

Australian Energy and Resources Update

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

Highlights this month include the results of the first carbon abatement auction under Australia's Direct Action program and the release of the Australian government's vision for the energy sector.

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.

First Direct Action auction sets price of carbon at A\$14

The first Emissions Reduction Fund auction was conducted by the Australian Clean Energy Regulator on 15 and 16 April 2015. The results of the auction were released a week later:

- 107 contracts were awarded to 43 contractors, covering 144 projects registered under the Emissions Reduction Fund. This amounts to a total commitment of approximately 47 million tonnes of carbon abatement. Australia's commitment under the Kyoto Protocol is to reduce emissions by 5 per cent below 2000 levels by 2020, which equates to 236 million tonnes of carbon abatement between now and 2020
- The total value of contracts awarded is approximately A\$660 million, with the average price per

tonne of abatement being A\$13.95

- Contract lengths range between three and ten years, with the majority being for the standard contract period of seven years
- The largest single contract is for 3.5 million tonnes of abatement and the smallest is for 12 000 tonnes of abatement
- The majority of contractors applied under the more established carbon sequestration methods (which accounted for just over half the total tonnes of abatement contracted for) and landfill and alternative waste treatment methods that have been in place since the introduction of the original Carbon Farming Initiative.

The Australian Government has enthusiastically welcomed the results of the auction while turning its attention to finalising the country's post-2020 reduction target to take to the next full Conference of Parties to

Key issues

- First Direct Action auction sets price of carbon at A\$14
- Energy White Paper released
- ACCC to review competitiveness of Eastern Australian wholesale natural gas market
- Discussion papers released by South Australian Uranium Inquiry
- High Court upholds cancellation of exploration licences obtained through alleged corruption
- "Low impact activities" definition released for public comment in WA
- Australian Energy Regulator cuts transmission network revenue.

the UN Framework Convention on Climate Change in Paris at the end of

2015. Public input on the target closed at the end of April and the Climate Change Authority has recommended a target of 30 per cent below 2000 levels by 2025 and 40 to 60 per cent by 2030.

Detailed results of the auction, including information about the successful projects, may be accessed here:

<http://www.cleanenergyregulator.gov.au/Emissions-Reduction-Fund/Want-to-participate-in-the-Emissions-Reduction-Fund/step2/auction-results-april-2015/Pages/default.aspx>.

Energy White Paper released

On 8 April, the Australian Government released its Energy White Paper outlining its vision for the Australian energy sector – namely, providing competitively priced and reliable energy supply to households, business and international markets through increased competition, productivity and investment. The intention of the White Paper is to provide policy certainty for investment in the energy market.

The Australian Government's priorities to achieving this vision include:

- **Competition (electricity):** Increasing competition in the electricity market to keep prices down for consumers through (amongst other things) privatisation of energy assets, the removal of cross subsidies and the introduction of cost-reflective tariffs which reflect the cost of supply at the time of use
- **Competition (gas):** Increasing competition in the gas market to keep prices down for consumers through (amongst other things) improving access to gas

pipelines to allow gas to be more readily traded between locations in order to ameliorate price pressures and further develop a liquid wholesale gas market

- **Productivity:** Improving energy productivity to promote economic growth by (amongst other things) increasing product choice for and information to customers about energy efficient options for the home and office and developing a National Energy Productivity Plan to increase the focus of key stakeholders on energy productivity; and
- **Investment:** Investing in Australia's energy future by (amongst other things) improved workforce productivity, deregulation and streamlining of project approvals, better engagement with communities affected by energy development projects and the adoption of new energy supply technologies.

A copy of the Energy White Paper can be found here:

<http://ewp.industry.gov.au/sites/test.ewp.industry.gov.au/files/EnergyWhitePaper.pdf>.

ACCC to review competitiveness of Eastern Australian wholesale natural gas market

As foreshadowed in the Energy White Paper mentioned above, the Australian Minister for Small Business issued a letter to the Australian Competition and Consumer Commission (ACCC) on 9 April directing it to hold a public inquiry into the competitiveness of wholesale gas prices and the structure of the upstream, processing, transportation, storage and marketing segments of

the gas industry operating in the eastern half of Australia, pursuant to s95H(1) of the *Competition and Consumer Act 2010*.

