

Australian Energy and Resources Update

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

Highlights this month include new foreign investment rules, substantial policy developments in two States relating to the unconventional gas sector and the conviction of a copper mining company and its managing director for environmental offences in Queensland.

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 foreign investment regulations released for comment

On 2 May 2015, the Australian Government announced a package of reforms to amend Australia's foreign investment framework.¹ On 13 October, the Government released draft regulations to implement these foreign investment reforms and supplementary explanatory materials for public comment. Comments closed on 30 October 2015.

The Government's foreign investment reforms include:

- increased scrutiny around foreign investment in agriculture
- increased transparency on the levels of foreign ownership in Australia through a land register
- a more modern and simpler foreign investment framework; and
- stricter penalties making it easier to pursue court action and ensure that foreign investors are not able to profit from breaking the rules.

Stakeholder comment was invited on:

- the exposure draft of the Foreign Acquisitions and Takeovers Regulation 2015 which will replace the existing regulations to the Commonwealth Foreign Acquisitions and Takeovers Act 1975. The draft regulation contains key provisions including

Key issues

- New foreign investment regulations released for comment
- Electricity market reforms move ahead in Western Australia
- Queensland solar energy auction announced
- WA Government responds to report on the mental health impact of Fly In Fly Out arrangements
- Whole of government framework for unconventional gas released in Western Australia...
- ...while in New South Wales, feedback is sought on new CSG guidelines
- WA Environmental Protection Authority sets new climate change tests for project approvals
- New mining technology centre for Queensland
- Mining company and its managing director fined for environmental offences in Queensland.

¹ Clifford Chance released a briefing note on these reforms on 19 October 2015 which is available at: http://www.cliffordchance.com/briefings/2015/10/foreign_investmentregulationinaustralia.html.

the definition of "agribusiness", definitions and rules around foreign government investors and implements aspects of the Government's previously announced modernisation of foreign investment legislation which includes incorporation of foreign investment policy and practice into the formal legislative framework and aligning the framework with broader Commonwealth law-making principles; and

- the exposure draft of the Foreign Acquisitions and Takeovers Fees Imposition Regulation 2015 which provides for fees for notifiable actions and the exemption certificates contemplated by the Foreign Acquisitions and Takeovers Regulation 2015 referred to above.

The regulations and related papers can be accessed here:

<http://treasury.gov.au/ConsultationsandReviews/Consultations/2015/Regulations-to-implement-foreign-investment-reforms>.

Electricity market reforms move ahead in Western Australia

On 30 September 2015, West Australian Treasurer and Energy Minister Dr Mike Nathan announced the transfer of the operation and system management of the wholesale electricity market in south-west Western Australia (known as the South West Interconnected System, or SWIS) to the Australian Energy Market Operator (AEMO).

AEMO was established in 2009 to integrate the electricity and gas markets operating in the eastern half of the country into a multi-sector,

multi-jurisdiction market. The approach has been flexible and AEMO's functions vary across jurisdictions. AEMO's core functions include managing the National Electricity Market, which covers the generation, distribution and supply of electricity, and the operation of the wholesale and retail gas market.

In the wholesale electricity market in Western Australia (WEM), the functions of power system and market operator are currently performed by the Independent Market Operator (IMO). The role of the IMO is to oversee the operation and system security of the WEM, which involves providing technical information to the market about supply availability and reserve levels, administering the market rules and procedures and planning future reserve capacity. The IMO also administers the WA Gas Bulletin Board and Gas Statement of Opportunities, providing information across the gas supply and demand chain to market participants.

These functions will now be transferred to AEMO, with the aim being to establish a more consistent and streamlined approach, a common governance structure, enhance network security and harness financial and operational efficiencies. The decision has been welcomed by industry groups, which see the utilisation of AEMO's systems as a way to lower costs for industry and consumers and create a more competitive and transparent energy market overall.

The IMO will temporarily retain its function as an industry regulator until that function is transferred to a Western Australian government entity which is still to be created.

System management, which includes issuing instructions to generators in

the SWIS and providing technical information back to the IMO, is currently carried out by Western Power, the state-owned utility, but will gradually be transferred to AEMO.

