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Briefing note November/December 2015

Australian Energy and Resources Update

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

Highlights this month include commencement of Australia's new foreign investment regime, the release of the Australian Government's response to the Harper Review of competition policy and recommendations from the Western Australian Parliament to improve the State's onshore petroleum regime.

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

New Foreign Investment regime comes into force

On 1 December 2015, Australia's new inbound foreign investment regime came into force which repealed and replaced the former regime in its entirety.

The new legislation comprises:

- the amended Foreign Acquisitions and Takeovers Act 1975 (Cth) (FATA Act), which substantially redrafts the former foreign investment regime, including establishing a notification system based on new concepts of "substantial actions" (which are not subject to mandatory notification requirements, but nonetheless may be reviewed by the Treasurer) and "notifiable actions" (which the Foreign Investments Review Board (FIRB) must be notified of)
- the Foreign Acquisitions and Takeovers Regulation 2015 (Cth), which replaces the existing regulations and contains provisions central to the interpretation and application of the new FATA Act, such as the definition of agribusiness, definitions relating to foreign government investors and various exemptions to the new Act
- the Register of Foreign Ownership of Agricultural Land

Act 2015 (Cth), which gives legal effect to the Government's policy requirement for all foreign persons with certain interests in agricultural land to register those interests with the Australian Taxation Office; and

- the Foreign Acquisitions and Takeovers Fees Imposition Act 2015 (Cth), which imposes new filing fees for applications made under the Act.

While the extensive redrafting of the regime will pose a number of new issues concerning interpretation and practice, the key substantive changes which foreign investors should be aware of are:

- 20% substantial interest threshold: Under the old Act, foreign persons generally required FIRB approval if acquiring a stake of 15 per cent or more (depending on the relevant monetary threshold). The FATA Act lifts the substantial interest threshold from 15 per cent to 20 per cent, aligning it more closely with the takeovers threshold in the Corporations Act 2001 (Cth)
- Increased penalties: The new Act imposes stricter criminal penalties for breaches, supplemented by civil pecuniary penalties and infringement notices for less serious breaches of the residential real estate rules. It is expected that a proportionate penalty regime and increased flexibility around the types of pecuniary orders which may be made by the Treasurer (which includes divestment orders, among others) will make it easier for the Government to pursue foreign investors that breach the legislation. Third parties who knowingly assist a foreign investor to breach the legislation are also subject to civil and criminal penalties
- Interests in "Australian land": The old concepts of "Australian rural land" and "Australian urban land" have been replaced with definitions of "agricultural land", "residential land", "mining and production tenements" (which exclude exploration and prospecting tenements) and "commercial land"; and
- Information and record-keeping: The new legislation imposes new recordkeeping requirements on investors, requiring them to (among other things) keep records of notifiable actions and compliance with the FATA Act for specified periods of time.

The Australian Government has also adopted a new foreign investment policy which provides an overview of the new legislative framework and guidance on factors that are taken into account when considering the national interest test under the new regime (which test remains unchanged).

A Clifford Chance briefing note on the new foreign investment framework can be accessed here: http://www.cliffordchance.com/briefings/2015/12/foreign_investmentregulationinaustralia.html.

The legislation and new investment policy can be accessed here: http://firb.gov.au/resources/.

East Coast gas market review report released for public comment

The Australian Energy Market Commission (AEMC) released its draft report on Australia's East Coast gas markets for public comment on 4 December 2015. If implemented, its key recommendations will introduce significant additional regulation in the industry.

Submissions can be made until 12 February 2016 and AEMC plans to submit its final report to the COAG Energy Council in May 2016. The May deadline follows the 9 April 2016 deadline for the release of the report by Australian Competition and Consumer Commission (ACCC) into the competitiveness of East Coast gas markets. AEMC did not recommend changes to the economic regulation of gas pipelines, but indicated that it may supplement its draft recommendations in light of the ACCC's findings.

