

Australian Energy and Resources Update

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

Highlights this month include a proposal for a Resources Ombudsman in South Australia, consultation on a new Australian Tax Transparency Code and major developments in the renewables 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.

Australian Government contemplates a Tax Transparency Code

In mid-December 2015, the Australian Board of Taxation released a consultation paper to aid the development of a voluntary tax transparency code (TTC) in Australia. The consultation paper includes the Board's preliminary findings and recommendations to the government about a TTC and is intended to facilitate additional discussion. Comments on the consultation paper closed on 29 January 2016.

The Board was commissioned by the Australian Government to develop a TTC. The purpose of the TTC is to improve community confidence in the tax system and to encourage large businesses to be more transparent about their tax affairs. The development of the TTC reflects an international trend of G20/OECD countries mandating or encouraging

increased transparency of tax information.

The TTC is to contain a set of principles and minimum standards of content. The Board has proposed that TTC disclosure should be delivered in two parts:

- improvements to the disclosures of tax information in financial statements (Part A)
- an annual 'taxes paid' report (Part B).

The consultation paper recommends that 'large businesses' adopt Part A and Part B and 'medium businesses' adopt Part A. A 'large business' is a business with aggregated TTC Australian turnover of AUD500 million or more. A 'medium business' is a business with aggregated TTC Australian turnover of between AUD100 million and AUD500 million.

The government intends the increased transparency of tax information will enable an informed debate about tax policy and will

Key issues

- Australian Government contemplates a Tax Transparency Code
- Resource Operations Ombudsman proposed for South Australia
- Emissions Reduction Fund auctions to be audited
- Northern Australia Infrastructure Bill released for comment
- ARENA announces solar PV funding winners
- Tasmania contemplates zero carbon while the Australian Capital Territory seeks battery storage
- Major road project environmental approval ruled invalid in Western Australia
- Productivity Commission releases final report on workplace relations.

encourage businesses to adopt a low risk approach to their tax affairs.

The consultation paper can be accessed at:

<http://taxboard.gov.au/files/2015/08/Tax-Transparency-Code-Consultation-FINAL.pdf>.

Resource Operations Ombudsman proposed for South Australia

On 2 December 2015, a bill was introduced into the South Australian Parliament to establish a Resource Operations Ombudsman. According to Robert Brokenshire, a member of the Family First Party sitting in the upper house of the Parliament, the bill is designed to "combat issues where mining companies disregard the concerns of farmers or other affected parties in relation to accessing land, lease and licence agreements". Establishing the Resource Operations Ombudsman is intended to provide an effective grievance mechanism which is legitimate, accessible, predictable, equitable and transparent.

The existence of the Resource Operations Ombudsman is not intended to change the intent and purpose of the Mining Act, but rather to make the Mining Act more balanced and fair towards farmers. The Resource Operations Ombudsman will act as an independent umpire for those people and other groups affected by the actions of miners to turn to.

The Resource Operations Ombudsman will have broad powers encompassing three basic functions:

- to receive and investigate complaints related to the conduct of resource operations and make detailed recommendations to the communities, the relevant

company and, where needed, the industry as a whole

- to advise industry and government on developments required in policy as well as prepare and publish standards
- to ensure that companies comply with the recommendations from the complaints mechanism and that the industry implements standards and policies.

The Resource Operations Ombudsman will also provide information, education and advice in relation to the rights and responsibilities of those conducting resource operations and persons affected by those operations, avoiding expensive legal costs which would otherwise be incurred for that type of information and service.

There are separate provisions which provide for the Ombudsman to take action against a person engaged in the conduct of a resource operation that is in contravention of any act, condition or standard published by the Ombudsman.

A copy of the bill can be accessed here:

https://www.legislation.sa.gov.au/LZ/B/CURRENT/RESOURCE%20OPERATIONS%20OMBUDSMAN%20BILL%202015_HON%20ROBERT%20BROKENSQUIRE%20MLC/B_AS%20INTRODUCED%20IN%20LC/RESOURCE%20OPERATIONS%20OMBUDSMAN%20BILL%202015.UN.PDF.

Emissions Reduction Fund auctions to be audited

The Australian National Audit Office (ANAO) has recently commenced an audit into the effectiveness of the Clean Energy Regulator's (CER) conduct of auctions under the

Australian Emissions Reduction Fund (ERF) program.

The objective of the ANAO's audit is to assess the effectiveness of the CER's crediting and selection of carbon abatement to purchase under the ERF. The audit is the first independent analysis of Australia's unique emissions reduction scheme. The ANAO is accepting public submissions on the auctions until 19 February 2016. The ANAO's audit report is due to be tabled in the third quarter of 2016.

The first and second ERF auctions were conducted in April and November 2015. According to the CER, the carbon abatement contracts entered into following those auctions will deliver almost 92.8 million tonnes of carbon dioxide equivalent abatement for a total financial commitment of AUD1.2 billion.

The third ERF auction is scheduled to take place on 27 and 28 April 2016.

Contributions to the audit can be made here:

<http://www.anao.gov.au/Publications/Audits-in-Progress/2016/Winter/Emissions-Reduction-Fund-Abatement-Crediting-and-Purchasing>.