Further information about the transfer of roles and responsibilities is available here:

<https://www.finance.wa.gov.au/cms/PublicUtilitiesOffice/ElectricityMarketReview/InstitutionalArrangements.aspx>.

Queensland solar energy auction announced

The Queensland Government recently announced its intention to hold a reverse solar auction, similar to the wind auctions held by the government in the Australian Capital Territory in March 2014 and August 2015. The solar auction is for 60MW of capacity, and is in line with the State's renewable energy target of 50 per cent by 2030. KPMG has been selected to advise the government on running the solar tender. The solar auction was announced in connection with the joint announcement by the Australian Renewable Energy Agency (ARENA) and the Clean Energy Finance Corporation (CEFC) of A\$350 million of funding for large scale solar projects.

ARENA has announced a A\$100 million programme and invited bids from large scale solar projects for up to A\$30 million. The CEFC has announced its provision of A\$250 million of funding for projects of more than 10MW, with loan requirements of A\$15 million or more. Projects with power purchase agreements in place as well as those intending to take on some merchant risk are eligible for CEFC financing. The CEFC will also co-invest in debt and equity.

CEO of the CEFC Oliver Yates has stated that the CEFC's finance will be the largest debt financing offering to the Australian large-scale solar industry to date, stating "the CEFC's provision of fixed-rate longer-dated senior debt finance is designed to directly support the network of financiers, project suppliers and developers in the delivery of additional large-scale solar in Australia".

Expressions of interest for the ARENA program have closed, however, the CEFC will accept submissions for the Large Scale Solar Program at any time. More information can be found at: [http://www.cleanenergyfinancecorp.com.au/media/releases-and-announcements/files/cefc-backs-large-scale-solar-with-\\$250-million-finance-program.aspx](http://www.cleanenergyfinancecorp.com.au/media/releases-and-announcements/files/cefc-backs-large-scale-solar-with-$250-million-finance-program.aspx).

WA Government responds to report on the mental health impact of Fly In Fly Out arrangements

In our June 2015 Australian Energy and Resources Update, we reported on the Western Australian Parliamentary Committee's report on the impact of fly-in fly-out (FIFO) work practices on mental health.

On 13 October 2015, the West Australian Government released its substantive response to the report. Of the 30 recommendations made in the report, 14 are supported by the government, one is partially supported and 15 are noted. The Mines and Petroleum Minister, Bill Marmion, said that "the health and safety of workers in the resources industry is one of the Government's highest priorities" and that "we will now work with the Mining Industry

Advisory Committee and the Mental Health Commission to address the report's recommendations". Mr Marmion indicated that implementation may come in the form of "reviewing and strengthening existing codes of practice".

The proposed Work Health and Safety (Resources) Bill which is currently being prepared will address many of the recommendations in the report. Industry heads have welcomed the proposal.

In short, the recommendations supported by the Government include:

- The collection of data on the number of FIFO and drive-in drive-out workers, and whether they work in construction or production positions within the industry
- A database to monitor deaths in Western Australia, which is scheduled to be implemented in the 2016/17 financial year
- Considering existing research into mental health of FIFO workers and their families. In this context, the Government has noted that work ought to be done to seek resource companies and industry bodies to acknowledge and respond to information provided, including that their industry is vulnerable to mental illness and suicide
- That the new Bill (referred to above) include provisions requiring mine managers to report attempted suicides and suicides and any death on site, regardless of whether the individual was on- or off-shift
- The Minister for Mines and Petroleum investigate every death notification received

- The existing Code of Practice on FIFO work include explicit acknowledgement of the impact of fatigue on mental health, provision for the development of workplace culture and that accommodation villages provide high quality, reliable and accessible communications technology; and
- An inquiry into possible harmful drinking habits and alcohol consumption of FIFO workers and the impact this has on their mental health.

The Government has only partially supported the proposal for a Code of Practice implemented in conjunction with the Minister for Mines and Petroleum, Mental Health Commission and industry stakeholders. Instead of a new Code, the Government will aim to strengthen existing codes and practices.