The inquiry will affect gas producers, sellers and buyers and infrastructure owners and operators.

In preparing its report, the ACCC will liaise closely with the Australian Minister for Industry and Science, with whom the policy responsibility for the wholesale gas industry resides and the Australian Productivity Commission which issued reports to government on the electricity market in 2013 and the mineral and energy resource exploration market in 2014.

An issues paper is due to be released by the ACCC by 31 May 2015 on matters relevant to the inquiry and ACCC will also call for public submissions.

The final report from the ACCC is due by April 2016.

Further information on the inquiry can be found here:

<http://www.accc.gov.au/regulated-infrastructure/energy/east-coast-gas-inquiry-2015>.

Discussion papers released by South Australian Uranium Inquiry

The South Australian Nuclear Fuel Cycle Royal Commission has released discussion papers seeking public input on two aspects of the nuclear fuel cycle. Submissions can be made until 24 July 2015.

The first discussion paper covers exploration, extraction and milling. It seeks specific input on:

- What else is needed to encourage further exploration for

uranium and thorium and what economic conditions (including taxation and research & development funding) are required for the long-term financial viability of an exploration industry in South Australia

- What needs to be done now and in the future in relation to investment in skills and training, research, education and infrastructure to support decisions to invest in new nuclear projects or expand existing ones; and
- If there was an expansion of exploration or extraction activities, what would be the estimated flow on benefits to economic activity in South Australia.

The second discussion paper deals with management, storage and disposal of nuclear and radioactive waste and asks:

- What sort of mechanisms should be established to fund the costs associated with storage or disposal of radioactive wastes generated either in Australia or overseas (and whether there are current examples of funding mechanisms that should be considered); and
- Whether there are any best practice models or case studies for the operation and legal regulation of storage and disposal facilities and what processes need to be undertaken to build public confidence in those facilities.

The discussion papers reflect two of the four matters that the Royal Commission is tasked with investigating. Discussion papers addressing the other two issues – further processing and manufacture and electricity generation – will be released shortly.

The Australian Government noted in its recently released Energy White Paper (see above) that it will consider the outcomes of the Royal Commission as they relate ongoing investment in the nuclear regulatory framework and further development of Australia's nuclear knowledge and skills to underpin regulatory capability.

A copy of the discussion papers from the Royal Commission can be accessed here:

<http://nuclearrc.sa.gov.au/our-reports/>.

High Court upholds cancellation of exploration licences obtained through alleged corruption

The Australian High Court has upheld the cancellation of three exploration licences by special legislation passed by the New South Wales Parliament. The Mining Amendment Act 2014 implemented the Independent Commission Against Corruption (ICAC)'s findings that the exploration licences were "so tainted by corruption that [they] should be expunged or cancelled".

The holders of the cancelled licences challenged the validity of the Amendment Act. The principal argument was that the Act involved an exercise of judicial power which could not be exercised by a state parliament. The High Court disagreed saying that the purpose of the Act was to promote integrity in public administration and it did not have the characteristics of judicial power such as administering punishment or determining guilt.

Since the High Court's decision, ICAC's powers have been successfully challenged in an unrelated case. As a result, many of ICAC's investigations and

prosecutions have been, or will be, challenged or abandoned, including dropping separate criminal charges against the directors of the companies that held the cancelled licences. Despite the collapse of the underlying corruption allegations, the legislation and resulting cancellations remain valid.

The New South Wales government has been adamant that the cancellation of the licences did not increase Australia's sovereign risk, arguing that by removing and deterring corruption in the tenement application process, Australia's reputation had been enhanced.

A copy of the judgment in *Duncan v New South Wales; NuCoal Resources Limited v New South Wales; Cascade Coal Pty Limited v New South Wales* [2015] HCA 13 can be found here: <http://www.austlii.edu.au/au/cases/cth/HCA/2015/13.html>.

