.

The bill has been referred to the Senate Environment and Communications Legislation Committee which is not due to report until 7 August 2015.

A copy of the draft bill can be accessed here:

[http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbills%2Fs996\\_first-senate%2F0000%22;rec=0](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbills%2Fs996_first-senate%2F0000%22;rec=0)

## Liberal victory in New South Wales suggests go-ahead for privatisations

The Liberal Government, led by Premier Mike Baird, was returned to power at the New South Wales election on Saturday 28 March.

The result has been widely interpreted as an endorsement of the Liberals' plan to partially privatise the State's electricity distributors, Ausgrid and Endeavour Energy, through the sale of a 49% share of both companies, and to fully privatise TransGrid, which operates the NSW's high voltage transmission network.

The return of the Liberal Government also suggests a continuation of the state's approach to coal seam gas development, which includes a buyback of previously issued CSG exploration licences.

The government was returned with a reduced majority, while the Australian Greens may pick up three additional seats to bring its numbers to four in

the lower house of Parliament. Two of the new Greens seats are on the state's north coast where CSG development was a key election issue.

## Ministers agree to draft a National Clean Air Agreement

Australia's environment ministers have agreed to negotiate a National Clean Air Agreement by July 2016. The proposed goal of the agreement is "the sustained reduction in air pollution and exposure for all Australians, with associated health, environmental and economic benefits."

A recently released discussion paper provides an overview of the purpose of the agreement and its suggested implementation. Submissions on the discussion paper can be made to the Australian Environment Department until 17 April 2015.

The discussion paper states that the agreement would identify the most pressing air pollution issues in Australia and help formalise government action to address them.

Priorities that have been identified for possible inclusion in the agreement are:

- Improvement of existing national standards such as the Ambient Air Quality National Environment Protection Measure for sulphur dioxide, ozone and nitrogen dioxide levels. Most resources and energy projects are required to observe this standard through conditions attached to environmental approvals
- Implementation of emission reduction measures, with a focus

on wood heaters and non-road spark ignition engines

- Creation of partnerships with community organisations and to allow for exchange of air quality information across jurisdictions; and
- Improved research into air quality data for researchers, policy makers and the community.

A copy of the discussion paper can be found here:

<http://www.environment.gov.au/protection/air-quality/national-clean-air-agreement>

## Legislation for Exploration Development Incentive passed

Legislation introducing the Exploration Development Incentive received Royal Assent on 19 March 2015.

As reported in our March 2014 *Energy and Resources Update*, the Incentive allows eligible small exploration companies to convert tax losses to credits, which are then distributed to shareholders to claim a tax deduction.

The Incentive will last for three years ending in the 2016-17 financial year and is capped at A\$25 million for the 2014-15 financial year, A\$35 million for the 2015-16 financial year, and A\$40 million for the 2016-17 financial year.

Companies that issue exploration credits in excess of their maximum entitlements will have to pay this back in the form of an excess exploration credit tax. The government may decide to extend the programme for a further period after reviewing it in 2016.

To be eligible for the Incentive:

- an exploration company must have no taxable income for the relevant financial year; and
- expenditure must be incurred from 1 July 2014 in Australia on 'greenfields' exploration for minerals.

With the introduction of the Incentive, mining exploration companies can now create exploration credits (in addition to using tax losses to reduce their taxable income in later years). This encourages investment in junior exploration companies that do not pay any form of dividend.

A copy of the *Tax and Superannuation Laws Amendment (2014 Measures No. 7) Bill 2015* (Cth) which contains the Incentive may be found here:

[http://parlinfo.aph.gov.au/parllInfo/download/legislation/bills/r5389\\_aspassed/toc\\_pdf/14262b01.pdf;fileType=application%2Fpdf](http://parlinfo.aph.gov.au/parllInfo/download/legislation/bills/r5389_aspassed/toc_pdf/14262b01.pdf;fileType=application%2Fpdf)

## Final details for Emissions Reduction Fund auctions settled

The Carbon Credits (Carbon Farming Initiative) Rule 2015 (Cth), which finalises a number of important process matters ahead of the first Emissions Reduction Fund (ERF) auction on 15 and 16 April 2015, has been laid before the Australian Parliament without incident and is now operational.

These process matters include the duration of a carbon abatement contract between the Clean Energy Regulator (CER) and an applicant wishing to participate in an ERF auction; and the key principles that should be reflected in the ERF auction guidelines.

- A link to the Carbon Credits (Carbon Farming Initiative) Rule 2015 and Explanatory Memorandum can be found here: <http://www.comlaw.gov.au/Details/F2015L00156/Download>
- A link to the ERF auction guidelines published by the CER can be found here: <http://www.cleanenergyregulator.gov.au/Emissions-Reduction-Fund/Want-to-participate-in-the-Emissions-Reduction-Fund/step2/Documents/ERF%20auction%20guidelines.pdf>

The new rule replaces in part the existing Carbon Credits (Carbon Farming Initiative) Regulations 2011 and the remaining regulations will be transferred across to the rule as the Carbon Farming Initiative and Direct Action Plan measures are fully developed.

