

Australian Energy and Resources Update

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

Highlights this month include the release of the Australian Government's strategy for development of the northern third of the country, new rules around port developments adjacent to the Great Barrier Reef and further reform of the approvals process for the New South Wales mining 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.

New Integrated Mining Policy for New South Wales

The New South Wales Department of Planning and Environment announced its Integrated Mining Policy (IMP) on 28 May 2015. The IMP aims to streamline the process for assessing and regulating mining development across the State.

The Department is seeking community and industry feedback on the first package of proposed policy reforms under the IMP umbrella by 9 July 2015:

- Standardised Secretary's Environmental Assessment Requirements (SEARs): An environmental impact statement for a significant development that is regulated by the Environmental Planning and Assessment Act 1979 (NSW) must (amongst

other things) take into account any additional environmental assessment requirements issued by the Secretary of the Department. To avoid duplication and facilitate integration across regulatory agencies, it is proposed that standard SEARs incorporate and consolidate the assessment requirements of the following agencies:

- Department of Planning and Environment for development consent applications;
 - Environment Protection Authority for Environment Protection License applications; and
 - Division of Resources and Energy for Mining Lease applications.
- Mine Application Guidelines: Guidelines have been prepared

Key issues

- New Integrated Mining Policy for New South Wales
- Gas Community Benefits Fund consultation in New South Wales
- Inquiry into unconventional gas resources underway in Victoria
- Northern Australia White Paper released
- New port development laws to protect the Great Barrier Reef
- Draft Gladstone Port Master Plan released for comment
- Mental health impacts of FIFO arrangements considered in Western Australia
- Australian Law Reform Commission recommends changes to proving native title rights and interests
- Native title resolution in south west Australia.

to assist proponents better understand how to put together a preliminary environmental assessment and environmental impact statement for their mining or extractive industry project in NSW. It is hoped that this will reduce the need for agencies to seek further information from proponents after initial documents are submitted which can delay the process.

- Policy Framework for Biodiversity Offsets for Upland Swamps and Associated Threatened Species: The objective of this policy is to ensure alignment with the framework outlined in the NSW Biodiversity Offsets Policy for Major Projects in respect of subsidence impacts on upland swamps and associated threatened species to ensure there is no overlap or gaps.

Details regarding the Department's second stage of proposed policy reforms have not yet been confirmed.

Further information on the Integrated Mining Policy can be found here: http://planspolicies.planning.nsw.gov.au/index.pl?action=view_job&job_id=7086.

Gas Community Benefits Fund consultation in New South Wales

The New South Wales Government has also released a discussion paper on establishing a Gas Community Benefits Fund and is seeking views from stakeholders about the Fund's structure and design by 17 July 2015. Establishment of the fund was one of the key priorities identified in the NSW Gas Plan released in November 2014.

Contribution to the Fund will be voluntary rather than mandatory. However, gas companies (both

explorers and producers) will receive an incentive from the NSW government for choosing to contribute to the Fund. The incentive will take the form of a royalty reduction – A\$1 will be deducted from a company's gas royalty liability for every A\$2 paid into the Fund, capped at 10% of the royalty payable for each gas project in each production year.

If a gas company makes contributions during the exploration phase (ie front end payments into the Fund) it will be entitled to claim credit for those contributions when it begins to pay royalties during the production phase. However there will be no refund if the project never moves into production.

Stakeholders are encouraged to provide their views about the governance and funding decisions of the Fund, including whether the Fund should be administered by the NSW Government or by an independent body comprising government, industry and community members.

Further information about the Discussion Paper on Establishing a Gas Community Benefits Fund can be found here:

<http://www.haveyoursay.nsw.gov.au/assets/Uploads/nsw-gas-community-benefit-fund-discussion-paper-1.pdf>.

Inquiry into unconventional gas resources underway in Victoria

The Victorian Parliament has ordered an inquiry into onshore unconventional gas in Victoria. The closing date for public submissions to the inquiry is 10 July 2015.