The Government has noted, but does not support, the recommendation of a 2-on 1-off week, or 8-on 6-off day rosters. It will seek further input on this recommendation in the context of the other recommendations that have been supported by the Government.

A copy of the Government's response can be accessed here:

[http://www.parliament.wa.gov.au/parliament/commit.nsf/\(Report+Lookup+by+Com+ID\)/2E970A7A4934026448257E67002BF9D1/\\$file/17176723.pdf](http://www.parliament.wa.gov.au/parliament/commit.nsf/(Report+Lookup+by+Com+ID)/2E970A7A4934026448257E67002BF9D1/$file/17176723.pdf).

Whole of government framework for unconventional gas released in Western Australia...

The West Australian Government has released a document outlining the whole-of-government regulatory framework for shale and tight gas.

The framework is built on five key principles:

- Transparent, effective and risk-based regulation
- Whole-of-government approach
- Consistent State and Commonwealth Government objectives
- Effective engagement with stakeholders, particularly local communities; and
- Compliance and enforcement.

The framework has been endorsed by all State government agencies involved in the assessment and regulation of petroleum resources: the Office of the Environmental Protection Authority (OEPA), the Environmental Protection Authority (EPA) and the Departments of Mines and Petroleum (DMP), Water, Health, Environment Regulation, Aboriginal Affairs, Parks and Wildlife, and Planning.

Some points to note are:

- The DMP is the lead agency responsible for the regulation of WA petroleum activities and evaluates all technical matters relating to drilling for petroleum, formation evaluation, resource management and production in accordance with industry best practice
- The DMP's lead agency role is complemented by key regulatory processes undertaken by the Department of Water, as well as the EPA and OEPA
- The framework is supported by new regulations mandating stringent well and environment management plans and baseline water monitoring
- Under the framework, the public has right to be informed and raise concerns. Proponents must be frank, honest and thorough in

their disclosures, and demonstrate adequate consideration of matters of public concern

- The framework has been designed to respond to potential issues such as land access, flora and fauna impacts, air quality, local amenity, water quality and quantity, human health and induced seismicity; and
- The framework sets out a detailed overview of the enforcement actions and penalties that are administered by various government agencies.

The framework document can be accessed here:

http://www.dmp.wa.gov.au/documents/Shale_and_Tight_Gas_Framework.pdf.

...while in New South Wales, feedback is sought on new CSG guidelines

The New South Wales Department of Planning and Environment has released draft Guidelines for the Economic Assessment of Mining and Coal Seam Gas Proposals. The due date for comments is 24 November 2015.

The objective of the Guidelines is to provide clarity to applicants on two key matters that will be taken into consideration by the relevant consent authority when determining an application for consent to carry out a development under the Environmental Planning and Assessment Act 1979 (NSW):

- Local effects analysis: This relates to the likely impacts of the development on the local community including environmental, social and economic impacts. These

impacts may relate to matters such as local employment and income effects, effects on local suppliers and environmental and social changes in the local community

- Public interest: This relates to assessing the net present value of the development to the NSW community using a cost benefit analysis (CBA):

Step 1: Establish the base case against which to assess the potential impacts of the development

Step 2: Define the scope of the development

Step 3: Quantify the changes from the base case due to the development

Step 4: Estimate the monetary value of these changes

Step 5: Estimate the net present value of the development's future net benefits cash flow stream using the discount rate specified in the NSW Treasury's Guidelines for Economic Appraisal (2007) – being 7% per annum with sensitivity testing at 4% and 10% per annum

Step 6: Undertake sensitivity analysis

Step 7: Assess the distribution of costs and benefits across different groups; and

Step 8: Report CBA results and decide which is better for society.

Further information about the Guidelines can be found here: http://planspolicies.planning.nsw.gov.au/index.pl?action=view_job&job_id=7312.

WA Environmental Protection Authority sets new climate change tests for project approvals

The WA Environmental Protection Authority has revised and updated its guidance on the assessment of greenhouse gas emissions and climate change impacts associated with environmentally significant proposals.