AEMC's key recommendations were as follows:

- Concentrate trading of wholesale gas at the existing physical hub at Wallumbilla, situated 5 hours west by road of Brisbane in southern Queensland, and creation of a virtual hub in the Victorian Declared Wholesale Gas Market (DGSM): AEMC was concerned that multiple trading locations unnecessarily split liquidity and reduced the benefits to participants of a liquid wholesale gas market. Therefore, it recommended that trading of wholesale gas be concentrated at a Northern Hub (the existing Wallumbilla gas supply hub) and at a Southern Hub (by enhancing the DGSM). The Southern Hub will be a virtual hub covering the Victorian gas transmission system. The development of the Northern Hub at Wallumbilla is expected to be more evolutionary. The hub will initially continue to be a physical hub. If the first round of reform does not promote

gas market liquidity, AEMC believes there would then be a case for expanding the hub to a virtual one covering either the Wallumbilla compound or more widely over pipelines in south-east and/or south-west Queensland

- Introduce three new mechanisms to access pipeline capacity by holding daily auctions on all pipelines for day-ahead contracted but un-nominated capacity; having mandatory capacity trading platforms, with standardised capacity products and publication of trading information; and mandatory publication of the actual (not published) prices for capacity sold by pipeline owners; and
- Expand information required to be published on the Natural Gas Services Bulletin Board to improve the content, frequency and compliance of reporting.

AEMC's full report can be accessed here: http://www.aemc.gov.au/getattachment/00fe1a44-27b6-4575-b993-ebc3188988a6/Stage-2-Draft-Report.aspx.

Results of the second Emissions Reduction Fund auction announced

Following the first Emissions Reduction Fund (ERF) auction in April 2015, the second ERF auction was held on 4 and 5 November 2015. The auction results reveal that:

- The Clean Energy Regulator (CER) committed to purchase 45,451,010 tonnes of abatement by entering into 129 contracts with 77 different project owners covering 131 projects
- The total value of contracts awarded was A$556,875,549. When added to the contracts signed at the first auction, the CER has now spent over A$1.2 billion to contract 92,784,150 tonnes of carbon abatement under the ERF regime
- The average price per tonne of abatement was A$12.25, which is down from the A$13.95 mark in the first auction
- The largest single contract was for 2.5 million tonnes of abatement and the smallest was for 15,333 tonnes of abatement; and
- Based on the two auctions, the CER has now secured almost 240 contracts that will deliver the nearly 92.8 million tonnes of abatement at an average price of A$13.12 per tonne.

The date for the third auction has been set for 27 and 28 April 2016. It is envisaged that the format of the third auction will largely mirror the second auction.

Detailed results of the second auction, including information about the successful projects, may be accessed here: http://www.cleanenergyregulator.gov.au/ERF/Auctions-results/November-2015.

Draft guidelines on dewatering operations in Western Australia released

In late November, the Western Australia Department of Environment Regulation (DER) released a draft guidance statement on proposed changes to the regulation of mine dewatering operations in the State. Public comments on the draft guidance statement can be made until 5 February 2016.

At present, mine dewatering is regulated by both the Department of Water (DOW) and the DER. The extraction of water is regulated by the DOW under the Rights in Water and Irrigation Act 1914 (RIWI Act) while discharge of the same water is regulated by the DER under the Environmental Protection Act 1986 (EP Act). Industry bodies and participants have been lobbying for some time for the entire process of dewatering to be regulated by one agency.

The draft guidance statement proposes that the process be simplified with the regulation of the discharge of dewater moving to the DOW under the RIWI Act with certain exceptions. Importantly, where dewater may be contaminated or may impact on the environment downstream of the release point, the DER will continue to oversee the licensing and regulation of the discharge.

It is proposed that holders of current licences for dewatering under the EP Act will be able to apply to the DER to remove the conditions relating to mine dewatering from their licence. For new licences where there is no suggestion of contamination or downstream impact from the discharge, it is proposed that a separate approval from the DER will not be required and the DOW alone will assess the application for dewatering. However, if the DOW refuses to assess or grant a licence for dewatering, the licensee will be able to request that the DER assess the application pursuant to the EP Act (which would result in a licence for dewatering being issued under the EP Act).

