JONES DAY

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AUSTRALIAN RESOURCES LAW UPDATE

This update sets out some significant changes in mining and environmental planning laws in Australia.

GREEN LIGHT FOR URANIUM EXPLORATION IN NEW SOUTH WALES

The 26-year-old prohibition on uranium exploration in New South Wales, found in the Uranium Mining and Nuclear Facilities (Prohibitions) Act 1986 (NSW), has been removed by the Mining Legislation Amendment (Uranium Exploration) Act 2012 (NSW) ("Act"). The Act has been passed by both houses of parliament and has received Royal Assent, but is yet to come into force.

The Act also made consequential amendments to the:

- Mining Act 1992 (NSW);
- Radiation Control Act 1990 (NSW);
- Aboriginal Land Rights Act 1983 (NSW);
- Mining Regulation 2010; and
- State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007.

Broadly, these amendments:

- Vest all uranium existing in a natural state on or below the surface of any land in the state in the Crown without compensation to any owners,
- Include uranium as a "mineral" in a new group,
- Provide that exploration for uranium will not require development consent under the Environmental Planning and Assessment Act 1979 (NSW) ("EPA Act") but will be subject to the environmental assessment processes under Part 5 of the EPA Act by the Minister for Mineral Resources and
- Provide for the procedure to obtain an exploration licence for uranium to be governed by the provisions relating to exploration licences under the Mining Act 1992 (NSW).

By way of comparison, exploration and mining of uranium is already permitted in the Northern

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Territory and the Australian states of South Australia, Tasmania and Western Australia. In the Australian state of Queensland and now New South Wales, only exploration is permitted. In the Australian state of Victoria, both exploration for and mining of uranium are still prohibited.

In announcing the proposed change in relation to uranium exploration, the Premier of New South Wales, Barry O'Farrell, said that the state would be "stupid to turn a blind eye to the revenue that uranium mining could generate" and announced his government wanted to repeal the long-held ban on uranium exploration and move New South Wales into the 21st century.

The mining of uranium continues to be banned in New South Wales, and further legislation will be required in the future to allow uranium mining. The holder of an exploration licence for uranium will therefore have no certainty that they will be able to commercialise their uranium deposits.

Mineral exploration is a risky business. Undertaking exploration of uranium when mining of uranium is still banned is even more risky. It remains to be seen whether many will rise to the challenge presented by the New South Wales Government.

SIGNIFICANT CHANGES TO NEW SOUTH WALES ENVIRONMENTAL POLLUTION LAWS

Changes to the pollution reporting obligations under the Protection of the Environment Operations Act 1997 (NSW) came into effect in February 2012. The changes, contained in the Protection of the Environment Legislation Amendment Act 2011 (NSW):

- Require that an increased number of statutory authorities be notified immediately after becoming aware of a pollution incident, including the local council where the incident occurred, the Ministry of Health, WorkCover, Fire and Rescue NSW and any other person as the Environment Protection Authority directs;
- Double the maximum penalty for failing to notify pollution incidents to A$2 million, with A$240,000 for each day the offence continues for a corporation, and to A$500,000, with A$120,000 for each day the offence continues for individuals;
- As further information becomes known, require polluters to continually notify the authorities about developments in relation to a pollution incident; and
- Require the holder of an environment protection licence to prepare, test and maintain a pollution incident response management plan. Failure to do so will result in monetary penalties for noncompliance.

The amendments also provide that if a corporation contravenes the new rules, each director and person involved in the management of the corporation is taken to have contravened the same rule, unless they can establish that they were not in a position to influence the conduct of the corporation in contravening the rule or they used all due diligence to prevent the contravention by the corporation.

TRANSFER OF EXPLORATION TENEMENTS IN QUEENSLAND MAY BECOME DUTIABLE

The former Queensland Labor Government announced, on 13 January 2012, that the Duties Act 2001 (Qld) ("Duties Act") would be amended such that the direct and indirect transfer of Queensland mineral and petroleum exploration and prospecting tenements would now attract duty, with effect from that date. Historically these transfers did not attract stamp duty in Queensland.

However, a bill amending the Duties Act was not introduced into Parliament before the Queensland state election on 24 March 2012, which the Labor government lost. With the Liberal National Party's win in the election, it remains to be seen what position the new government will take on this matter and whether they will enact the changes announced by the former government. Hence, uncertainty remains until an announcement is made by the new government as to its position.