The Standing Committee on Environment and Planning has been asked to inquire into and consider

matters relating to the exploration, extraction, production and rehabilitation for onshore unconventional gas in Victoria. An interim report is due no later than 1 September 2015 and a final report is to be delivered no later than 1 December 2015.

The inquiry will consider the following:

- the prospectivity of Victoria's geology for commercial sources of onshore unconventional gas
- the environmental, land productivity and public health risks, risk mitigations and residual risks of onshore unconventional gas activities
- the co-existence of onshore unconventional gas activities with existing land and water uses
- the ability of potential onshore unconventional gas resources to contribute to the State's overall energy sources
- the resource knowledge requirements and policy and regulatory safeguards that would be necessary to enable exploration and development of onshore unconventional gas resources; and
- relevant domestic and international reviews and inquiries covering the management of risks for similar industries including, but not limited to, the Victorian Auditor-General Office's report Unconventional Gas: Managing Risks and Impacts (contingent upon this report being presented to the Victorian Parliament).

More information about the inquiry is available here:

<http://www.parliament.vic.gov.au/epc/references-committee-inquiries/article/2634>.

Northern Australia White Paper released

The Federal Government has released a white paper setting out the Government's priorities and strategies for development of the northern part of Australia.

The white paper follows the release of a green paper in 2014 which received over 500 submissions. These submissions, together with work done by the Joint Select Committee chaired by north Queensland parliamentarian Warren Entsch, an infrastructure audit prepared by Infrastructure Australia and input from a select advisory committee, informed the development of the white paper.

The white paper sets out the Government's proposals in five areas:

- Simpler land arrangements to support investment: Reforms to land tenure arrangements, including diversification of activity on pastoral leases, and a number of proposals to support Aboriginal groups and native title claimants and holders to better utilise their traditional lands and engage with potential investors
- Developing the north's water resources: A\$200 million has been allocated to build water infrastructure
- A business, trade and investment gateway: Proposals include allocation of funds to develop a Tropical Health Strategy and commercialisation of Australia's existing tropical disease research & development, reducing red tape by establishing a single point of entry office for major project development and single jurisdiction fisheries management and various initiatives to boost economic ties between the north

and the Asia Pacific region through ASEAN and APEC

- Infrastructure to support growth: A\$5 billion has been allocated for concessional loans through a Northern Australia Infrastructure Facility to build new infrastructure. Other sums have been allocated to road and freight rail projects
- Northern workforce for growth: Proposals include changes to visa programmes to encourage greater short term immigration to the north for work in certain industries including tourism and agriculture and employment targets for Aboriginal Australians

Implementation of the white paper's initiatives will be led by a strategic partnership between the governments of Western Australia, the Northern Territory and Queensland and chaired by the Prime Minister. The Office of Northern Australia, currently based in Canberra, will be moved to the north to oversee implementation of the white paper by various governments and government agencies.

A copy of the white paper can be downloaded here: https://northernaustralia.dpmc.gov.au/sites/default/files/papers/northern_australia_white_paper.pdf.

New port development laws to protect the Great Barrier Reef

The Queensland Government has introduced the Sustainable Ports Development Bill 2015 (Qld) to implement its pre-election commitments and the Great Barrier Reef 2050 Long Term Sustainability Plan.

The Bill was urgently introduced into the Parliament to deliver on Queensland's commitments before

the UNESCO World Heritage Commission meeting in Germany to consider the status of the Great Barrier Reef as "in danger" on the World Heritage List. The Bill has been referred to the Infrastructure, Planning and Natural Resources Committee which is required to report on the Bill by 1 September 2015.

In its current form, the Bill:

- prohibits the disposal of material generated by port-related capital dredging (ie the creation of new civil works through dredging) within the Great Barrier Reef World Heritage Area
- mandates the beneficial reuse of port-related capital dredged material
- restricts the development of new ports in the Great Barrier Reef World Heritage Area to within current port limits; and
- restricts capital dredging for the development of new or expansion of existing port facilities to within the regulated port limits of Gladstone, Hay Point/Mackay, Abbot Point and Townsville (called Priority Ports).