Northern Australia Infrastructure Bill released for comment

Following a public consultation process in November 2015, the Australian Government has now released an exposure bill (called the Northern Australia Infrastructure Facility Bill 2016) to establish the Northern Australia Infrastructure Facility (NAIF). The NAIF's function will be to grant financial assistance to the States and Territories for the construction of economic

infrastructure in Northern Australia and will offer up to AUD5 billion in finance from 2016-17 to encourage private sector investment.

Some key points in the Bill are as follows:

- the Bill enables the NAIF to utilise a broad range of financing mechanisms
- the NAIF will be run by a board comprising of experts in a range of fields (such as banking and finance, private equity and engineering) which will decide the NAIF's strategies and policies
- a legislative instrument issued by the Minister – the Investment Mandate – will provide directions to the NAIF about its functions (eg how the NAIF's financing mechanisms will operate in practice) and will detail the NAIF's objectives and strategies, eligibility criteria, loan conditions and risk and return parameters
- the Investment Mandate must not direct the NAIF to provide financial assistance for the construction of particular infrastructure or in relation to a particular person. The Investment Mandate is currently being developed and will be subject to a separate consultation process
- the Minister may decide that financial assistance should not be provided if such assistance is inconsistent with Government objectives, will have adverse implications on Australia's national or domestic security or will have an adverse impact on Australia's international reputation on foreign relations
- the NAIF will operate for 5 years and no decisions to provide financial assistance are to be made after 30 June 2021

(although decisions to provide financial assistance after this date may be made before 30 June 2021).

The public comment period for the Bill closed on 4 February 2016. More information on the NAIF can be found here:

<http://industry.gov.au/Industry/Northern-Australia-Infrastructure-Facility/Pages/default.aspx>.

ARENA announces solar PV funding winners

On 14 January 2016, the Australian Renewable Energy Agency (ARENA) announced its shortlist of 22 "high merit" large-scale solar photovoltaic (PV) projects eligible for a total of AUD100 million in funding. The funding is designed to deploy 200MW of additional capacity and assist in driving down the costs of solar development. Full applications for funding are due by 15 June 2016.

ARENA released a statement that the competitive round had attracted strong interest, with 77 eligible expressions of interests being submitted by both domestic and international companies, including several new entrants to the market.

The funding requests for the 22 shortlisted projects exceed the amount available by a factor of 3 - approximately AUD332m for projects totalling AUD1.68 billion. Combined, the 22 shortlisted projects have a total capacity of 766MW, each demonstrating a cost of energy below the benchmark threshold of AUD135 per MWh.

Media reports have stated that a number of projects shortlisted are understood to be seeking finance from the Clean Energy Finance Corporation, which has established an AUD250 million program to

support solar PV projects of more than 10MW, with loan requirements of AUD15 million or more.

ARENA plans to publish the aggregated analysis of the expressions of interest in February to provide the sector with insight about cost and generation parameters.

A full list of the 22 projects shortlisted can be found here:

<http://arena.gov.au/programmes/advancing-renewables-programme/large-scale-solar-pv/>.

Tasmania contemplates zero carbon while the Australian Capital Territory seeks battery storage

The Tasmanian Government has released a draft climate change action plan for the period 2016 to 2021 which outlines the actions the Tasmanian Government will take in response to climate change. The draft action plan is open for feedback until 25 March 2016 and will be finalised in the middle of this year.

The draft action plan details the four key areas that the government is looking to develop:

- meeting the climate change challenge by having well planned and appropriate management systems set up to reduce the increasing risks that come with climate change
- maximising energy advantages by generating more of its power from renewable resources and selling excess back to the grid (already Tasmania generates 90% of its electricity capacity from renewables)
- maximising its business advantage: using the current status of a "low emitter of

greenhouse gases" to enhance Tasmania's reputation as an attractive place to do business. Tasmania has already started investing in its comparable strengths of agriculture, tourism, energy and resources, science, education and research as well as advances in niche manufacturing

- maximising its liveability: Tasmania's cool, temperate climate makes it highly attractive as a place to live, work, invest and raise a family.

Because Tasmania has already exceeded its goal of reducing emissions by 60% on its 1990 levels by 2050 set under the State's Climate Change (State Action) Act 2008, the draft action plan presents a series of targets that could now be formulated for the State. The most ambitious is that of having a zero carbon policy. A zero carbon policy reflects growing scientific consensus that net zero to net negative emissions will be required to achieve the internationally agreed goal of limiting global warming to less than 2 degrees Celsius.

Tasmania plans to review the action plan every five years to align with the intention agreed in Paris in December 2015 for a rolling five year review of international commitments.

A copy of the draft action plan can be found here: http://www.dpac.tas.gov.au/_data/assets/pdf_file/0006/275343/Embracing_the_Climate_Challenge-Action_Plan.pdf.