In the meanwhile, the Queensland Office of State Revenue is leaving it to parties to choose whether they pay any transfer duty, pending legislation. If legislation is eventually enacted, then those parties who did not pay the transfer

duty between 13 January 2012 and the date the legislation comes into effect will be then forced to pay the duty for which they are liable. It is unclear whether any late fees or fines will apply at that time. Conversely, if a party opts to pay the duty amount prior to any legislation coming into force, and no legislation eventuates, it is unclear if and how duty will be refunded. Given this uncertainly, the Queensland Department of Mines and Safety, which is responsible for registration of tenement transfers, has said that it will accept unstamped transfers from 13 January 2012 onwards, meaning that transfers of exploration and prospecting tenements can still be made regardless of what position a party takes in respect of duty.

If imposed, duty would be payable on the value of the dutiable tenements at a sliding scale from 1.5 percent to 5.25 percent depending on value, where 5.25 percent duty applies to a value over A$980,000.

NATIVE TITLE TRIBUNAL REFUSES GRANT OF EXPLORATION LICENCE IN WESTERN AUSTRALIA ON CONDUCT GROUNDS

In the recent decision of *Seven Star Investments Group Pty Ltd/Western Australia/Wilma Freddie and Ors on behalf of Wiluna* [2011] NNTTA 53, the National Native Title Tribunal found that the grant of an exploration licence to Seven Star should be refused, based on the prior conduct of Seven Star in undertaking derogatory and intimidating communication with the registered native title party over the subject land.

The Native Title Act 1993 (Cth) has a "right to negotiate" procedure which must be followed by the tenement applicant and a registered native title party. Parties owe a duty of good faith to each other as part of the negotiation process under that Act. In this instance, negotiations and mediation failed. For only the second time in its history, The Tribunal determined that a future act (grant of the exploration licence) must not occur given Seven Star's conduct during the "right to negotiate"' process and the fact that the prior conduct was a "predictor" of what would happen in the future if negotiations were to continue.

This case shows that it is crucial for parties seeking exploration or mining tenements to engage in a bona fide process of consultation and negotiation with registered native title parties and ensure that all cultural and heritage issues are dealt with in a mutually satisfactory manner, in order to avoid the risk of not being granted exploration or mining titles.

CHANGES ARE COMING TO THE JORC CODE AND ASX LISTING RULES

Recently, the Australian Securities Exchange ("ASX") has been undertaking a review of the reporting requirements applicable to reserves, resources and exploration results for listed Australian mining and oil & gas companies.

In parallel, the Joint Ore Reserves Committee ("JORC") is currently reviewing the JORC Code (which is included within the ASX Listing Rules), a now internationally known and accepted code setting out the minimum standards, recommendations and guidelines for the public reporting of exploration results, mineral resources and ore reserves.

On 2 April 2012, the ASX released a report on consultation feedback which noted that the submissions received:

- Were broadly supportive of the reserves and resources reporting requirements being updated (by way of supplementary reporting requirements in Chapter 5 of the ASX Listing Rules) to ensure that they are aligned with international best reporting practices and facilitate greater consistency and transparency in reserves and resources reporting; and
- Recommended the scope of ASX's review and consultation be extended to include the introduction of mandatory requirements similar to the Dodd-Frank Act in the U.S., to facilitate greater transparency around payments made by companies to host governments in the jurisdictions in which they operate.

The ASX also proposes to work with JORC to update the JORC Code in relation to the reporting of exploration results

and targets, encouraging greater transparency in the reporting of mineral resources and ore reserves, introducing minimum level of study requirements for the announcement of maiden ore reserves and streamlining competent person sign-off requirements.

The ASX will also be updating the reporting framework for petroleum reserves and other petroleum resources under the ASX Listing Rules by adopting the Petroleum Resources Management System published by the Society of Petroleum Engineers as part of the new reporting framework.

The ASX is expected to release an exposure draft in mid-2012. Affected parties will need to closely examine any proposed amendments to the ASX Listing Rules and the revised draft of the JORC Code to ensure that they have a comprehensive understanding of the proposed changes and new requirements.

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