

# Australian Energy and Resources Update

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

Highlights this month include the substantial changes to the Federal Government Ministry in the wake of Malcolm Turnbull's appointment as Prime Minister and the release of long – awaited safeguard rules under the Direct Action Plan.

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 Federal Ministry announced

On 20 September 2015, the new Prime Minister of Australia, Malcolm Turnbull, announced a number of changes to the Federal Ministry. The changes followed his successful challenge to Tony Abbott for the leadership of the Liberal Party and subsequent swearing in as Australia's 29<sup>th</sup> Prime Minister on 15 September 2015. Mr Turnbull was formerly the Minister for Communications.

The key points for the energy and resources sector are as follows:

- Warren Truss, Leader of the National Party, remains as Minister for Infrastructure and Regional Development and Deputy Prime Minister
- Christopher Pyne has been appointed the Minister for Industry, Innovation and Science,

replacing the long-serving Industry Minister, Ian Macfarlane. The express inclusion of innovation and science reflects Prime Minister Turnbull's focus on innovation as a key component of reshaping the Australian economy. Australia's youngest Federal parliamentarian, Wyatt Roy, has been appointed as Assistant Minister for Innovation

- Former Assistant Treasurer Josh Frydenberg has been appointed the Minister for Resources, Energy and Northern Australia. This position had no immediate predecessor in the previous Abbott Ministry, although Ian Macfarlane had responsibility for energy and resources matters
- National Party deputy leader, Barnaby Joyce remains the Minister for Agriculture and, as part of a renewed agreement between the Liberal and National

## Key issues

- New Federal Ministry announced
- Draft rules on safeguard mechanism for the Emissions Reduction Fund released
- Queensland's "Innovative Resources Tenures Framework" released for comment
- NOPSEMA's environmental management process endorsed after 12 months of operation
- NSW Swamp Offset Policy for longwall coal applied to new mine expansion

Parties, is now also be responsible for Water Resources. Water was previously dealt with under the Environment portfolio

- Greg Hunt retains responsibility for Environment but, as noted above, without responsibility for Water
- Scott Morrison is the new Federal Treasurer, taking over from Joe Hockey who announced his retirement from the Parliament soon after the ministerial reshuffle.

The full list of Ministers can be accessed here:

[http://www.dpmc.gov.au/sites/default/files/files/ministry\\_List\\_21\\_Sept.pdf](http://www.dpmc.gov.au/sites/default/files/files/ministry_List_21_Sept.pdf).

## Draft rules on safeguard mechanism for the Emissions Reduction Fund released

The Federal Government's Direct Action Plan adopts a carrot and stick approach to achieving its objectives to cut greenhouse gas emissions to 5% below 2000 levels by 2020 and 26-28% below 2005 levels by 2020 – the carrot being the purchasing and crediting of Australian Carbon Credit Units (ACCUs) through the Emissions Reduction Fund (details of which can be found in our September update [here](#) and our March update [here](#)) and the stick being the "safeguard mechanism".

On 2 September 2015, the Department of Environment released a number of draft legislative instruments and explanatory statements relating to the safeguard mechanism. The mechanism aims to "safeguard" the emissions reductions achieved through the Emissions Reduction Fund by requiring large businesses to keep their net

emissions below certain baseline levels. Public comment on the documents closed in mid-September.

The key elements of the proposed safeguard mechanism are as follows:

- Commencement: The safeguard mechanism will commence operation on 1 July 2016
- Coverage: Large facilities with direct emissions of more than 100,000 tonnes of carbon dioxide equivalence will be required to keep their net emissions at or below certain baseline levels. The entity with operational control of the facility will be responsible for meeting these requirements
- Baselines for existing facilities: Baselines for existing facilities will be set using historical data which reflects the highest level of reported emissions over the period 2009-2010 to 2013-2014 and adjusted to accommodate (amongst other things) facility expansions or emissions variability associated with extraction of the natural resource or reserve
- Baselines for new investments: Baselines for new investments will depend upon whether the new facility is already underway (and therefore limited scope to change design) or entirely new. If the facility exceeds the designated large facility threshold (ie 100,000 tonnes of carbon dioxide equivalence) before 1 July 2020 the baseline will reflect the audited emissions forecast provided by the facility operator with a true-up after the forecast period based on actual performance. If the facility does not exceed the threshold, the

