CLIFFORD
CHANCE

Briefing note August 2015

Australian Energy and Resources Update

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

Highlights this month include the announcement of Australia's new greenhouse gas emission target and the second carbon abatement auction under the Emissions Reduction Fund, a rebuff to shareholder activists who sought to express opinions about the Commonwealth Bank's relationship to climate change at the company's annual general meeting and a new report that says Victoria is not ready for an unconventional gas industry.

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

Second Emissions Reduction Fund auction announced

The Clean Energy Regulator (CER) has announced a second Emissions Reduction Fund auction for carbon abatement contracts will take place on 4 to 5 November 2015.

The second auction will be conducted in accordance with guidelines released by the CER on 21 August 2015. Whilst broadly similar to the guidelines for the first auction, the second auction guidelines introduce a new volume criterion for determining successful bids in order to provide greater flexibility to the CER:

- **Price criterion**: The first criterion is that the bid price must be less than the benchmark price set by the CER for the auction. The lowest price bid will be ranked first and the highest price bid will be ranked last. Bids offering the same price will be ranked equally;
- **Volume criterion (new)**: Assuming the price criterion is satisfied, bids will then be selected based on a new variable volume threshold (e.g. 50% to 100%) which is calculated by reference to the cumulative total volume of Australian Carbon Credit Units offered for sale through all bids that satisfy the price criterion.

To participate in the second auction parties will need to:

- register their project with the CER on or before 18 September 2015
- complete auction qualification on or before 6 October 2015 – this will lock in the parties to a code of common terms and the commercial terms of the standard carbon abatement contract
- complete auction registration on or before 27 October 2015 – this will lock in the delivery terms of the carbon abatement contract, including the total quantity of Australian Carbon Credit Units that will be delivered under the contract, the period over which the abatement will be delivered, the dates that Credit Units are to be delivered and the quantity of Units to be delivered on those dates; and
- submit an auction bid on 4 to 5 November 2015 through the approved online bidding platform – this will establish the remaining terms of the carbon abatement contract including the unit price to be paid for each Australian Carbon Credit Unit that is delivered.

Further information on the second Emissions Reduction Fund auction and guidelines can be accessed here: http://www.cleanenergyregulator.gov.au/DocumentAssets/Documents/Guidelines%20for%20the%20second%20ERF%20auction.pdf

Australia announces new national CO_2 emission target

The Australian Government has announced that it intends to reduce Australia's greenhouse gas emissions to 26-28% below 2005 levels by 2030. This target will be taken to the international climate change conference to be held in Paris in December 2015, where countries hope to reach a new global agreement on emissions reductions.

The reduction target announced by the Government has been criticised as being too low, especially in light of the following targets released by other nations including:

- Canada: 30% reduction on 2005 levels by 2030
- New Zealand: 30% reduction on 2005 levels by 2030
- USA: 26-28% reduction on 2005 levels by 2025 (equivalent to 40% by 2030); and
- European Union: 40% reduction on 1990 levels by 2030 (equivalent to a 34% reduction on 2005 levels).

The Australian Prime Minister Tony Abbott has defended the target stating that it is a "good, solid, economically responsible, environmentally responsible target" and will allow Australia to continue to have strong economic growth.

The reduction in emissions is to be achieved by a combination of measures including continued implementation of the Emissions Reduction Fund, the development of a National Energy Productivity Plan and investigating initiatives such as improving the efficiency of vehicles, phasing out hydrofluorocarbons and increasing the utilisation of solar power.

A copy of the Government's announcement can be found here: https://www.pm.gov.au/media/2015-08-11/australias-2030-emissions-reduction-target

Victoria "not ready" for CSG industry

The Victorian Auditor General's office has released the findings of its enquiry into whether Victoria is positioned to successfully address and respond to potential environmental and community risks and impacts of onshore unconventional gas activities. The answer is a clear "no".

In 2012, a government-imposed moratorium placed CSG exploration and development in Victoria on hold. After its investigations, the Auditor General has concluded that if the moratorium is lifted, Victoria is not positioned to address potential risks and impacts associated with unconventional gas activities, including consideration of Victoria's comparatively small land mass, dense population, limited water resources and high reliance on agriculture. Other issues include:

- the Victorian Resources Department has not identified all risks associated with unconventional gas, or assessed their likelihood and consequence
- there are insufficient environmental controls and consideration of competing interests
- the current regime lacks early community engagement
- before licences are granted, there is no land-use planning or impact assessment regime
- the regulatory system is too complex; and
- there are problems applying the current "earth resources" regime used in Victoria to unconventional gas activities.

The report concluded that both the infancy of the industry and the operation of the current moratorium produce an ideal opportunity for the State Government to evaluate potential risks and impacts before the moratorium is reviewed.