The Bill creates a two-part planning framework for Priority Ports, comprising master plans and port overlays created by the Queensland Minister for State Development. Master plans will set out at a high level the strategic vision and an environmental management framework for each Priority Port. As soon as practicable after a master plan takes effect, the Minister is required to make a port overlay to regulate port development in the master planned area. A port overlay will have the force of law and may only be repealed when another port

overlay specifically repeals the existing port overlay.

The restrictions on new port development and capital dredging will not apply to any development the subject of an environmental impact assessment process that started before the Bill comes into force.

The Queensland Government has announced that master planning will commence for Gladstone (see next item) and Abbot Point later this year, with planning for Hay Point/Mackay and Townsville ports to occur in 2017.

The bill may be accessed at: <https://www.legislation.qld.gov.au/Bills/55PDF/2015/SustainPortsDevB15.pdf>.

Draft Gladstone Port Master Plan released for comment

The Queensland Government is seeking public comment on the proposed boundary for the Gladstone Port master planned area. The proposed boundary is open for public comment until 20 July 2015.

Gladstone Port is Queensland's second biggest port, having a throughput of more than 97 million tonnes in 2014. Cargo exported from the port includes coal, and mineral and petroleum products.

The objective of the master plan is to optimise the use of existing infrastructure and address operational, economic, environmental, and community relationships, as well as supply chains and surrounding land uses. It also requires consideration of issues other than those related to the port land itself, including marine impacts, supply chain capacity and environmental and social issues. Identification of the proposed

boundary is the first step in the master planning process for Gladstone Port.

More information on the proposed boundary is available at www.statedevelopment.qld.gov.au/sustainableports.

Mental health impacts of FIFO arrangements considered in Western Australia

On 18 June 2015, the Education and Health Standing Committee of the Western Australian Parliament tabled its final report on the impact of fly-in, fly-out (FIFO) work practices on mental health. The report is the result of an inquiry prompted by the reported suicide of nine FIFO workers in the last 12 months.

The Committee emphasised the lack of transparency of mental health issues amongst FIFO and DIDO (drive-in, drive-out) employment in Western Australia, including a lack of information about the nature of employment itself.

The Committee recommended significant legislative changes, including the requirement of reporting all suicides and attempted suicides and all deaths on a mine site, regardless of the cause and regardless of whether they have occurred on-shift or off-shift, to the Department of Mines and Petroleum. The Committee also recommended that the Department should fully investigate all mine site deaths, regardless of the presumed cause or motivation behind the death.

The Committee recommended that a Code of Practice be developed to address (amongst other things):

- Fatigue

- Workplace culture
- Bullying, including a greater ability for the Department to prosecute bullying
- The impact of FIFO on personal relationships and improvement of communication facilities to aid communication with an employee's home
- Accommodation facilities, including the eventual abolition of "motelling" (where a worker is given a different room each time he or she comes to site); and
- Improved and consistent procedures for dealing with mental health concerns, including the evacuation of workers from site where necessary.

Other findings and recommendations by the Committee included:

- Industry tailoring FIFO positions to accommodate the mental health needs of workers, rather than FIFO workers being selected for their ability to fit in with current practices
- Conducting more research into the mental health impacts of FIFO and DIDO employment on employees and their families; and
- Encouraging FIFO workers to engage with the local communities and recommending that the State government investigate ways in which FIFO workers could be encouraged to live within the local community as opposed to on-site.

The full page report can be viewed here:

[http://www.parliament.wa.gov.au/parliament/commit.nsf/\(Report+Lookup+by+Com+ID\)/2E970A7A4934026448257E67002BF9D1/\\$file/20150617+-+Final+Report+w+signature+for+web+site.pdf](http://www.parliament.wa.gov.au/parliament/commit.nsf/(Report+Lookup+by+Com+ID)/2E970A7A4934026448257E67002BF9D1/$file/20150617+-+Final+Report+w+signature+for+web+site.pdf).