## Emissions Reduction Fund Safeguard Mechanism Consultation Paper released for comment

The Australian Environment Minister released the Emissions Reduction Fund Safeguard Mechanism Consultation Paper on 26 March 2015. Written submissions on the Consultation Paper from interested parties are due by midday (AEST) on 27 April 2015.

The safeguard mechanism, which forms part of the Australian Government's Direct Action Plan to cut emissions to 5% below 2000 levels by 2020, is not scheduled to start until 1 July 2016.

The main object of the safeguard mechanism is to ensure that emissions reductions purchased by

the Clean Energy Regulator (CER) in the form of Australian Carbon Credit Units through the ERF auction process are not displaced by large emitters that choose not to participate in the process.

This is achieved by imposing a statutory duty on those large emitters to ensure that the net emissions from their designated large facilities do not exceed the relevant baseline emissions numbers for the applicable monitoring period.

The Environment Minister is due to release draft safeguard rules specifying the baseline emissions numbers in July 2015, with a view to finalising them on or before 1 October 2015.

The Consultation Paper addresses a number of questions regarding the design elements of the safeguard mechanism, with a particular focus on the waste and electricity sectors, and proposes a number of possible approaches for consideration:

**Coverage:** Which emissions will be covered; who will participate; and what happens if a facility falls below the baseline emissions number

**Baselines:** What are the minimum baseline amounts; what changes are required to current reporting methods; what changes are required to baselines to reflect the variability of emissions in certain energy and resource sectors; and what are the rules for establishing baselines for new investments and significant expansions

**Emissions management:** How will the natural variability of emissions be addressed; how can carbon offsets be used to net off emissions; what exemptions should exist for

exceptional circumstances (e.g. natural disaster); and what enforcement options are available to the CER?

Administration: What information should the CER publish; and what level of review should be undertaken by government regarding the operation of the safeguard mechanism?

A copy of the Consultation Paper can be found here:

<http://www.environment.gov.au/system/files/pages/dbabd13c-f8f1-49cd-ab40-621f056de35a/files/safeguard-mechanism-consultation-paper.pdf>

## Panel to review National Energy Market

The Australian government has named the members of the expert panel that will review governance arrangements for Australian energy markets.

The review will consider the legislative framework that establishes and assigns functions to energy market institutions and identify governance arrangements that support market outcomes in the long-term interests of consumers.

The three person panel is chaired by Dr Michael Vertigan AC, who is currently a Director of the Commonwealth Superannuation Corporation and has previously been a director of a number of energy companies.

Professor George Yarrow, Chairman of the Regulatory Policy Institute at Oxford, and Euan Morton, Principal of Synergies Economic Consulting, are also on the panel which will provide advice to the Council of Australian Governments (COAG) Energy

Council on potential areas for improvement to energy market institutions and the current market governance model.

The panel will release an issues paper in April which will be followed by an extensive public consultation process. The final report will be delivered to the COAG Energy Council in September 2015.

Details of the panel are available here:

<https://scer.govspace.gov.au/workstreams/energy-market-reform/review-of-governance-arrangements/>

## Draft policy on setting conditions under bilateral agreement released

The Commonwealth Environment Department has released a draft policy on condition setting under bilateral arrangements established under the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act). The draft is open for public comment until 15 May 2015.

In line with the current Australian government's efforts to streamline the environmental approvals process, the draft policy seeks to reduce the duplication of conditions and the imposition of inconsistent conditions by giving states and territories the primary responsibility for setting and enforcing conditions for the protection of matters of national environmental significance regulated by the EPBC Act.

Under the draft policy, once the environmental assessment of a proposal by a state or territory is complete, a risk assessment will be conducted by the Commonwealth department before the final approval

decision is made by the state or territory.

This risk assessment will form the basis of the Commonwealth's decision whether to attach additional conditions to the approval and will involve considerations such as the scale and intensity of the potential impacts, the compliance history of the proponent, and the likelihood of compliance with the conditions set by the state or territory.

Importantly, the Commonwealth will retain the power to add to or vary the conditions set by the state or territory. For example, after conducting a risk assessment, if it considers that non-compliance with the conditions set by the state or territory could potentially cause unacceptable impacts on a matter of national environmental significance regulated by the EPBC Act, the Commonwealth may attach a single additional condition requiring compliance with the state conditions.

This means that the proponent would still only be required to comply with a single set of conditions, but, significantly, the Commonwealth has the ability to step in and take enforcement action against the proponent under the EPBC Act for non-compliance.

The draft policy may be accessed here:

<http://www.environment.gov.au/protection/environment-assessments/bilateral-agreements/condition-setting-assessment#reducing>



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