A copy of the report can be found here: http://www.audit.vic.gov.au/reports_and_publications/latest_reports/2015-16/20150819-unconventional-gas.aspx

Federal Court sets aside Adani coal mine approval

The Australian Government's approval of Adani Mining's Carmichael Coal Mine and Rail Project in central Queensland under the *Environment Protection and Biodiversity Conservation Act* 1999 (EPBC Act) was set aside this month by the Australian Federal Court. The approval was set aside because the Federal Environment Minister had not properly considered advice about two threatened animal species.

The A$16.5 billion project, which comprises an open cut and underground coal mine and a 189 kilometre rail link, faced fierce environmental opposition due to the proximity of the project's coal terminals to the Great Barrier Reef. The project was approved by the Commonwealth Environment Minister under the EPBC Act in July 2014.

The Mackay Conservation Group sought judicial review of the Minister's decision in January 2015 on the grounds that the Minister had not taken into account:

- the greenhouse gas emissions that would result from burning coal produced by the mine
- the impact of the project on the yakka skink and the ornamental snake; and
- Adani Mining's environmental track record.

The Minister's decision was formally set aside by the Court with the consent of the parties. In a statement by the Federal Environment Department, the basis for setting aside the decision was described as a "technical, administrative matter" and the Department noted that "reconsidering the decision does not require revisiting the entire approval process". The Department expects that it will take six to eight weeks for the Minister to reconsider his decision.

The Department's statement is available here: http://www.environment.gov.au/protection/assessments/key-assessments#carmichael

Australian Government moves to change rules for public interest litigants

While the actual decision of the Federal Court in relation to the Carmichael Coal Mine (see above) was relatively low key, political and public reaction to the decision and its consequences was not. One opinion that emerged almost immediately was that significant projects were being delayed or stopped by public interest groups that took advantage of perceived "loopholes" in Commonwealth legislation.

The Federal Government responded to the Court's decision by tabling the Environment Protection and Biodiversity Conservation (EPBC) Amendment (Standing) Bill on 20 August 2015. The Bill is aimed at restricting the ability of third parties to challenge administrative decisions made under the EPBC Act and regulations.

The Administrative Decisions (Judicial Review) Act 1977 (Cth) (ADJR Act) sets out the test for standing for challenging an administrative decision by defining "a person who is aggrieved by a decision". It essentially restricts standing to persons whose interests are adversely affected by a decision.

Section 487 of the EPBC Act extends the meaning of aggrieved persons beyond the ADJR Act definition to allow challenges to decisions by Australian individuals or organisations engaged in recent environmental conservation or research activities. This means that environmental activist groups can currently apply for a review of decisions to grant environmental approval for mining activities and use the litigation process to delay developments for long periods of time.

In his second reading speech, the Commonwealth Environment Minister Greg Hunt stated that, "contrary to the intentions of the EPBC Act, the federal law is now being used to disrupt and delay infrastructure. The strategy is almost completely disconnected from concerns which were the intended purpose of the EPBC Act". He went on to state that "changing the EPBC Act will not prevent those who may be affected from seeking judicial review. It will maintain and protect their rights. However, it will prevent those with no connection to the project, other than a political ambition to stop development, from using the courts to disrupt and delay key infrastructure where it has been appropriately considered under the EPBC Act".

If the Bill is passed, section 487 of the EPBC Act will be repealed and the narrower ADJR test for standing will apply. The repeal will affect all applications for review which are made after commencement of the Bill, regardless of the date the initial decision is made.

The Bill has been sent for review by the Senate Environment and Communications Legislation Committee which is due to report by 12 October 2015.

A copy of the Bill can be accessed here: http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5522

Federal Court says shareholder resolutions on climate impacts not valid

The Australian Federal Court has confirmed that activist shareholders cannot control or direct how their company is managed, in circumstances where the directors are vested with exclusive responsibility for that management.

In 2014, the Australasian Centre for Corporate Responsibility (ACCR) notified Commonwealth Bank Australia (CBA) that it wished to put three resolutions to shareholders for consideration at its next annual general meeting (AGM), using a power in section 249N of Corporations Act 2001 (Cth).

The first two resolutions were expressed to be ordinary resolutions in relation to certain matters in connection with greenhouse gas emission disclosures. Both resolutions were expressed as an "opinion" of the shareholders in relation to the directors' approach to greenhouse gas disclosures. The third resolution was proposed as a special resolution to amend the CBA's constitution to require the directors to report annually on greenhouse gas emissions connected to the bank's financing activities.

The notice of meeting for the 2014 AGM only included the third proposed resolution. The company's Board included its own commentary on the substance of the resolution and made a recommendation to shareholders to vote against it. The two ordinary resolutions were not included in the notice of meeting because the CBA formed the view that they were matters within the purview of the Board and management of the bank and so could not be properly put to shareholders at a general meeting.

The ACCR sought a declaration that each of the three proposed resolutions could be validly put to an AGM and that the directors should not comment or make any recommendation in respect of the third resolution. The Federal Court dismissed the ACCR's application, finding that CBA was not required to put the first or second proposed resolutions to its AGM as they went directly to matters concerning the bank's management, a power which is exclusively vested in the directors.