"Low impact activities" definition released for public comment in WA

As noted in previous Energy & Resources Updates, the Western Australian Department of Mines and Petroleum proposes to make substantial amendments to the State's Mining Act. One such proposal is to remove the requirement for "low impact activities" (LIAs) to be approved by the Department through a programme of work or mining proposal prior to those activities being undertaken.

The DMP has now released a discussion paper seeking comment on the proposed definition of LIAs and how they must be carried out. Comment is open until 28 May 2015.

Proposed LIAs include:

- Activities that involve no clearing of native vegetation

- Exploration drilling if the drill pads are less than 20m x 20m in size; drilling is along drill lines with a grid density of no greater than 100m x 100m or if not in a grid, the drill lines are at least 100m apart
- Scrape and detect operations (less than 2ha cleared at any one time)
- Excavation for exploration sampling where the excavation rate is less than 20m³ and each excavation is at least 100m away from any other excavation
- Clearing for construction of temporary access tracks for drilling operations, pipeline maintenance and ancillary infrastructure, camp sites and storage areas.

If the proposed activity is to be carried out in specified environmentally sensitive areas or ecosystems, the activity cannot be an LIA and the existing approval process will remain.

LIAs must be carried out in accordance with prescribed environmental standards to ensure that the LIA is conducted in a manner that limits or avoids harm to the environment and limits cumulative disturbance in any given area. It is also proposed to amend the Mining Regulations to state that certain environmental obligations will be “deemed conditions” on all tenements and that breach of those conditions will trigger the existing enforcement and penalty regime in the Mining Act. These obligations include weed control and dieback measures, rehabilitation, removing rubbish, controlling intercepted and discharged waters, and record keeping.

The discussion paper can be accessed here:

<http://www.dmp.wa.gov.au/documents>

[/153592_Low_impact_Activities_Document.pdf](#).

Australian Energy Regulator cuts transmission network revenue

The Australian Energy Regulator (AER) has released its decision setting the amount of revenue that can be recovered by TransGrid, the transmission network provider in New South Wales, for the three year period commencing 1 July 2015.

The AER set the revenue cap at A\$2,188.9 million which is more than 24% below TransGrid’s request to the AER in June 2014 (A\$2,906 million).

TransGrid is entitled to appeal the AER’s decision. However the bigger issue for the New South Wales government, which owns TransGrid, is the impact that the AER’s decision may have on the value of the company as the government prepares to privatise the company in the next 12 months. No doubt investors will be considering the AER decision carefully when modelling the future revenue potential of the TransGrid network and how much they might be willing to pay.

A copy of the AER decision can be found here:

<http://www.aer.gov.au/sites/default/files/AER%20-%20Final%20decision%20TransGrid%20transmission%20determination%20-%20Overview%20-%20April%202015.pdf>.

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

Nadia Kalic

Counsel, M&A and Corporate, Infrastructure
T: +61 2 8922 8095
E: nadia.kalic@cliffordchance.com

Perth

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: +61 8 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

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

HK-1063359-v1

www.cliffordchance.com

Clifford Chance, Level 7, 190 St Georges Terrace, Perth, WA 6000, Australia
© Clifford Chance 2015

Clifford Chance is a law firm with liability limited by a scheme approved under Professional Standards legislation

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

Abu Dhabi ■ Amsterdam ■ Bangkok ■ Barcelona ■ Beijing ■ Brussels ■ Bucharest ■ Casablanca ■ Doha ■ Dubai ■ Düsseldorf ■ Frankfurt ■ Hong Kong ■ Istanbul ■ Jakarta* ■ Kyiv ■ London ■ Luxembourg ■ Madrid ■ Milan ■ Moscow ■ Munich ■ New York ■ Paris ■ Perth ■ Prague ■ Riyadh ■ Rome ■ São Paulo ■ Seoul ■ Shanghai ■ Singapore ■ Sydney ■ Tokyo ■ Warsaw ■ Washington, D.C.

*Linda Widyati & Partners in association with Clifford Chance.