FEBRUARY 2016

COMMENTARY

Australian Energy Law Update–In Brief

Jones Day presents a snapshot of material developments in Australian law relevant to the energy sector over the last 12 months.

Commonwealth

1 The renewable energy target for large scale generation was reduced from 41,000 gigawatt-hour to 33,000 gigawatt-hour by 2020. Exemptions were provided for moderate and high emissions-intensive trade-exposed activities. Native forest biomass was included as an eligible renewable energy source. The target for small scale generation remained at 4,000 gigawatt-hour by 2020.

2 Australian Free Trade Agreements with Korea, Japan and China are now operational. They provide for reduced or no tariffs on the import into those countries from Australia of minerals and petroleum products. Investment in Australian assets from private entities in those countries are notifiable under foreign investment laws only if the consideration or value of the investment is over the threshold of $1.094 million, subject to a lower threshold of $252 million for certain sensitive sectors such as telecommunications and transport. *See* item 4 below.

3 Standing to challenge environmental approvals under federal environmental law is proposed to be changed by the federal government so that activist groups will not have standing unless they are a person adversely affected by the approval granted. The bill to achieve this change has passed the House of Representatives. It is still to be voted on in the Senate though some of the opposition parties oppose the bill. This proposed change is being made due to the success of the activist groups in challenging environmental approvals for resources projects particularly coal projects through the courts.

4 Federal foreign investment laws changes took effect from 1 December 2015. The changes which affect energy and resources assets in the same way they affect most other assets include:

- Acquisitions of substantial interests continue to require notification but a substantial interest has been changed from a 15 percent to a 20 percent interest;

- Civil pecuniary penalties and infringement notices for low level non-compliances have been introduced;
- Criminal penalties have been increased;
- Persons who knowingly assist in the non-compliance can also be guilty of offences—such persons may include real estate agents, migration agents, conveyancers and lawyers;
- Regulatory authorities are given increased powers of enforcement;
- Application fees will be payable for notifications with the lowest fee being $5,000; and
- Thresholds have been changed for certain sectors such as the introduction of a $55 million threshold for direct interests in agribusiness. The standard threshold of $252 million remains for energy and resources assets where the non-government foreign person is not located in the United States, New Zealand, Japan, South Korea, Chile and China while the threshold of $1.094 million applies to private foreign persons from those countries, subject to the standard threshold applying for certain sensitive sectors.

5 Federal tax laws have been changed to allow certain greenfield mineral explorers who incur tax losses from their exploration activities to pass exploration credits to shareholders, which can be applied as a refundable tax offset by shareholders. The scheme runs for three tax years initially ending 30 June 2017 and certain caps apply each year.

6 The offshore petroleum legislation has been amended to:

- Automatically grant or extend the coverage of titles under the legislation to ensure security of tenure for titleholders over blocks moving from State/Northern Territory coastal waters into Commonwealth jurisdiction as a result of a change to the boundary of the coastal waters of a State or Territory; and
- Provide comprehensive arrangements for the valid granting of renewals of Commonwealth titles over blocks remaining in Commonwealth waters, where part of that title has moved into State/Northern Territory waters as a result of a change to the boundary of the coastal waters of a State or Territory.

New South Wales

1 The New South Wales ("NSW") Government is implementing its gas plan. This includes (i) allowing coal seam gas exploration and production in certain areas of the State subject to stringent conditions including confirmation that applicants and licence holders have the required technical and financial resources to fund and undertake agreed work programs, (ii) cancelling pending licence applications, (iii) offering a limited buyback of existing petroleum exploration licences, and (iv) excising national park and urban residential zones from existing licences.

2 Special legislation has been passed cancelling coal exploration licences, the grant of which was found by the NSW Independent Commission of Corruption ("ICAC") to be the subject of corrupt conduct by the relevant Minister and the applicants or their directors and representatives and divesting the licence holders of all data generated by their exploration activities, without compensation. There was a High Court challenge to the legislation but it was dismissed and the legislation stands. It has been announced that some foreign shareholders of affected parties are seeking to use investor protection agreements to which Australia is a party to obtain compensation for expropriation.

3 The High Court of Australia in an unrelated case held corrupt conduct under the ICAC Act did not encompass conduct which did not compromise the probity of public administration. This meant that some ICAC findings referred to in 2 above were outside power. Legislation was subsequently passed validating ICAC actions including its corrupt conduct findings.

Victoria

The mineral resources legislation has been amended to introduce risk-based work plans for extractive industries and to give the Minister increased power in respect of eliminating or minimising risks in the course of licence holders carrying out licence activities.

Queensland

A policy position paper titled "Innovative Resources Tenures Framework" was released by the government in August 2015. Submissions were invited on the paper.

The proposed framework involves the following.

1 A set of common resource authorities for each stage of the resource life cycle being available, including information authority, exploration authority, development authority, production authority, and infrastructure authority.

2 Project status for a group of related authorities approaching production stage being available, so that there is one plan and one set of performance and reporting requirements for that group.

3 The exploration authority being for a maximum term without renewals with no statutory maximum area and a 50 percent relinquishment requirement half way through the term subject to negotiation of the area where strong performance has been achieved. The maximum terms contemplated are:
   - Exploration authority for minerals—eight years;
   - Exploration authority for coal—10 years; and
   - Exploration authority for petroleum, geothermal and greenhouse gas—12 years.

   There would be an annual self assessment of performance subject to a mid-term assessment by the department.