baseline will be established using certain benchmark emissions

- Baselines for electricity sector: A separate approach will apply to grid-connected electricity generators including the National Electricity Market. A sector baseline of 198 million tonnes of carbon dioxide equivalence will apply to all grid-connected electricity generators. The Clean Energy Regulator will publish a statement on its website if this baseline is exceeded. Individual baselines will also apply, calculated on the basis of the facility's highest annual emissions between 2009-10 and 2013-14, if the sector baseline no longer applies
- Flexible compliance arrangements: Entities may seek to avail themselves of certain flexibilities under the safeguard mechanism including the use of ACCUs purchased through the Emissions Reduction Fund to offset emissions (given emissions are based on "net" rather than "gross" numbers); exemptions if emissions are exceeded due to (amongst other things) a natural disaster or criminal activity; and multi-year monitoring whereby a facility could exceed the baseline in one year but avoid a breach if its average emissions over 3 years were below the baseline.
- Administration: The Clean Energy Regulator will administer the safeguard mechanism. The operation of the Emissions Reduction Fund including the safeguard mechanism will be reviewed by the Government in 2017 / 2018 to ensure its ongoing effectiveness.

More information about the Emissions Reduction Fund and the safeguard mechanism can be found here:

[http://www.environment.gov.au/climate-change/emissions-reduction-fund/about/safeguard-mechanism?utm\\_source=Clean+Energy+Regulator+-+Update&utm\\_campaign=2eec4586a6-6-Consultation+on+safeguard+legislative+instruments&utm\\_medium=email&utm\\_term=0\\_56e080d9b7-2eec4586a6-51741477](http://www.environment.gov.au/climate-change/emissions-reduction-fund/about/safeguard-mechanism?utm_source=Clean+Energy+Regulator+-+Update&utm_campaign=2eec4586a6-6-Consultation+on+safeguard+legislative+instruments&utm_medium=email&utm_term=0_56e080d9b7-2eec4586a6-51741477).

## Queensland's "Innovative Resources Tenures Framework" released for comment

On 4 September 2015, the Queensland Minister for State Development and Minister for Natural Resources and Mines, Dr Anthony Lynham, released a policy paper outlining proposals for modernising Queensland's resources tenure system. The Innovative Resources Tenures Framework is the most recent development in a reform project that started under the Labor Government six years ago which is expected to culminate in legislation being introduced in the second half of 2016. Submissions on the policy paper close on 16 October 2015.

The paper seeks to address a number of issues with the existing tenure framework which is currently regulated by six different Acts. Among the issues identified by industry stakeholders is the requirement for strict compliance with prescriptive exploration permit work plans and relinquishment provisions at intervals that are too short to achieve effective exploration results.

The key changes proposed in the paper are related to the exploration phase of resource projects. The paper considers that an effective and targeted exploration effort will lead to expansion in the geological knowledge of the state and in some instances a profitable resource operation and the associated economic benefits.

In the interests of promoting certainty, the paper proposes that resource exploration authorities (or titles) be capped, with default maximum terms of:

- 8 years for minerals
- 10 years for coal; and
- 12 years for petroleum, geothermal and greenhouse gas.

Other key proposals include:

- introducing uniform tenure types across the different Acts
- removing the ability to renew the term of a resource exploration authority (other than where proponents have applied for less than the maximum term)
- removing the requirement for prescriptive work programs and instead requiring proponents to provide a work plan which details the proposed exploration objective and geological model to be used for the resource exploration authority up to the mid-term
- introducing a default relinquishment requirement of 50% of the area granted at the mid-term; and
- removing statutory maximum areas.

A copy of the paper is available at: <https://www.dnrm.qld.gov.au/our-department/policies-initiatives/mining-resources/legislative-reforms/tenure-reforms>.

## NOPSEMA's environmental management process endorsed after 12 months of operation

The process used by the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) to assess and authorise the environmental impacts of offshore petroleum and greenhouse gas activities has been endorsed by the Federal Environment Minister.