Australian Law Reform Commission recommends changes to proving native title rights and interests

On 4 June, the Australian Law Reform Commission released its final report on its review of certain aspects of the Native Title Act 1993 (Cth).

The review, which commenced in early 2014, focussed on the “connection” requirements that native title claimants are required to satisfy to establish a successful claim for native title and certain procedural aspects of the NTA in relation to authorisation and amendment of native title claims.

For claimants to have a successful native title claim under the Act, they must be able to prove that the rights and interests claimed are held under “traditional” laws and customs observed by the native title claim group. The difficulty with this proposition, which reflected the decision of the original Mabo native title decision from the Australian High Court, has always been the extent to which those laws and customs could change and evolve over time while still remaining “traditional” for the purposes of the Act and proving the necessary “connection” for a successful native title claim.

The Commission responded to this issue by making the following recommendations:

- The Act be amended to explicitly acknowledge that traditional laws and customs can adapt, evolve and change over time
- The definition of native title be amended to make it clear that it is not necessary to prove that every generation of claimants

has acknowledged the relevant traditional laws and customs or that the acknowledgement of traditional laws and customs has been substantially uninterrupted.

The Commission also responded to the issue that has often been raised in native title cases as to whether native title rights can include commercial rights of trade. It recommended that the definition of “native title” in the Act be amended to include rights that can be exercised “for any purpose, including commercial or non-commercial purposes” and “trading rights”. However, the terms “commercial purposes” and “trading” should not be further defined.

While the Commission’s recommendations are unlikely to be acted upon in the short term, the Commission’s report does have the potential to be used by native title claimants as further support for individual claims and be acted on accordingly by the Federal Court.

A copy of the Commission’s report can be downloaded here: <https://www.alrc.gov.au/publications/alrc126>.

Native title resolution in south west Australia

In early June, the Western Australian Government announced that it had signed six indigenous land use agreements with Aboriginal groups (referred to collectively as the Noongar people) in the south west corner of the State. If all the agreements are registered by the National Native Title Tribunal, native title claims over 200,000 square kilometres of the State, including the south-west coal, bauxite and gold-mining areas around Collie and Boddington, will be finally resolved.

Registration of the agreements will also trigger the establishment of the independent Noongar Boodja Trust that will receive assets, including up to 320,000 hectares of Crown land, and funding of A\$50 million per annum for 12 years. Six regional corporations will be established to benefit and promote the six Aboriginal groups and assist with delivery of the community development framework agreed in the settlement. In addition to the land transfer, the settlement provides for the establishment of joint management arrangements for conservation areas in the region and a greater acknowledgement of Noongar customary activities in relation to access to land and water.

A separate Aboriginal Heritage Partnership Agreement will provide the framework for identification, protection and management of Noongar heritage. With the execution of the indigenous land use agreements, all West Australian government departments and agencies are now required to enter into a Noongar Standard Heritage Agreement that will regulate heritage surveys conducted by government for future land development activities.

While the indigenous land use agreements proceed through the registration process at the National Native Title Tribunal, the Government is required to introduce the Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Bill into Parliament. The Bill formally recognises the Noongar people as the traditional owners of the lands in the south west and acknowledges their ongoing spiritual and cultural relationship with those lands.

In exchange for these and the other benefits set out in the agreements, the Noongar people have agreed to

the extinguishment of all native title rights and interests in the lands (as would otherwise be recognised by the courts under the Native Title Act 1993 (Cth)) and to release the Western Australian Government from any further compensation obligations.

Details about the settlement, including the text of each of the agreements, can be accessed here:

<https://www.dpc.wa.gov.au/lantu/Claims/Pages/SouthWestSettlement.aspx>.

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: +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

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.

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

www.cliffordchance.com

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.