The Court stated there was no power implied at general law, or conferred in the Corporations Act, that gave shareholders the ability to express opinions by formal resolutions. The Court also found that it was within the power of the directors under CBA's constitution, and indeed incumbent on them by virtue of their duties as directors, to include commentary and a voting recommendation regarding the third proposed resolution in the AGM notice.

The ACCR has appealed the Court's decision.

The Court's judgment can be accessed here: http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2015/2015fca0785

National explosives regulation discussion paper released for comment

Safe Work Australia (SWA) has released a discussion paper designed to gather information about the issues caused by the differences in Australian explosives legislation, including impacts on business. Public submissions on the paper must be made by 10 September 2015.

Commonwealth explosives legislation covers explosives in the possession or control of the Commonwealth and the explosives of other countries' visiting armed forces. State and territory jurisdictions have their own legislation that addresses similar activities, such as licensing, authorisations, transport, selling, importing, exporting, manufacturing and using explosives. Although the statutory provisions are similar in intent and scope across the different jurisdictions, there are differences in how those provisions are applied.

The discussion paper poses questions relating to the differences in explosives legislation between the jurisdictions. The main areas for consideration are:

- the different definitions of 'explosives'
- explosives licensing requirements; and

- explosives notification requirements.

A copy of the discussion paper, entitled *Explosives Regulation in Australia: Discussion Paper and Consultation Regulation Impact Statement*, is available at the SWA website at: https://submissions.swa.gov.au/SWAforms/explosives/pages/form

Draft report on the Workplace Relations Framework released

In December 2014, the Australian Productivity Commission was asked to review the complex array of workplace laws, regulations and institutions that together make up the Australian workplace relations framework. The Productivity Commission has now released its draft report. The key finding by the Commission is that the system is in need of a renovation, not a "knockdown and rebuild". Public comments on the draft report can be made until 18 September 2015.

In the Commission's opinion, there are significant deficiencies that need to be addressed. Several recommendations are particularly relevant to the resources sector including:

- penalties for unlawful industrial action should be increased to better reflect the costs that such actions can inflict on employers and the community
- employers should be allowed to stand down employees without pay where employees have withdrawn notice of industrial action and employers have implemented a reasonable contingency plan
- the 'better off overall' test for approval of an enterprise agreement should be replaced with a slightly less stringent 'no-disadvantage' test
- if negotiations for a greenfields agreement have not led to a negotiated outcome within 3 months, the employer should be allowed to request that the Fair Work Commission undertake 'last offer' arbitration; and
- existing union rights of entry to a workplace should be curtailed.

The Commission is seeking feedback on the potential benefits of a new form of statutory individual agreement called an enterprise contract that could operate as an alternative to enterprise agreements and individual arrangements. Of particular interest is the Commission's preliminary view that it is too easy for businesses to engage in sham contracting. The Commission is considering recommending that the high hurdle for sham contracting, which requires 'reckless' misrepresentation of an employee as an independent contractor, be lowered.

A copy of the draft report can be accessed here: http://www.pc.gov.au/inquiries/current/workplace-relations/draft

Draft outcomes-based conditions policy and guidance released

The Australian Government has released a draft policy statement and guidance note on imposing outcomes-based conditions on approvals issued under the EPBC Act. Public comment on the draft policy statement closes on 5 October 2015.

Outcomes-based conditions specify the environmental outcome that must be achieved, without prescribing how that outcome should be achieved. The purpose of this approach is to encourage approval holders to innovate and achieve the best environmental outcome at the lowest cost, while increasing transparency.

The draft policy states that suitability for outcomes-based approvals will be determined on a case-by-case basis. Characteristics that may indicate that an action, or parts of it, is suitable for an outcomes-based approval include:

- all environmental risks are well understood and can be adequately managed
- high quality baseline data is available or can be obtained
- there is a good understanding of the likely impacts of an action
- the approval holder is capable and willing to achieve the outcome
- a sufficient level of knowledge and information is available
- the outcome is measurable, able to be enforced and appropriately monitored; and
- the performance towards achievement of the outcome is capable of independent and periodic audit.

Outcomes-based conditions will usually include interim milestones which will be tailored to each project and condition. They will also be accompanied by conditions requiring regular, robust and transparent monitoring and reporting.

The draft policy statement and guidance note will apply to proposals referred after 10 August 2015. The application of the policy statement and guidance note to existing proposals will depend on what stage of the assessment process the project is in.

The draft policy statement and guidance note are available here: http://www.environment.gov.au/epbc/consultation/policy-guidance-outcomes-based-conditions

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 800
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 89262 5558
E: robyn.glindemann@cliffordchance.com

Jenni Hill
Partner, Litigation and Dispute Resolution
T: +61 8 9262 5582
E: jenni.hill@cliffordchance.com