The draft guidance note can be accessed here: http://www.der.wa.gov.au/images/documents/our-work/consultation/gs-mine-dewatering-regulation/draft_GS_Regulation_of_Mine_Dewatering.pdf.

Electricity storage systems approved in Western Australia

Battery storage and electric vehicle (EV) systems will be able to export excess electricity into the Western Power network in Western Australia from 1 December 2015 after an agreement was reached between Synergy and Western Power.

The two State Government-owned entities have agreed on a non-reference service which will allow storage systems to export electricity onto the South West Interconnected System (SWIS). The non-reference service agreed between Synergy and Western Power meant that the Economic Regulatory Authority (ERA) did not need to amend the network access arrangement that regulates third party access to the transmission network managed by Western Power.

Previously eligible customers were able to export electricity into the SWIS from residential solar photovoltaic systems, but were not able to do so from a battery or electric vehicle storage facility.

When the ERA set the guidelines for the reference services for the 2013-17 period for customers with bi-directional energy flows (ie those with rooftop solar sending electricity back into the grid), it excluded those with battery storage and EVs. At that time, it concluded that “more detailed consideration” was needed before a reference service that catered for batteries and electric vehicles could be approved, although such services could be offered to users as a “non-reference service” if there was demand. That demand has now been accommodated.

More information about connecting new technology to the SWIS is available here: http://www.westernpower.com.au/residential-customers-approval-to-connect-a-solar-pv-system.html.

Northern Territory gas pipeline interconnector contract awarded

On 17 November 2015, Jemena was awarded the contract to build and operate the Northern Territory's North East Gas Interconnector (NEGI), an A$800 million project which involves the construction of a 622-kilometre gas pipeline connecting the east coast of Australia to the Northern Territory.

The pipeline aims to open up access to the Northern Territory's extensive gas resources, linking Northern Territory's Amadeus pipeline to Queensland's Carpentaria pipeline between Tennant Creek in the Territory and Mount Isa in Queensland.

In securing the contract, Jemena is reported to have outbid a number of other major players in the field, including DUET Group, Pipeline Consortia Partners Australia Pty Ltd backed by China National Petroleum Corporation, and a local natural gas infrastructure company, APA Group.

The Managing Director of Jemena, Paul Adams, believes the NEGI will accelerate the development of the gas industry in Northern Territory stating in a Jemena media release that “Building the NEGI will drive commercial exploration and development of currently untapped gas reserves, unlocking the next phase of economic growth for the Territory and helping build a stronger Northern Australia”.

Construction of the gas pipeline is due to commence in 2017 with completion scheduled in 2018.

For more information on the NEGI construction plan, see Jemena's media release at: http://jemena.com.au/about/newsroom/media-release/2015/jemena-to-build-north-east-gas-interconnector and the Northern Territory Government's factsheet at: https://onshoregas.nt.gov.au/new-gas-pipeline.

WA Parliament makes recommendations for fracking operations

On 17 November 2015, the Standing Committee on Environment and Public Affairs of the Western Australian Legislative Council tabled its report on hydraulic fracturing (fracking) for unconventional gas in WA. The report considers land impact, chemical use, water quality and rehabilitation issues in relation to fracking activities. It found that there is mistrust and confusion within the community about fracking, as well as a level of misinformation.

Factual findings included:

- Not all well failures have environmental impacts
- There is a negligible risk of induced seismicity associated with fracking of shale plays at depth
- Suggestions that the development of the WA unconventional gas industry will

result in thousands of wells are over-stated; and
- The likelihood of hydraulic fractures intersecting underground aquifers is negligible.

The report found that most public concerns about fracking can be addressed through robust regulation and ongoing monitoring and the Committee recommended that all future consideration of fracking be based on established facts, ascertained through baseline data and monitoring, with a view to strengthening the industry's social licence to operate.