The EPA has imposed greenhouse gas emission-related conditions on proposals assessed by it since the late 1990s. Previously, the Authority indicated that it would cease imposing such conditions when the reduction of greenhouse gas emissions was regulated through other statutory mechanisms (such as a national emissions trading scheme). As no such regulation exists, the Authority has revised its previous guidance in line with the more recently developed approach to identifying, assessing and managing risks associated with proposed development.

The stated purpose of EPA Bulletin No. 24 is to discuss the circumstances under which the EPA will assess greenhouse gas emissions associated with development proposals; describe what principles the EPA will expect proposals to meet with regard to minimising greenhouse gas emissions; and outline the EPA's expectations for environmental impact assessment with respect to projected climate change impacts.

In imposing conditions in relation to greenhouse gas emissions reductions, the Authority may ask proponents to target continuous improvement in net greenhouse gas emissions and emission intensity through the

periodic review and, where practicable, commit to the adoption of advances in technology and process management.

The Authority will apply a precautionary approach to climate change-related impacts, particularly where a proposal is to have a multidecade lifespan as these types of proposals "will generally be at greater risk of climate change impacts and may present significant environmental challenges in an uncertain future". The Authority will use the following considerations to determine whether climate change impacts may be environmentally significant in relation to a particular proposal:

- The operating longevity of the proposal and whether it extends over a period during which current projections suggest observable climatic changes will occur; and
- Whether the nature of the proposal is such that climate change could increase the frequency or consequences of adverse events related to the proposal that may lead to environmental harm.

If the Authority determines that climate change impacts are environmentally significant in relation to any given proposal, it may require proponents to undertake additional studies, apply certain assumptions or modelling or certain specific factors when preparing environmental scoping or assessment documentation.

A copy of the new bulletin can be accessed here: <http://edit.epa.wa.gov.au/EPADocLib/EPB%2024%20Greenhouse%20September2015.pdf>.

New mining technology centre for Queensland

Queensland's University of Technology has been chosen to host a new Mining Equipment, Technology and Services (METS) Industry Growth Centre as part of the Australian Government's Innovation and Competitiveness Agenda.

The Australian Government will provide A\$3.5 million of funding to the Centre for the next 4 years, while the Queensland Government will provide A\$6 million of funding plus staff support.

The focus of the METS Centre will be on four areas:

- reducing regulatory burden
- increasing collaboration and commercialisation
- improving international engagement capabilities; and
- enhancing management and workforce skills.

The Centre will operate collaboratively to develop solutions to mining equipment and technology challenges, including production costs and mine site rehabilitation.

Further information about the METS Centre can be located here: <http://www.metsigned.org/>

Mining company and its managing director fined for environmental offences in Queensland

A copper mining company and its managing director have been fined over A\$400,000 in the Cairns Magistrates Court after pleading guilty to causing environmental harm as a result of the release of contaminated water from the mine's catch dam into the local waterway.

The Queensland Environment Minister issued a press release at the end of October noting that the company had pleaded guilty to wilfully contravening several conditions of its environmental licence and statutory transitional environmental program, wilfully contravening an Environmental Protection Order that had previously been issued by the Department of Environment and Heritage Protection and wilfully causing unlawful serious environmental harm under the Environmental Protection Act 1994. The company's managing director was charged for failing to ensure the company complied with the Environmental Protection Act 1994.

While no conviction was recorded against either the company or the managing director, the company was fined A\$250,000 and the managing director was fined A\$50,000. The company was also ordered to pay:

- A\$37,000 in investigation costs
- A\$1600 in legal fees
- A\$40,000 towards an environmental rehabilitation project focussed on water quality to be undertaken by the local Aboriginal Corporation; and
- A\$40,000 for a rehabilitation project focussed on riparian vegetation downstream of the mine site.

The court is also considering a formal rehabilitation order that would require the company to rehabilitate the mine site.

The Minister's press release can be accessed here:

<http://statements.qld.gov.au/Statement/2015/10/28/mining-company-fined-for-wilfully-causing-serious-environmental-harm>.

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