4 The development authority being for the appraisal of resources and to determine infrastructure requirements. It can also be used as a retention title. Proposed maximum terms without renewals are:
   - Development authority for minerals and coal—10 years; and
   - Development authority for petroleum, geothermal and greenhouse gas—15 years.

   Application for renewal of the term would be permitted for a development authority only when the authority is in retention status.

5 The information authority being for the gathering of information in a way that does not trigger native title negotiations with a proposed term without renewal of two years.

6 The infrastructure authority being for resources related infrastructure activity and is intended to replace various authorities currently granted for infrastructure such as pipeline licences, petroleum facilities licences and mining leases for infrastructure.

7 Transitional arrangements being made which will be based on the following principles:
   - Current granted rights under tenures will be maintained by continuance of the existing granted tenure rights;
   - Tenure holders can opt into the new framework to the equivalent authority in the new tenure pathway;
   - Opportunities for higher tenure may only be available under the new tenure legislation;
   - In general, renewals will be limited in duration to coincide with implementation of the new laws, unless previously committed as part of the authority grant (further extensions of rights will need to be applied for under the new tenure legislation); and
   - Production tenures that have rights and processes in common between the current and new tenure framework may be transitioned by the statute to the new framework.

Western Australia

1 A position paper titled "Proposed Low Impact Activity Framework Prospecting and Exploration" was released in December 2015.

   The department is promoting a fully automated system for authorisation to access land for low impact activities.

Those activities include activities using machinery to disturb the surface of the land for the purpose of, or in preparation for, prospecting or mineral exploration, exploration drilling, constructing temporary tracks, excavation of no more than 2 hectares open at any one time (including costeaning, augering, bulk sampling, underground exploration and excavation for investigative purpose), temporary camp sites and storage areas. The disturbance footprint is to be limited to five hectares.

2 Many resources projects in Western Australia are governed by a project agreement with the State which is ratified by legislation. If a variation to the project agreement is to be made then it needs to be ratified by legislation. This has occurred for two projects, the North West Shelf liquefied natural gas ("LNG") project and the Gorgon project on Barrow Island.

For the North West Shelf LNG project, variations were required to give effect to a new LNG export approval process and a new domestic gas arrangement for the joint venturers, consistent with Western Australia Government domestic gas policy.

For the Gorgon project, amendments were required to allow the State to provide an indemnity to the joint venturers for certain common law liability after formal closure of the Gorgon carbon dioxide injection operations beneath Barrow Island.

South Australia

The Nuclear Fuel Cycle Royal Commission was established in March 2015. Former Governor of South Australia, Rear Admiral the Honourable Kevin Scarce AC CSC RAN (Red) was appointed Royal Commissioner.

The Commission is to undertake an independent and comprehensive investigation into South Australia's participation in four areas of activity that forms part of the nuclear fuel cycle.

Those activities relate to the potential for the expansion of exploration and extraction of minerals, and the undertaking of further processing of minerals and manufacture of materials containing radioactive substances, use of nuclear fuels for electricity generation and the storage and disposal of radioactive and nuclear waste.

In each case the Commission will consider the feasibility and viability as well as the risks and opportunities associated with those activities. Inquiring into risks and opportunities requires consideration to be given to their future impact upon the South Australian economy, environment and community. Consideration must also be given to the measures that might need to be taken to facilitate and regulate those activities.

The Commission is to report its findings and recommendations by 6 May 2016.

Northern Territory

1 The Northern Territory Government established in November 2015 a new process for land access agreements between the mining, petroleum and agriculture industries.

- The new process includes:
- The establishment of a land access agreement for those exploration activities considered to create more disturbance and requires the lodgement of a Mining Management Plan or Petroleum Environment Plan;
- If agreement over conditions for land access cannot be reached within 60 days by mutual consent, the matter will be referred to an arbitration panel to be made up of high level government and industry representatives;
- The arbitration panel will arbitrate between the parties for a successful agreement within 21 days of the formation of the panel; and
- Once agreement has been reached, the Department of Mines and Energy may approve the Mining Management Plan or Petroleum Environment Plan.

2 Legislation has been passed proving for the adoption of the National Electricity Law, a national law providing for the operation of a national electricity market, for

the purpose of transferring the economic regulation of prescribed electricity networks in the Northern Territory to the Australian Energy Regulator ("ARE") and other related purposes.

The Northern Territory is adopting a three stage approach to the implementation of the National Electricity Law in the Territory. In the first stage, ARE will replace the Northern Territory Utilities Commission as the economic regulator under the Northern Territory's Electricity Networks (Third Party Access) Act. This phase will run from 1 July 2015 until 30 June 2019.

In stage two, certain provisions of the National Electricity Law will commence on 1 July 2016 in the Territory. This will establish the legislative framework to allow ARE to undertake the preliminary work to make their first network pricing determination (which is to take effect on 1 July 2019) of the Territory's electricity network service provider, the Power and Water Corporation.

Stage three will involve full operation of the National Electricity Law (as it applies in the Territory) from 1 July 2019.

3 Legislation has been passed making special provisions in connection with the North East Gas Interconnector Pipeline Project.

The legislation creates new statutory rights to cross roads and waterways with Ministerial approval; provides a mechanism to enable a range of persons responsible for construction and operation of the facilities comprising the Project to rely on the Authority Certificates issued in connection with the Project under the Aboriginal Sacred Sites legislation; stipulates that an easement in gross may be created on pastoral land and exempts the land comprising the pipeline corridor from the subdivision requirements of the Planning Act.

Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com/contactus/.

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