Whilst the Committee broadly endorsed the current regulatory framework, it made a number of recommendations including:

- Increasing the maximum fines for breaches of the Petroleum and Geothermal Energy Resources Act 1967 (WA)
- Improving transparency by amending the definition of the "permanently confidential information" that may be held by resource companies in relation to their fracking activities
- Establishing a statutory body to act as an independent arbiter for land owners and resource companies in land access negotiations
- Bans on using certain chemicals in fracking activities
- Introducing subsidiary legislation requiring public disclosure of all chemicals used in fracking
- Baseline monitoring of aquifers (and subsequent publication of the data) to become mandatory conditions of all approvals for fracking; and
- Establishing a fund similar to the Mining Rehabilitation Fund (used for the rehabilitation of abandoned mines in Western Australia and funded by an industry levy) for the purposes of covering the cost of fracking activities where licence holders fail to meet their obligations.

Shortly before the Committee tabled its report, the Land Access Roundtable, comprising farming and petroleum industry representatives, released a Farming Land Access Agreement Template under which landowners can obtain access to expert advice, detailed information and appropriate management plans in relation to fracking activity on their property and be compensated for losses as a consequence of those activities occurring.

The report can be accessed here: http://www.dmp.wa.gov.au/Documents/Petroleum/Report42-HydraulicFracturing_UnconventionalGas.pdf.

The Farming Land Access Agreement Template can be accessed here: http://www.appea.com.au/wp-content/uploads/2015/10/Final-Template-Access-Agreement-Oct-2015.pdf.

Back to the drawing board in the Great Australian Bight

BP Developments Australia Pty Ltd (BP)'s environment plan has been rejected by the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA).

The environment plan proposed the drilling of four exploration wells in the Great Australian Bight (GAB). The GAB is an open bay off the central and western portions of the southern coastline of mainland Australia. BP's environment plan was the first received by NOPSEMA that related to the GAB.

NOPSEMA assessed the environment plan against the requirements of the Commonwealth Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009 and on 16 November 2015 stated that it was not satisfied that BP's environment plan met the regulatory requirements.

NOPSEMA has given BP an opportunity to modify the environment plan. BP has indicated that it will be submitting a modified plan.

NOPSEMA's decision highlights that it will not be a rubber stamp for environment plans and will not approve plans that it believes do not meet the required standards. Proponents should ensure that any environment plan is prepared in accordance with, and includes all elements specified in, the Environment Regulations.

Further information about NOPSEMA's environment plan assessment process is available at: http://www.nopsema.gov.au/environmental-management/environment-plans.

Wildlife protection legislation to be overhauled in Western Australia

The Western Australian Government has fulfilled a promise made at the last election and introduced a new Biodiversity Conservation Bill 2015 into Parliament on 25 November 2015.

The Bill replaces the decades-old flora and fauna protection provisions in the Wildlife Conservation Act 1950

and the Sandalwood Act 1929 with a regime that reflects the current approach to biodiversity protection and conservation based on principles of ecologically sustainable development. Enforcement tools available to the regulator (the Department of Parks and Wildlife) for breaches of the legislation have also been updated to be consistent with modern environmental protection legislation.

Other key features of the Bill include:

- An updated threatened species listing process that will allow threatened ecological communities and critical habitat to be listed for protection in Western Australia for the first time
- A more streamlined approvals process that recognises approvals given under other State legislation and meets the requirements of the Federal Environment Protection and Biodiversity Conservation Act 1999 (Cth)
- The ability for land owners and occupiers to enter into biodiversity conservation agreements with the State Minister for the Environment to facilitate the ecologically sustainable use of biodiversity resources or provide biodiversity offsets for other activities
- Increasing the penalties for harming protected species from A$10,000 to A$250,000 for corporations, with even higher penalties for harming specially protected species, including whales and dolphins; and
- Enhanced provisions dealing with the liability of corporations, and their directors and senior managers, for offences under the Act. There are also separate provisions that address the liability of partners in a partnership and principals and their agents and the liability of employers for offences committed by employees.