In February 2014, NOPSEMA became the sole assessor of the environmental impacts associated with petroleum and greenhouse gas activities in Australian waters following a strategic environmental impact assessment and approval process carried out under the Environment Protection and Biodiversity Conservation Act 1999 (Cth).

A condition of NOPSEMA's designation as sole regulator was the periodic independent review of NOPSEMA's compliance with its approved environmental management authorisation process. The first review was to take place after 12 months of operation. This review commenced in April 2015 and the review report was endorsed by the Commonwealth Environment Minister (via delegate) on 4 September 2015.

The objective of NOPSEMA's environmental management authorisation process is to ensure offshore petroleum and greenhouse gas activities are carried out in a manner in which impacts on the environment are reduced to as low as reasonably practicable and are of an acceptable level. The review report determined that NOPSEMA is

meeting all of its commitments under its authorisation process. It also found that the necessary procedures are in place for NOPSEMA to continue to meet its commitments in the future.

The review report identified a number of opportunities for improvement (largely relating to inter-agency liaison and greater communication with stakeholders) which NOPSEMA has undertaken to implement.

The next review of the Program is required in five years. Further information on the review and NOPSEMA's response can be found here: <http://www.nopsema.gov.au/environmental-management/>.

### NSW Swamp Offset Policy for longwall coal applied to new mine expansion

Centennial Coal's proposed expansion of its Springvale mine received development consent from the independent NSW Planning Assessment Commission (PAC) on 21 September 2015. The PAC's development consent gives an indication as to how the NSW Government will apply its proposed new Policy Framework for Biodiversity Offsets for Upland Swamps and Associated Threatened Species (Swamp Offset Policy).

The draft Swamp Offset Policy provides for the calculation and provision of offsets for subsidence impacts of longwall coal mining on upland swamps and associated threatened species. The key parts of the policy are:

- Application of policy extends to existing projects: The policy will be applied to all new applications for longwall mining, to

applications that are already on foot, and to all new extraction plans approved after 31 October 2015

- Nil or negligible impact threshold: Where 'nil' or 'negligible' environmental consequences for upland swamps and threatened species are predicted, no up-front offset is required
- Maximum predicted offset liability: If an offset is required, it should be assessed as a potential maximum (ie a 'worst case scenario') because of the difficulty and uncertainty in predicting subsidence and its impacts on upland swamps
- Monitoring: A minimum of two years pre-mining piezometric data should be used to establish the baseline shallow groundwater regime in every swamp within 400m of longwall mining. If later monitoring demonstrates that the shallow groundwater aquifer is impacted, then there is a presumption of long-term impacts on the swamp. If monitoring identifies that the predicted impacts have not occurred within 12 months of completion of all mining within 400m of a swamp, then the proponent can seek to have the offset deducted from the project's overall offset liability.

The Swamp Offset Policy has been one of the most controversial aspects of the New South Wales Government's proposed new Integrated Mining Policy. Consultation on the Integrated Mining Policy is not complete. At least two of most anticipated aspects of the policy have yet to be released: the Guidelines for the Economic Assessment of Mining and Coal Seam Gas Projects and the standardised development consent

conditions. Thus, it is unclear how much, if any, change will be made to the Swamp Offset Policy.

In relation to the Springvale mine expansion, the development consent issued by the PAC predicted negligible consequences to the first swamps to be undermined by the expansion project, but imposed the meeting of these negligible consequences as a performance measure in the consent. This means that breach of this performance measure by Centennial Coal in the future will constitute a breach of the consent which could result in penalties or offences under the New South Wales Environmental Planning and Assessment Act. It could also result in offsets being imposed on the project if the consequences cannot be satisfactorily remediated. A A\$2 million offset bond must be paid before mining can commence, unless otherwise agreed by the Secretary of the Department for Planning and Environment.

Subsequent mining under other swamps is predicted to cause greater than negligible environmental consequences and so Centennial Coal has to demonstrate that it can satisfy the maximum predicted offset liability for these swamps prior to the commencement of mining those areas.

A copy of the PAC's decision can be accessed here: <http://www.pac.nsw.gov.au/Projects/ta/bid/77/ctl/viewreview/mid/462/pac/498/view/readonly/myctl/rev/Default.aspx>.

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