Meanwhile, in Australian Capital Territory, the Territory Government is aiming to have 90% of its power generated from renewable sources by 2020 and cut greenhouse gas emissions by 40%. In what is possibly a world first, the Territory Government

has launched the "Next Generation Energy Storage Pilot" as part of its Next Generation Renewables program, under which the Government is seeking bids to provide renewable energy battery storage systems. Initially the bids will be sought through a competitive grants process where up to AUD600,000 would be awarded to companies to install distributed solar storage in the Territory and supported through its fourth reverse auction for 109MW of renewable energy later this year.

It has been reported that the global battery storage market is predicted to be worth AUD400billion by 2030 and the Territory's Environment Minister, Simon Corbell, believes low-cost energy storage is the missing-link in the transition to a 100% renewable energy grid.

In addition to seeking renewable energy battery storage systems, the ACT has been holding auctions to buy renewable power, which has so far backed two new windfarms in Victoria amongst other projects.

More information on Next Generation Renewables and the Next Generation Energy Storage Pilot is detailed here: <http://www.environment.act.gov.au/energy/cleaner-energy/next-generation-renewables>.

Major road project environmental approval ruled invalid in Western Australia

The Western Australian Government's troubled Roe 8 highway extension project hit another hurdle in mid-December 2015 when the Western Australian Supreme Court ruled that the project's environmental approval was invalid.

The Roe 8 project is part of a broader road transport infrastructure project designed to link Perth's inland industrial areas to the Port of Fremantle on the coast. The intention of the Urban Transport Corridor, of which the Roe 8 project forms a part, is to create a proper heavy transport road corridor to provide greater freedom of movement for industry between key hubs and to improve road safety for all other road users.

However, the Roe 8 project has created considerable controversy because the proposed route of the new highway will transect a portion of the Beelihar Wetlands, an important remnant urban wetland area.

The State's Environmental Protection Authority (EPA) recommended approval of the Roe 8 project in September 2013 and the State Environment Minister then issued a formal environmental approval in July 2015. A local activist group, Save Beelihar Wetlands (Inc), challenged the Minister's decision to approve the Roe 8 project on a number of grounds, including that the EPA failed to consider its own published (and since repealed) policies on the provision of offsets for the environmental impact of the project when it made its report to the Environment Minister in September 2013. As a result, the EPA's assessment was ruled invalid by the court, and the Minister's decision, which relied on the EPA's assessment, was also held invalid. None of the other grounds of review put forward were upheld.

Following the court's decision:

- the Western Australian Government announced that it would appeal the Supreme Court's decision, because of the potential impact that the court's findings might have on other

approvals issued by the Environment Minister

- the Government also indicated that it would resubmit the Roe 8 project for assessment by the EPA
- the Environment Minister announced an independent review of the EPA's practice for policy and guidance development and how those policies and guidance materials are applied in the assessment process. The review is being conducted by two independent lawyers with expertise in environmental matters, supported by a lawyer and researcher. The panel's report is due to be delivered in April 2016.

The timetable for the Roe 8 project has now been considerably delayed as a result of the challenge, and the Government's subsequent decision to resubmit the project for assessment. The decision of the Supreme Court is yet another example of the use of universal principles of administrative law to challenge environmental decisions, rather than challenging the scientific merits or analysis used in assessment.

The judgment of the Supreme Court in *Save Beeliiar Wetlands (inc) v Jacob* can be accessed here: <http://decisions.justice.wa.gov.au/supreme/supdcsn.nsf/judgment.xsp?documentId=516E4EF53FD4CE2148257F1D0009605E&action=openDocument>.

Productivity Commission releases final report on workplace relations

The final report on Australia's Workplace Relations Framework was publicly released on 21 December 2015. We commented on the interim report in the August 2015 edition of

the Australian Energy and Resources Update.

The Commission confirmed the conclusion reached in its interim report that Australia's workplace relations framework was not "dysfunctional" but that there was a need for reform. In doing so, the Commission advocated for repairs to the existing system rather than replacement, with an overall endorsement of Australia's workplace relations structure. The bulk of the recommendations contained in the Commission's interim report remain unchanged, including those which we previously highlighted as being relevant in relation to the resources industry, namely:

- 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, requiring assessment of whether each class of employees would be placed at a net disadvantage overall compared with the relevant award
- 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

- existing union rights of entry to a workplace should be curtailed
- the requisite level of knowledge of an employer regarding unlawful involvement in "sham" contracting (hiring someone as an independent contractor when they are in fact an employee) be reduced from "reckless" to "reasonably expected to know".

While the release of the final report has been broadly welcomed, some feedback has suggested that the report falls short in a number of areas. The Chamber of Minerals & Energy of Western Australia described the report as a "missed opportunity to undertake fundamental workplace relations reform to deliver a system more aligned to the modern economy capable of delivering enhanced productivity and competitiveness" while the Australian Chamber of Commerce and Industry stated that "[w]hile there are changes recommended across a range of areas that are worthy of support, bold and forward thinking reforms appropriate for this period of fundamental economic change are missing".

The Australian Government has not yet announced which of the Commission's recommendations will be accepted as government policy. A series of discussions with employees, employers, unions, social welfare groups and women's groups on the final report's findings will be held in early 2016. A copy of the final report can be accessed here: <http://pc-web01.squiz.net/inquiries/completed/workplace-relations/report#contents>.

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