A copy of the Bill can be downloaded here: http://www.parliament.wa.gov.au/parliament/bills.nsf/BillProgressPopup?openForm&ParentUNID=05B04B49751B582448257F07002E7566.

Queensland to appoint a new Resources Investment Commissioner

On 25 November 2015, the Queensland Premier, Annastacia Palaszczuk, announced that the State would appoint its first Resource Investment Commissioner, a position created to help attract new investment into the resources sector.

The appointment comes at a critical time for Queensland, with suppressed commodity prices as well as policy and regulatory challenges impacting the State's productivity and competitiveness. It is hoped that the appointment of the Commissioner will address these issues by securing new international investment for capital intensive exploration activity.

In addition to securing new international investment, the Commissioner's role will also include:

- securing new business partnerships and alliances
- leading delegations at domestic and international forums
- providing strategic leadership and advice on promoting Queensland's resource industry; and
- contributing to government policy development (with a particular focus on reducing red tape for new investment) and developing strategies to identify, prioritise and market opportunities.

The position has been advertised nationally and the candidate is expected to be appointed early 2016.

More information is available here: http://statements.qld.gov.au/Statement/2015/11/25/investment-hound-seeks-out-mining-funds.

Proposed Utah Point Port sale moves ahead in Western Australia

On 25 November 2015, the Western Australian Government announced that it had introduced enabling legislation to allow for the divestment, by long-term lease, of the Utah Point Bulk Handling Facility.

Utah Point is located in the world's largest iron ore export port and is a multi-user berth managed by the Pilbara Ports Authority. It is used primarily for the export of iron ore and manganese and in 2014/2015 reached a record throughput of 19.4 million tonnes. It was hoped to be sold for more than A$1 billion, but falling iron ore prices have now cast doubt on the facility's value and the potential selling price.

The Pilbara Port Assets (Disposal) Bill 2015 allows the Government to make regulations relating to the access to, and pricing of, services provided at Utah Point.

The Government has stated that it will consider all aspects of the divestment before it decides to seek expressions of interest for the long-term lease of Utah Point. It is set to seek expressions of interest in the first half of 2016.

Further information on the Government's proposed divestment of Utah Point and other Government assets is available at: http://www.treasury.wa.gov.au/AssetSales.

A copy of the Bill can be accessed at: http://www.parliament.wa.gov.au/parliament/Bills.nsf/BillProgressPopup?openForm&ParentUNID=87D463C5E194ADAD48257F0700243652.

Australia signs nuclear cooperation agreements

In late November, the Australian government finalised two nuclear cooperation agreements with India and the United Arab Emirates (UAE) to expand Australia's global uranium exports.

Both agreements set out strict conditions for the peaceful use, safeguarding and security of Australian uranium. The agreements also cover conditions for the supply of nuclear material, components related to nuclear technology and associated equipment for use in a domestic power industry. They both explicitly prohibit the use of Australian nuclear material in weapons.

Under the Australian-India agreement, the completion of the administrative arrangements ensures that the agreement enters into force and that Australian companies can commence commercial uranium exports to India with immediate effect. The administrative arrangements are yet to be completed under the Australia-UAE agreement and so that agreement has not yet entered into force. It is anticipated that the arrangements will be completed prior to the UAE's nuclear program coming online in early 2017.

The signing of the agreements has been welcomed by the Australian resources sector, with the Minerals Council of Australia stating that the uranium industry was looking forward to building relationships with customers and stakeholders in India and the UAE.

Australia hosts the largest endowment of uranium resources in the world (31% of the world total) and around 12% of the world annual production. Australia now has 24 nuclear cooperation agreements in force, allowing exports to 42 countries plus Taiwan.

A full copy of the Agreement between the Government of Australia and the Government of the United Arab Emirates on Cooperation in the Peaceful Uses of Nuclear Energy can be found here: http://www.austlii.edu.au/au/other/dfat/treaties/ATS/2014/10.html.

A full copy of the Agreement between the Government of Australia and the Government of India on Cooperation in the Peaceful Uses of Nuclear Energy can be found here: http://www.austlii.edu.au/au/other/dfat/treaties/ATS/2015/9.html?stem=0&synonyms=0&query=australia%20india%20nuclear%20cooperation%20agreement.

Australian Government responds to competition policy report

On 24 November, the Australian Government released its formal response to the review of Australia's competition policy, colloquially known as the Harper Review. The Review Report was released on 31 March 2015 and made 56 recommendations to, amongst other things, modernise and simplify Australia's competition laws.

The Government has said that it will implement the majority of the recommendations in the Review Report and will engage with states and territories in relation to recommendations in the areas of state and territory responsibility. Some of the key reforms foreshadowed by the Government's response of particular relevance for the resources sector are:

- A commitment at all levels of government to a new set of principles to guide competition policy implementation
- The introduction of cost-reflective road pricing as a long term reform option - this would see a move from indirect charges and taxes on road users to the use of direct pricing
- Deregulation of electricity and gas prices, promoting national energy legislation and rules across all Australian jurisdictions, adoption by Western Australia and the Northern Territory of the National Electricity Market framework (without physical connection) and the development of a national regime for reliability standards
- Implementation of the National Water Initiative (which was executed by all Australian governments in 2004) to ensure independent economic regulation of water pricing and to separate service providers from the regulatory and policy functions of government. The government also supports the creation of incentives for increased private participation in the sector
- Streamlining of the Australian Competition and Consumer

Commission's formal merger review process to combine the current formal process (which is yet to be used) with the authorisation process administered by the Australian Competition Tribunal. The Government proposes to develop exposure draft legislation to implement the streamlining proposal for public consultation. The Government has also noted that it expects further consultation between the Commission and business representatives on the informal merger approval process to deliver more timely decisions; and

- Simplification of the prohibitions against cartel conduct in the Competition and Consumer Act 2010 (Cth) and specific reforms including:
  - confining the provisions to conduct involving firms that are actual or likely competitors, where 'likely' means on the balance of probabilities
  - an expanded exemption for joint ventures (including so as to apply to joint ventures for the acquisition or marketing of goods or services, as well as production and supply joint ventures); and
  - an exemption for trading restrictions imposed by one firm on another in connection with the supply or acquisition of goods or services (including intellectual property licensing).

The Government says that the reform package will deliver stronger economic performance by promoting more dynamic, competitive and well-functioning markets.

A copy of the Government's response to the Review is available at: http://www.treasury.gov.au/PublicationsAndMedia/Publications/2015/CPR-response.

More red tape cut in Western Australia

The Western Australian Government has announced a number of new measures to reduce red tape for mining companies.

Under the Licensing Provisions Amendment Bill 2015 introduced into Parliament on 17 November, the State Government intends to abolish the requirement for miners to go through a separate approval process for authorisation to explore or mine for iron ore. Section 111 of the Mining Act 1978 (WA) currently requires a separate authorisation to be issued exploration, prospecting and retention licences and for mining leases issued for iron ore. It is proposed that the Mining Act be amended to abolish this requirement in respect of any new tenement applications. The Government believes that the removal of this requirement could save the resources sector up to A$2 million a year.

The Licensing Provisions Amendment Bill also proposes a single point of contact for all mining tenements and applications for mining tenements known as the "designated tenement contact". Currently, where there are multiple tenement applicants or tenement holders with separate addresses, the Western Australian Department of Mines and Petroleum must send separate correspondence to each tenement applicant or tenement holder, creating inefficiencies and increasing costs.

The State has also proposed to reduce the duplication and red tape surrounding environmental assessments carried out as part of the tenement application process. Currently, miners have to submit a mining proposal and a native vegetation clearing permit application separately for essentially the same activity. Under the Mining Legislation Amendment Bill 2015, it is proposed that these will be combined into the one application.

Copies of the draft bills are available here: http://www.parliament.wa.gov.au/parliament/bills.nsf/WebCurrentBills?openview.

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